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CASES ARGUED AND DECIDED
IN THE
SUPREME COURT
OF THE
UNITED STATES

215, 216, 217, 218 U. S.

BOOK 54,

LAWYERS' EDITION,

CITED "LAW. ED."

**COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND
AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.**

BY

THE PUBLISHERS' EDITORIAL STAFF

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JUSTICES
OF THE
SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MELVILLE WESTON FULLER.¹

ASSOCIATE JUSTICES,

HON. JOHN MARSHALL HARLAN,

HON. DAVID JOSIAH BREWER,²

HON. EDWARD DOUGLASS WHITE,

HON. RUFUS W. PECKHAM,³

HON. JOSEPH MCKENNA,

HON. OLIVER WENDELL HOLMES,

HON. WILLIAM R. DAY,

HON. WILLIAM HENRY MOODY,

HON. HORACE H. LURTON,⁴

HON. CHARLES EVANS HUGHES.⁵

ATTORNEY GENERAL,

HON. GEORGE W. WICKERSHAM

SOLICITOR GENERAL,

HON. LLOYD W. BOWERS.⁶

/?

CLERK,

JAMES HALL MCKENNEY, ESQ.

REPORTER,

HON. CHARLES HENRY BUTLER.

MARSHAL,

JOHN MONTGOMERY WRIGHT, ESQ.

¹ Died July 4, 1910.

² Died March 28, 1910.

³ Died October 24, 1909.

⁴ Commission ordered recorded, January 3, 1910.

⁵ Commission ordered recorded, October 10, 1910.

⁶ Died September 9, 1910.

ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

From December 24, 1906, to January 10, 1910.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see 51 L. ed., Appendix I. p. 1193.

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM APPOINTED.	CIRCUITS. 1902-1903.	COMMISSIONED.	SWORN IN.
ASSOCIATE JUSTICE OLIVER WENDELL HOLMES, Massachusetts.	President ROOSEVELT.	FIRST. ME., N. H., MASS., R. I.	1902. (Dec. 4.)	1902. (Dec. 8.)
ASSOCIATE JUSTICE RUFUS W. PECKHAM, New York.	President CLEVELAND.	SECOND. VERMONT, CONN., NEW YORK.	1895. (Dec. 9.)	1896. (Jan. 6.)
ASSOCIATE JUSTICE WILLIAM H. MOODY, Massachusetts.	President ROOSEVELT.	THIRD. NEW JERSEY, PA., DEL.	1906. (Dec. 12.)	1906. (Dec. 17.)
CHIEF JUSTICE MELVILLE W. FULLER, Illinois.	President CLEVELAND.	FOURTH. MD., VA., N. C., W. VA., S. C.	1888. (July 20.)	1888. (Oct. 8.)
ASSOCIATE JUSTICE EDWARD D. WHITE, Louisiana.	President CLEVELAND.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1894. (Feb. 19.)	1894. (Mar. 12.)
ASSOCIATE JUSTICE JOHN M. HARLAN, Kentucky.	President HAYES.	SIXTH. KY., TENN., OHIO, MICH.	1877. (Nov. 29.)	1877. (Dec. 10.)
ASSOCIATE JUSTICE WILLIAM R. DAY, Ohio.	President ROOSEVELT.	SEVENTH. IND., ILL., WIS.	1903. (Feb. 23.)	1903. (Mar. 2.)
ASSOCIATE JUSTICE DAVID J. BREWER, Kansas.	President HARRISON.	EIGHTH. MINN., IOWA, MO., KAN., ARK., NEB., COLO., N. D., S. D., UTAH, WYO., NEW MEX.,* OKLA.*	1889. (Dec. 18.)	1890. (Jan. 6.)
ASSOCIATE JUSTICE JOSEPH MCKENNA, California.	President MCKINLEY.	NINTH. CAL., OR., NEV., MONT., WASH., IDAHO, ALASKA,* ARIZONA,* HAWAII.*	1898. (Jan. 21.)	1898. (Jan. 26.)

*Territories assigned to circuits by order of the Supreme Court.

ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

January 10, 1910.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT
OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see *infra*, Appendix I. p. 1215.

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM APPOINTED.	CIRCUITS. 1902-1903.	COMMI- SIONED.	SWORN IN.
ASSOCIATE JUSTICE OLIVER WENDELL HOLMES, Massachusetts.	President ROOSEVELT.	FIRST. ME., N. H., MASS., R. I.	1902. (Dec. 4.)	1902. (Dec. 8.)
ASSOCIATE JUSTICE HORACE H. LURTON, Tennessee.	President TAFT.	SECOND. VERMONT, CONN., NEW YORK.	1909. (Dec. 20.)	1910. (Jan. 3.)
ASSOCIATE JUSTICE WILLIAM H. MOODY, Massachusetts.	President ROOSEVELT.	THIRD. NEW JERSEY, PA., DEL.	1906. (Dec. 12.)	1906. (Dec. 17.)
CHIEF JUSTICE MELVILLE W. FULLER, Illinois.	President CLEVELAND.	FOURTH. MD., VA., N. C., W. VA., S. C.	1888. (July 20.)	1888. (Oct. 8.)
ASSOCIATE JUSTICE EDWARD D. WHITE, Louisiana.	President CLEVELAND.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1894. (Feb. 19.)	1894. (Mar. 12.)
ASSOCIATE JUSTICE JOHN M. HARLAN, Kentucky.	President HAYES.	SIXTH. KY., TENN., OHIO, MICH.	1877. (Nov. 29.)	1877. (Dec. 10.)
ASSOCIATE JUSTICE WILLIAM R. DAY, Ohio.	President ROOSEVELT.	SEVENTH. IND., ILL., WIS.	1903. (Feb. 23.)	1903. (Mar. 2.)
ASSOCIATE JUSTICE DAVID J. BREWER, Kansas.	President HARRISON.	EIGHTH. MINN., IOWA, MO., KAN., ARK., NEB., COLO., N. D., S. D., UTAH, WYO., OKLAHOMA, NEW MEX.*	1889. (Dec. 18.)	1890. (Jan. 6.)
ASSOCIATE JUSTICE JOSEPH McKENNA, California.	President McKINLEY.	NINTH. CAL., OR., NEV., MONT., WASH., IDAHO, ALASKA,* ARIZONA,* HAWAII.*	1898. (Jan. 21.)	1898. (Jan. 26.)

*Territories assigned to circuits by order of the Supreme Court.

CASES REPORTED.

Ballinger, Conley v.	393	Bank, National, of Commerce v. Downie (218 U. S. 345) ..	1065
v. United States ex rel. Frost (216 U. S. 240)	464	People's United States, Goodwin v. (Mem.) (218 U. S. 691)	1211
Baltimore, Hannis Distilling Co. v.	482	Seattle Nat., v. Downie (218 U. S. 345)	1065
Baltimore & O. R. Co., Haynes v. (Mem.)	347	Baralong, The, Androvette v. (Mem.) ..	343
v. Interstate Commerce Commission (215 U. S. 216) ..	164	Barker v. Butte Consol. Min. Co. (Mem.) (215 U. S. 584) ..	338
v. United States ex rel. Pitcairn Coal Co. (215 U. S. 481)	292	Bartholomew v. United States (Mem.) (217 U. S. 608) ..	901
v. Winters (Mem.) (218 U. S. 671)	1204	Baruch, United States v. (Mem.) ..	348
Baltimore & O. S. W. R. Co. v. United States (Mem.) (216 U. S. 617)	639	Baum v. Comer (Mem.) (216 U. S. 622)	642
Bamberger v. McCoach (Mem.)	1206	Bayamo, The, Jacksonville Towing & Wrecking Co. v. (Mem.) ..	346
Bank, Abilene Nat., v. Dolley (Mem.) (218 U. S. 673)	1205	Beckham, Woodside v.	408
American Nat., v. Tappan (Mem.) (217 U. S. 600) ..	897	Beecher, H. C. Cook Co. v.	855
Canal-Louisiana, & Trust Co., Waterman v. (215 U. S. 33)	80	Belt R. Co. v. United States (Mem.) ..	1213
Citizens' Central Nat. v. Appleton (216 U. S. 196) ..	443	Bergan, Fries-Breslin Co. v. (Mem.) ..	347
Citizens' Nat., v. Kentucky use of Boyle County (217 U. S. 443)	832	Berger v. Tracy (Mem.) (215 U. S. 594)	341
Citizens Sav., Newburyport v. (Mem.) (215 U. S. 598) ..	342	Bernard, Brady v. (Mem.)	896
Collin County Nat., Hughes v. (Mem.) (215 U. S. 618) ..	351	Bettman, Unity Banking & Sav. Co. v. ..	695
Farmers & M., Kerfoot v. (218 U. S. 281)	1042	Bierce, Ex parte (Mem.)	1212
Farmers Nat., Aetna Indemnity Co. v. (Mem.) (215 U. S. 601)	344	Blachley, Missouri, K. & T. R. Co. v. (Mem.)	1202
First Nat., v. Estherville (215 U. S. 341)	223	Blake v. Openhym (216 U. S. 322) ..	498
First Nat., v. Guaranty Title & T. Co. (Mem.) (218 U. S. 693)	1212	Board of Assessors v. New York L. Ins. Co. (216 U. S. 517) ..	597
First Nat., Harris v. (216 U. S. 382)	528	Board of County Comrs. v. New Mexico ex rel. Coler (215 U. S. 296)	202
First Nat., v. William R. Trigg Co. (Mem.) (218 U. S. 693)	1212	Boeckman, United States v. (Mem.) ..	1208
First Nat., Williams v. (216 U. S. 582)	625	Boland v. The Oceanica (Mem.) (215 U. S. 599)	343
First Nat., Zartman v. (216 U. S. 134)	418	Booraem, Hudson Oil Co. v. (Mem.) ..	636
Fourth Street Nat., v. Taylor (Mem.) (217 U. S. 610) ..	902	Boston, Boston Chamber of Commerce v.	725
Fourth Street Nat., v. Taylor (Mem.)	1213	Boston Chamber of Commerce v. Boston (217 U. S. 189)	725
Hanover Nat., v. Suddath (215 U. S. 110)	115	Boulo, Foster v. (Mem.)	1207
Hanover Nat., v. Suddath (215 U. S. 122)	120	Boyle County, Kentucky use of, Citizens' Nat. Bank v.	832
Merrimack River Sav., v. Clay Center (Mem.) (218 U. S. 665)	1201	Bradford, Ex parte (Mem.) (218 U. S. 668)	1202
		Brady v. Bernard (Mem.) (217 U. S. 595)	896
		Braudenstein, Helvetia-Swiss F. Ins. Co. v. (Mem.)	339
		Helvetia Swiss F. Ins. Co. v. (Mem.)	641
		Brantley v. Georgia (217 U. S. 284) ..	768
		Brenizer, Supreme Council of the Royal Arcanum v. (Mem.) ..	348
		Brill v. Washington R. & Electric Co. (215 U. S. 527)	311
		Brown v. Horr (Mem.) (218 U. S. 692)	1211
		Huey v. (Mem.)	343
		Standard Oil Co. v.	939
		Brown-Forman Co. v. Kentucky (217 U. S. 563)	207

GENERAL TABLE OF CASES REPORTED IN THIS BOOK.

VOLUMES 215, 216, 217, 218.

A.			
Abaroa, Chantango v.	1116	Anderson, Messinger v. (Mem.) ..	121
Abilene Nat. Bank v. Dolley (Mem.)		v. United States (Mem.) (215	
(218 U. S. 673)	1205	U. S. 618)	351
Abril v. Cobian y Muniz (Mem.)		Andrews, Western U. Teleg. Co. v.	430
(215 U. S. 612)	348	Androvette v. The Baralong (Mem.)	
Acord v. Western Pocahontas Corp.		(215 U. S. 600)	343
(Mem.) (215 U. S. 607)	346	Ansonia Brass & C. Co., United	
Adams, Singer Mfg. Co. v. (Mem.)	639	States v.	1107
Adelbert College v. Wabash R. Co.		Appleton, Citizens' Central Nat. v.	443
(Mem.) (215 U. S. 598)	343	Archer v. Fidelity Trust & S. D. Co.	
A. Dreher & Co., Moore Bros. v.		(Mem.) (217 U. S. 606)	900
(Mem.)	1206	Arkansas, St. Louis S. W. R. Co. v.	698
Ætna Indemnity Co. v. Farmers Nat.		Williams v.	673
Bank (Mem.) (215 U. S.		Arkansas S. R. Co. v. Louisiana &	
601)	344	A. R. Co. (218 U. S. 431)	1097
Ainsa, Richardson v.	1044	Armour Packing Co., Smith v. (Mem.)	901
Alabama, Dozier v.	965	Ashburn, Graves v.	217
Albany & S. R. Co., Delaware & H. Co.		Atchison, T. & S. F. R. Co. v. Ham-	
v. (Mem.)	344	ble (Mem.) (217 U. S.	
Albright v. Sandoval (216 U. S. 331)	502	604)	899
v. Sandoval (216 U. S. 342)	509	v. Pickens (Mem.) (215 U.	
Sandoval v.	502	S. 617)	350
Alper v. Henkel (Mem.) (216 U. S.		Roach v.	978
624)	642	v. Sewell (Mem.) (215 U. S.	
Alvarez y Sanchez v. United States		612)	348
(216 U. S. 167)	432	United States v. (Mem.)	899
American Bonding Co., United States		West v. (Mem.)	1205
v. (Mem.)	350	Atherton, Green v. (Mem.)	1210
American Car & Foundry Co. v. See-		Atlantic Coast Line R. Co. v. Charles	
ger Refrigerator Co.		(216 U. S. 122)	411
(Mem.) (216 U. S. 618)	640	v. Geraty (Mem.) (215 U. S.	
American Lava Co., Kirchberger v.	139	616)	350
Steward v.	139	Huguley v. (Mem.)	642
American Law Book Co., Edward		Macon Grocery Co. v.	300
Thompson Co. v. (Mem.)	642	v. Mazursky (216 U. S. 122)	411
American Mfg. Co. v. The Wildenfels		v. Von Lehe (216 U. S. 122)	411
(Mem.) (215 U. S. 597)	342	Atlantic Mut. Ins. Co., Hood Rubber	
American Nat. Bank v. Tappan		Co. v. (Mem.)	344
(Mem.) (217 U. S. 600)	897	Quillin v. (Mem.)	1208
American Trust Co. v. W. & A.		Austin, Gill v. (Mem.)	1206
Fletcher Co. (Mem.) (215		Axman, United States v. (Mem.) ..	350
U. S. 600)	343	Aybar v. Porto Rico (Mem.) (218 U.	
American Woodworking Machinery		S. 669)	1203
Co. v. Union Trust Co.			
(Mem.) (215 U. S. 596)	342		
Amos, Delaware River Ferry Co. v.			
(Mem.)	1210		

B.

Babbitt v. Dutcher (216 U. S. 102)	402
Bach Fur Co., Pfaelzer v. (Mem.)	338

CASES REPORTED.

Browning, Wood v. (Mem.)	1206	Chicago, B. & Q. R. Co., Interstate Commerce Commission v.	959
Buck's Stove & Range Co., Gompers v. (Mem.)	346	v. United States (Mem.)	1213
Burlingham, Grace v. (Mem.)	1204	Chicago City R. Co., Venner v. (Mem.) (218 U. S. 669)	1203
Burnham, H. M. Dry Goods Co. v. Chicago, R. I. & P. R. Co. (218 U. S. 88)	946	Chicago G. W. R. Co. v. Minnesota (216 U. S. 234)	460
Bustos v. United States (Mem.) (218 U. S. 689)	1210	Chicago, M. & St. P. R. Co., United States v.	1015
Butte Consol. Min. Co., Barker v. (Mem.)	338	Chicago Railway Equipment Co. v. Perry Side Lining Co. (Mem.) (216 U. S. 619)	640
C.		Chicago, R. I. & P. R. Co., Burnham H. M. Dry Goods Co. v. ..	946
Cafarelli, United States v. (Mem.)	1208	Herndon v.	970
Calder v. Michigan ex rel. Ellis (218 U. S. 591)	1163	Interstate Commerce Commission v.	946
Calderon, The, New York, N. H. & H. R. Co. v. (Mem.)	343	Ludwig v. (Mem.)	350
California Development Co. v. New Liverpool Salt Co. (Mem.) (215 U. S. 603)	345	West v. (Mem.)	1205
New Liverpool Salt Co. v. (Mem.)	346	Chicago, St. P. M. & O. R. Co. v. United States (217 U. S. 180)	721
Caliga v. Inter Ocean Newspaper Co. (215 U. S. 182)	150	Childers v. McClaughry (216 U. S. 139)	420
Canal-Louisiana Bank & Trust Co., Waterman v.	80	Chiles v. Chesapeake & O. R. Co. (218 U. S. 71)	936
Cardwell v. United States (Mem.) (215 U. S. 599)	343	Cincinnati, I. & W. R. Co. v. Connersville (218 U. S. 336)	1060
Carland, McClellan v.	762	Cincinnati, N. O. & T. P. R. Co. v. Slade (216 U. S. 78)	390
McClellan v. (Mem.)	1213	Citizens' Central Nat. Bank v. Appleton (216 U. S. 196)	443
Carter v. Goss (Mem.) (217 U. S. 605)	900	Citizens' Nat. Bank v. Kentucky use of Boyle County (217 U. S. 443)	832
United States v.	769	Citizens Sav. Bank, Newburyport v. (Mem.)	342
Cartwright v. Holcomb (Mem.) (218 U. S. 685)	1209	Clark, Rosario Min. & Milling Co. v. (Mem.)	1204
Castleman, Mechanical Appliance Co. v.	272	Clark Iron Co., Rogers v. (Mem.)	895
Cates, Tennessee ex rel., Standard Oil Co. v.	817	Clay Center, Merrimack River Sav. Bank v. (Mem.)	1201
Celestine, United States v.	195	Cleland, Re (217 U. S. 120)	962
Central Altagracia, Javierre v.	859	Cleveland, C. C. & St. L. R. Co., Davis v.	708
Central of Ga. R. Co. v. Gaston (216 U. S. 418)	542	Coastwise Transp. Co., J. M. Guffey Petroleum Co. v. (Mem.)	1207
v. Wright (Mem.) (215 U. S. 617)	350	v. The Edda (Mem.) (216 U. S. 622)	641
Central Trust Co. v. Central Trust Co. (216 U. S. 251)	469	Cobian y Muniz, Abril v. (Mem.)	348
Cerecedo, Fraenkl v.	486	Cochran v. Preston (Mem.) (218 U. S. 690)	1211
Chambers, Waskey v. (Mem.)	641	Coffield v. Fletcher Mfg. Co. (Mem.) (215 U. S. 603)	345
Chantangco v. Abaroa (218 U. S. 476)	1116	Coffin v. Flint (Mem.) (217 U. S. 602)	898
Chapman, Yellow Poplar Lumber Co. v. (Mem.)	344	Coleman, Kansas ex rel., Pullman Co. v.	378
Charles, Atlantic Coast Line R. Co. v.	411	Kansas ex rel., Western U. Teleg. Co. v.	355
Chase v. Phillips (Mem.) (216 U. S. 616)	639	Coler, New Mexico ex rel. Board of County Comrs. v.	202
Chesapeake & O. R. Co., Chiles v. ..	936	Collier, Goessling v. (Mem.)	342
Chicago v. Erie & W. Transp. Co. (Mem.) (216 U. S. 620)	641		
Chicago & A. R. Co., Interstate Commerce Commission v.	291		

CASES REPORTED.

Collin County Nat. Bank, Hughes v. (Mem.)	351
Colorado & S. R. Co. v. United States (Mem.) (218 U. S. 689)	1210
Columbia Heights Realty Co. v. Macfarland. See COLUMBIA HEIGHTS REALTY Co. v. RUDOLPH.	
v. Rudolph (217 U. S. 547)	877
Columbus v. Mercantile Trust & D. Co. (218 U. S. 645)	1193
Comer, Baum v. (Mem.)	642
Commercial Loan & T. Co., Mallers v. (Mem.)	638
Commercial Mica Co. v. Mica Insulator Co. (Mem.) (215 U. S. 604)	345
Commercial Milling Co., Western U. Teleg. Co. v.	1088
Commercial Union Assur. Co. v. Richmond Coal Co. (Mem.) (215 U. S. 609)	347
Comstock v. United States (Mem.) (218 U. S. 670)	1203
Conant, Kinney v. (Mem.)	1206
Conklin v. Daimler Mfg. Co. (Mem.) (216 U. S. 621)	641
Daimler Mfg. Co. v. (Mem.)	641
Conley v. Ballinger (216 U. S. 84)	393
v. Garfield. See CONLEY v. BALLINGER.	
Connecticut, Griffith v.	1151
Griffith v.	1155
Connecticut General L. Ins. Co., White v.	1208
Connorsville, Cincinnati, I. & W. R. Co. v.	1060
Consolidated Land Co. v. Gilchrist (Mem.) (218 U. S. 687)	1209
Converse v. Stewart (Mem.) (218 U. S. 666)	1202
Cooper Union, New York ex rel., v. Gass (Mem.)	1213
Corbett v. Craven. See KENNEY v. CRAVEN.	
United States v.	173
Cornell Steamboat Co. v. Fallon (Mem.) (216 U. S. 623)	642
Lehigh Valley R. Co. v.	1039
Corrigan v. Kansas City (Mem.) (218 U. S. 691)	1211
Cox v. Hoy (Mem.) (215 U. S. 619)	351
Coyle, Ex parte (Mem.) (217 U. S. 590)	895
Crandell, Frellsen v.	670
Craven, Kenney v.	122
Creecy, Marbles v.	92
Crook v. International Trust Co. (Mem.) (215 U. S. 613)	349
Crosby, Cuba R. Co. v.	1212
Crozer, Fay v.	837
Cuba R. Co. v. Crosby (Mem.)	1212

Cudahy Packing Co., Ex parte (Mem.) (218 U. S. 668)	1203
v. Minnesota (Mem.) (215 U. S. 618)	351
Cumberland Lumber Co., Tunis Lumber Co. v. (Mem.)	345
Cumberland Teleph. & Teleg. Co., Memphis v.	1185

D.

Da Costa, Southern P. Co. v. (Mem.)	900
David, Swift v. (Mem.)	1207
David Kaufman & Sons Co. v. Smith (Mem.) (216 U. S. 610)	636
Davis v. Cleveland, C. C. & St. L. R. Co. (217 U. S. 157)	708
v. United States (Mem.) (215 U. S. 607)	346
Delaware & H. Co. v. Albany & S. R. Co. (Mem.) (215 U. S. 601)	344
Flannelly v. (Mem.)	1212
Delaware, L. & W. R. Co., Interstate Commerce Commission v.	605
Delaware River Ferry Co. v. Amos (Mem.) (218 U. S. 688)	1210
DeLos Angeles v. Maytin (216 U. S. 598)	632
Dempster, Mann v. (Mem.)	1204
Denver, Pochin v. (Mem.)	1201
Dering Coal Co. v. Hutton (Mem.) (215 U. S. 604)	345
Dewar v. Mowinckel (Mem.) (218 U. S. 676)	1205
De Winter, Thomas v. (Mem.)	347
Diehl, Schultz v. (Mem.)	896
Dinsmore v. Wood (Mem.) (218 U. S. 689)	1210
District of Columbia, Gregory v. (Mem.)	1205
Kraft v. (Mem.)	1205
Dobrinski, Haffner v.	277
Dolley, Abilene Nat. Bank v. (Mem.)	1205
Downie, National Bank of Commerce v.	1065
Seattle Nat. Bank v.	1065
Dozier v. Alabama (218 U. S. 124)	965
Dudley, Owen v.	851
Dufaur v. United States (Mem.) (215 U. S. 615)	350
Duncan, United States v. (Mem.)	1208
Durie, United States v. (Mem.)	1208
Duryea Power Co. v. Sternbergh (218 U. S. 299)	1047
Dutcher, Babbitt v.	402
Dyer v. Melrose (Mem.) (215 U. S. 594)	341

E.

Eagle Min. & Improv. Co. v. Hamilton (218 U. S. 513)	1131
v. Lund (Mem.) (218 U. S. 691)	1211

CASES REPORTED.

Earling v. Emigh. See RANKIN v. EMIGH.		Fairmount Coal Co., Kuhn v.	228
Eastin, Fall v.	65	Fall v. Eastin (215 U. S. 1)	65
Edda, The, Coastwise Transp. Co. v. (Mem.)	641	Fallon, Cornell Steamboat Co. v. (Mem.)	642
Eddy v. San Francisco (Mem.) 215 U. S. 604)	345	Farmers & M. Bank, Kerfoot v.	1042
Edison Electric Light Co., Novelty Incandescent Lamp Co. v. (Mem.)	342	Farmers' Elevator Co., Nebraska ex rel., Missouri P. R. Co. v. .	727
Edward Thompson Co. v. American Law Book Co. (Mem.) (216 U. S. 625)	642	Farmers Nat. Bank, Ætna Indemnity Co. v. (Mem.)	344
Eidman v. Lewisohn (Mem.) (218 U. S. 678)	1206	Fay v. Crozer (217 U. S. 455)	837
v. Shepard (Mem.) (218 U. S. 678)	1206	Ferrell, Prame v. (Mem.)	345
Elias v. Ramirez (215 U. S. 398)	253	Fianza, Reavis v.	72
Elkus, Re, (216 U. S. 115)	407	Fidelity Trust & S. D. Co., Archer v. (Mem.)	900
Ellis, Michigan ex rel., Calder v.	1163	First Nat. Bank v. Estherville (215 U. S. 341)	223
El Paso & N. E. R. Co. v. Gutierrez (215 U. S. 87)	106	v. Guaranty Title & T. Co. (Mem.) (218 U. S. 693) ..	1212
Emigh, Earling v. See RANKIN v. EMIGH.		Harris v.	528
Rankin v.	915	v. William R. Trigg Co. (Mem.) (218 U. S. 693) ..	1212
Empire Land Co. v. Gilchrist (Mem.) (218 U. S. 687)	1209	Williams v.	625
Emrick, Marrs v. (Mem.)	1204	Zartman v.	418
Equitable L. Assur. Soc., Keiper v. (Mem.)	346	Fisher v. New Orleans (218 U. S. 438)	1099
Erie & W. Transp. Co., Chicago v. (Mem.)	641	Flaherty, North Dakota ex rel., v. Hanson (215 U. S. 515) ..	307
Estherville, First Nat. Bank v.	223	Flannelly v. Delaware & H. Co. (Mem.)	1212
Eugene F. Moran, The, Henry Du Bois Sons Co. v. (Mem.)	342	Fleming v. McCurtain (215 U. S. 56)	88
Everett v. Everett (215 U. S. 203) ..	158	Fletcher Mfg. Co., Coffield v. (Mem.)	345
Ex parte Bierce (Mem.) (218 U. S. 693)	1212	Flint, Coffin v. (Mem.)	898
Bradford (Mem.) (218 U. S. 668)	1202	Flood, Hofstot v. (Mem.)	1201
Coyle, (Mem.) (217 U. S. 590)	895	Florida East Coast R. Co. v. Gilchrist (Mem.) (218 U. S. 687) ..	1210
Cudahay Packing Co. (Mem.) (218 U. S. 668)	1203	Florida Land & Timber Co. v. Gilchrist (Mem.) (218 U. S. 686)	1209
Gruetter (217 U. S. 586)	892	Folmina, The, v. Jahn (Mem.) (215 U. S. 608)	347
Heike (Mem.)	1213	Forbes v. State Council of Virginia (216 U. S. 396)	534
Hewett (Mem.) (216 U. S. 624)	642	Fornoff, Mullen v. (Mem.)	349
Lancer (Mem.) (218 U. S. 665)	1201	Foster v. Boulo (Mem.) (218 U. S. 681)	1207
Mallory S. S. Co. (Mem.) (218 U. S. 667)	1202	Fourth Street Nat. Bank v. Taylor (Mem.) (217 U. S. 610) ..	902
Morse (Mem.) (217 U. S. 596)	896	v. Taylor (Mem.)	1213
Nicola (Mem.) (218 U. S. 668)	1203	Fowler, Kenyon v. (Mem.)	341
Sobrinosa de Ezquiaga (Mem.) (218 U. S. 668)	1203	Fox, Stanclift v. (Mem.)	351
United States (217 U. S. 286)	769	Fox Bros. Mfg. Co. Shine v. (Mem.)	636
United States Consol. Seeded Raisin Co. (Mem.) (215 U. S. 591)	340	Fraenkl v. Cerecedo (216 U. S. 295) ..	486
		Franklin v. South Carolina (218 U. S. 161)	980
		v. United States (216 U. S. 559)	615
		Franklin Trust Co., New Jersey v. (Mem.)	1207
		Freeman, United States v.	344
		v. United States (217 U. S. 539)	874
		Frellsen v. Crandell (217 U. S. 71) ..	670
		Friday v. Hall & Kaul Co. (216 U. S. 449)	562

F.

Fairmont Coal Co. v. Merchants' Coal Co. (Mem.) (215 U. S. 614)	349
---	-----

CASES REPORTED.

Friend v. Talcott (Mem.) (218 U. S. 680)	1207
Fries-Breslin Co. v. Bergan (Mem.) (215 U. S. 609)	347
Frost, United States ex rel., Ballinger v.	464
Froyseth, Osborn v.	619

G.

Page v. Riverside Trust Co. (Mem.) (218 U. S. 690)	1210
Galbreath Oil & Gas Co., Laurel Oil & Gas Co. v. (Mem.)	1209
Gallagher v. McGourin (218 U. S. 442)	1101
Garfield, Conley v. See CONLEY v. BALLINGER.	
Gass, New York ex rel. Cooper Union v.	1213
Gassert, Strong v. (Mem.)	338
Gaston, Central of Ga. R. Co. v.	542
Louisville & N. R. Co. v.	542
Warfield v. (Mem.)	901
General Electric Co. v. Richmond Street & Interurban R. Co. (Mem.) (216 U. S. 620) ..	640
General Fireproofing Co. v. Wallace (Mem.) (217 U. S. 607) ..	900
Georgia, Brantley v.	768
Georgia R. & Bkg. Co., Wright v.	544
Geraty, Atlantic Coast Line R. Co. v. (Mem.)	350
German Alliance Ins. Co. v. Home Water Supply Co. (Mem.) (217 U. S. 602)	898
Gil v. United States (Mem.) (216 U. S. 623)	642
Gilchrist, Consolidated Land Co. v. (Mem.)	1209
Empire Land Co. v. (Mem.) ..	1209
Florida East Coast R. Co. v. (Mem.)	1210
Florida Land & Timber Co. v. (Mem.)	1209
Model Land Co. v. (Mem.)	1209
Southern States Land & Timber Co. v. (Mem.)	1209
Gill v. Austin (Mem.) (218 U. S. 677)	1206
v. Parrish (Mem.) 218 U. S. 677)	1206
Gillett, Harding v. (Mem.)	902
Globe Asphalt Co. v. Union Constr. & D. Co. (Mem.) (217 U. S. 607)	900
Goessling v. Collier (Mem.) (215 U. S. 596)	342
Gold v. South Side Trust Co. (Mem.) (218 U. S. 671)	1204
Gompers v. Buck's Stove & Range Co. (Mem.) (215 U. S. 605) ..	346

Goodwin v. People's United States Bank (Mem.) (218 U. S. 691)	1211
Gordon, Indian Protective Asso. v. (Mem.)	1202
Goss, Carter v. (Mem.)	900
Grace v. Burlingham (Mem.) (218 U. S. 672)	1204
Graham, Peale, P. & K. v. (Mem.) ..	347
Grahame, Valdes y Cobian v. (Mem.)	1209
Grand Lodge of Kentucky F. & A. M., Weber v. (Mem.)	346
Graves v. Ashburn (215 U. S. 331)...	217
Great Falls & O. D. R. Co. v. Hill (Mem.) (216 U. S. 619) ..	640
Great Northern R. Co. v. Minnesota (216 U. S. 206)	446
v. North Dakota ex rel. McCue (216 U. S. 581)	625
v. North Dakota ex rel. McCue (Mem.)	1212
v. Western U. Teleg. Co. (Mem.) (216 U. S. 619) ..	640
Green v. Atherton (Mem.) (218 U. S. 688)	1210
Greene, Southern R. Co. v.	536
Greensboro, Southern Pav. & Constr. Co. v. (Mem.)	898
Greenwood, Watson v. (Mem.)	343
Gregory v. District of Columbia (Mem.) (218 U. S. 673) ..	1205
Grenada Lumber Co. v. Mississippi (217 U. S. 433)	826
v. Mississippi (Mem.)	1214
Griesa, Mutual L. Ins. Co. v. (Mem.) ..	344
Griffith v. Connecticut (218 U. S. 563)	1151
v. Connecticut (218 U. S. 572)	1155
Stewart v.	782
Grimaud, United States v. (Mem.) ..	639
Gruetter, Ex parte (217 U. S. 586) ..	892
Guaranty Title & T. Co., First Nat. Bank v. (Mem.)	1212
Guaranty Trust Co. v. Metropolitan Street R. Co. (Mem.) (215 U. S. 587)	339
v. Metropolitan Street R. Co. (Mem.) (215 U. S. 603) ..	345
Morton Trust Co. v. (Mem.) ..	345
Gulf, C. & S. F. R. Co., West v. (Mem.)	1205
Gutierrez, El Paso & N. E. R. Co. v.	106

H.

Haas v. Henkel (216 U. S. 462)	569
Hadley v. Huidekoper (Mem.) (218 U. S. 672)	1204
v. Scoville (Mem.) (215 U. S. 612)	348
Haffner v. Dobrinski (215 U. S. 446)	277
Hall & Kaul Co., Friday v.	562
Halligan v. Trinidad Shipping & Trading Co. (Mem.) (215 U. S. 614)	349

Halligan v. Wayne (Mem.) (218 U. S. 680)	1207	Henry Du Bois Sons Co. v. New York C. & H. R. R. Co. (Mem.) (215 U. S. 596)	342
Hamble, Atchison, T. & S. F. R. Co. v. (Mem.)	899	v. The Eugene F. Moran (Mem.) (215 U. S. 596)	342
Hamilton, Eagle Min. & Improv. Co. v.	1131	Hensey v. Merillat (Mem.) (218 U. S. 688)	1210
Hammer, Waskey v. (Mem.)	1212	Herbert, Wagg v.	321
Hampton, United States v. (Mem.) ..	640	Herndon v. Chicago, R. I. & P. R. Co. (218 U. S. 135)	970
Hannis Distilling Co. v. Baltimore (216 U. S. 285)	482	Herr v. Tweedie Trading Co. (Mem.) (218 U. S. 679)	1207
Hanover Nat. Bank v. Suddath (215 U. S. 122)	120	Hertz, William J. Moxley v.	510
v. Suddath (215 U. S. 110) ..	115	v. Woodman (218 U. S. 205) ..	1001
Hanson, North Dakota ex rel. Flaherty v.	307	Hewett, Ex parte (Mem.) (216 U. S. 624)	642
Harding v. Gillett (Mem.) (217 U. S. 611)	902	Higgins v. Tweedie Trading Co. (Mem.) (217 U. S. 608) ..	901
Harlan v. McGourin (218 U. S. 442) ..	1101	Hill, Great Falls & O. D. R. Co. v. (Mem.)	640
Harris v. First Nat. Bank (216 U. S. 382)	528	Hine, United States use of, v. Morse (218 U. S. 493)	1123
v. The Lackawanna (Mem.) (215 U. S. 597)	342	Hines, Missouri ex rel., Scott County Macadamized Road Co. v.	221
Union P. R. Co. v.	246	Hitchcock, Irrigation Land & Improv. Co. v. (Mem.)	349
Harrison v. Philadelphia Contributionship (Mem.) (217 U. S. 603)	898	Hobbs, Hub Constr. Co. v. (Mem.) ..	342
Haskell, Oklahoma ex rel., Huston v. (Mem.)	340	Hofstot v. Flood (Mem.) (218 U. S. 665)	1201
Haug, United States v. (Mem.)	642	Hohl v. Norddeutscher Lloyd (Mem.) (216 U. S. 621)	641
Haviland, United States v.	640	Holcomb, Cartwright v. (Mem.)	1209
Hawaii, Lowrey v.	325	Hollan, Missouri, K. & T. R. Co. v. (Mem.)	639
Hawaiian Trust Co. v. Von Holt (216 U. S. 367)	519	Holmgren v. United States (217 U. S. 509)	861
Haynes v. Baltimore & O. R. Co. (Mem.) (215 U. S. 608) ..	347	Holt v. United States (218 U. S. 245) ..	1021
H. C. Cook Co. v. Beecher (217 U. S. 497)	855	Home Water Supply Co., German Alliance Ins. Co. v. (Mem.) ..	898
Healy, Illinois ex rel., Shedd v. (Mem.)	896	Hood Rubber Co. v. Atlantic Mut. Ins. Co. (Mem.) (215 U. S. 601)	344
Heany v. Moore (Mem.) (216 U. S. 624)	642	Hooe v. United States (218 U. S. 322)	1055
Heike, Ex parte (Mem.)	1213	Hopkins v. Peters (Mem.) (217 U. S. 603)	899
v. United States (217 U. S. 423)	821	Horr, Brown v. (Mem.)	1211
Heinze, United States v.	1139	Houghton, Whitin Mach. Works v. (Mem.)	899
v. United States (Mem.) (218 U. S. 675)	1205	Hoy, Cox v. (Mem.)	351
United States v.	1145	Hub Constr. Co. v. Hobbs (Mem.) (215 U. S. 598)	342
Helvetia-Swiss F. Ins. Co. v. Brandenstein (Mem.) (215 U. S. 588)	339	Hubert, Louisiana ex rel., v. New Orleans (215 U. S. 170) ...	144
v. Brandenstein (Mem.) (216 U. S. 621)	641	Hudson Oil & Supply Co. v. Booraem (Mem.) (216 U. S. 604) ..	636
Hempstead, United States v. (Mem.) ..	640	Huey v. Brown (Mem.) (215 U. S. 598)	343
Henderson v. Mayer (Mem.) (216 U. S. 622)	641	Hughes v. Collin County Nat. Bank (Mem.) (215 U. S. 618) ..	351
Henderson-White Mfg. Co., Ward Lumber Co. v. (Mem.) ..	349	Huguley v. Atlantic Coast Line R. Co. (Mem.) (216 U. S. 623) ..	642
Henkel, Alper v. (Mem.)	642	Huidekoper, Hadley v. (Mem.)	1204
Haas v.	569		
Peckham v.	579		
Price v.	581		
Henley v. Myers (215 U. S. 373) ...	240		

Hunter v. Mutual Reserve L. Ins. Co.	
(218 U. S. 573)	1155
Huston v. Oklahoma ex rel. Haskell	
(Mem.) (215 U. S. 592)	340
Hutchinson, P. & Co. v. Loewy (217	
U. S. 457)	838
Hutton, Dering Coal Co. v. (Mem.)	345
Hyde v. United States (Mem.) (218	
U. S. 681)	1207
Hygienic Chemical Co., Rumford	
Chemical Works v.	137
v. Rumford Chemical Works	
(215 U. S. 156)	137

I.

Ibex Min. Co., Van Sice v. (Mem.)	346
Illinois ex rel. Healy, Shedd v.	
(Mem.)	896
Illinois C. R. Co., Interstate Com-	
merce Commission v. ...	280
v. Kentucky (218 U. S. 551)	1147
v. O'Neil (Mem.) (217 U. S.	
604)	899
v. Sheegog (215 U. S. 308)	208
v. Sheegog (Mem.) (217 U. S.	
599)	897
Inda, United States v. (Mem.)	639
Indian Protective Asso. v. Gordon	
(Mem.) (218 U. S. 667)	1202
Insular Government of P. I., Tiglaio	
v.	257
Insurance Co., Atlantic Mut., Hood	
Rubber Co. v. (Mem.) (215	
U. S. 601)	344
Atlantic Mut., Quillin v.	
(Mem.) (218 U. S. 682)	1208
Connecticut General L., White	
v. (Mem.) (218 U. S. 684)	1208
German Alliance, v. Home	
Water Supply Co. (Mem.)	
(217 U. S. 602)	898
Helvetia-Swiss F., v. Branden-	
stein (Mem.) (215 U. S.	
588)	339
Helvetia Swiss F., v. Branden-	
stein (Mem.) (216 U. S.	
621)	641
Liverpool & L. & G., v. Mc-	
Fadden (Mem.) (215 U. S.	
604)	345
Maritime, v. M. S. Dollar S. S.	
Co. (Mem.) (218 U. S.	
674)	1205
Metropolitan L. v. Williamson	
(Mem.) (215 U. S. 608)	347
Mutual L., v. Griesa (Mem.)	
(215 U. S. 600)	344
Mutual Reserve L., Hunter v.	
(218 U. S. 573)	1155
New York L., Board of Asses-	
sors v. (216 U. S. 517) ..	597
New York L., v. McMaster	
(Mem.) (217 U. S. 610)	901

Insurance Co., New York L., Slocum v.	
(Mem.) (217 U. S. 603)	899
Northwestern Mut. L., v. Mc-	
Cue (Mem.)	1213
St. Paul F. & M., Penman v.	493
State Mut. L., Johnston v.	
(Mem.) (218 U. S. 674)	1205
Interior Construction & Improv. Co., ⁿ	
Lathrop, S. & H. Co. v.	177
International Text Book Co. v. Lynch	
(Mem.) (218 U. S. 664)	1201
v. Ottumwa (Mem.) (215 U.	
S. 614)	349
v. Peterson (Mem.) (218 U. S.	
664)	1201
v. Pigg (217 U. S. 91)	78
International Trust Co., Crook v.	
(Mem.)	349
Nowell v. (Mem.)	899
Inter Ocean Newspaper Co., Caliga	
v.	150
Interstate Commerce Commission,	
Baltimore & O. R. Co. v.	164
v. Chicago & A. R. Co. (215 U.	
S. 479)	291
v. Chicago, B. & Q. R. Co.	
(218 U. S. 113)	959
v. Chicago, R. I. & P. R. Co.	
(218 U. S. 88)	946
v. Delaware, L. & W. R. Co.	
(216 U. S. 531)	605
v. Illinois C. R. Co. (215 U.	
S. 452)	280
v. Northern P. R. Co. (216	
U. S. 538)	608
Southern P. Co. v.	169
v. Stickney (215 U. S. 98) ..	112
Iowa, Thomas v. (Mem.)	340
Iowa Mfg. Co., United Surety Co. v.	
(Mem.)	900
Irrigation Land & Improv. Co. v.	
Hitchcock (Mem.) (215 U.	
S. 613)	349

J.

Jackson Lumber Co. v. Turner (Mem.)	
(218 U. S. 685)	1209
Jacksonville Towing & Wrecking Co.	
v. The Bayamo (Mem.)	
(215 U. S. 606)	346
Jahn, The Folmina v. (Mem.)	347
Jameson v. United States (Mem.)	
(218 U. S. 670)	1204
Javierre v. Central Altagracia (217	
U. S. 502)	859
Jefferson, The Steamship. See SIM-	
MONS v. THE STEAMSHIP	
JEFFERSON.	
Jefferson, The Steamship, Simmons	
v.	125
Jenner, Starkweather v.	602
Jennings v. Philadelphia, B. & W. R.	
Co. (218 U. S. 255)	1031

J. J. McCaskill Co. v. United States (216 U. S. 504)	590	Klugh, Trimble v. (Mem.) (218 U. S. 609)	1203
J. L. Smathers & Co., Toxaway Hotel Co. v.	558	Knapp v. Milwaukee Trust Co. (216 U. S. 545)	610
J. M. Guffey Petroleum Co. v. Coastwise Transp. Co. (Mem.) (218 U. S. 680)	1207	Knight, Litcher & M. Lumber Co. v. Komada & Co. v. United States (215 U. S. 392)	757 249
Johnson, Mills v. (Mem.)	340	Kraft v. District of Columbia (Mem.) (218 U. S. 673)	1205
Johnston v. State Mut. L. Ins. Co. (Mem.) (218 U. S. 674)	1205	Kuhn v. Fairmount Coal Co. (215 U. S. 349)	228
Jones, Wenar v. (Mem.)	896	Kuykendall v. Union P. R. Co. (Mem.) (215 U. S. 602)	344
Willcox v. (Mem.)	1207		
Julian, Kansas City Star Co. v. (Mem.)	340		
		L.	
K.		La Barre v. Maroney (Mem.) (218 U. S. 691)	1211
Kansas, Plamondon v. (Mem.)	350	Lackawanna, The, Harris v. (Mem.)	342
Kansas ex rel. Taylor, Missouri P. R. Co. v.	472	La Compagnie Des Sucreries de Porto Rico, Souffront v.	846
Coleman, Pullman Co. v.	378	Ladd, Metropolitan Securities Co. v. (Mem.)	345
Coleman, Western U. Teleg. Co. v.	355	Ladew v. Tennessee Copper Co. (218 U. S. 357)	1069
Kansas City, Corrigan v. (Mem.) ..	1211	Lamson, United States v. (Mem.) ..	1208
Kansas City Hydraulic Press Brick Co., National Surety Co. v. (Mem.)	1208	Lancer, Ex parte (Mem.) (218 U. S. 665)	1201
Kansas City S. R. Co., West v. (Mem.)	1205	Lane Bros. Co., Virginia Passenger & Power Co. v. (Mem.)	348
Kansas City Star Co. v. Julian (Mem.) (215 U. S. 589) ..	340	Lapina v. Williams (Mem.) (218 U. S. 672)	1204
Keiper v. Equitable L. Assur. Soc. (Mem.) (215 U. S. 606) ..	346	Lathrop, S. & H. Co. v. Interior Con- struction & Improv. Co. (215 U. S. 246)	177
Kelley, United States ex rel. v. Peters (Mem.) (217 U. S. 606) ..	900	Laurel Hill Cemetery v. San Francis- co (216 U. S. 358)	515
Kelly, Moffit v.	1086	Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co. (Mem.) (218 U. S. 685)	1209
Kenney v. Craven (215 U. S. 125) ..	122	Lavino, United States v. (Mem.) ..	640
Kentucky, Brown-Forman Co. v.	883	Lehigh Valley R. Co. v. Cornell Steam- boat Co. (218 U. S. 264) ..	1039
Illinois C. R. Co. v.	1147	Lehigh Valley Transp. Co. v. Monk (Mem.) (217 U. S. 608) ..	901
Rand-McNally & Co. v. (Mem.)	337	Lewis v. United States (Mem.) (216 U. S. 611)	637
Kentucky, use of Boyle County, Citi- zens' Nat. Bank v.	832	Lewis Construction Co., Semple v. (Mem.)	1207
Kenyon v. Fowler (Mem.) (215 U. S. 593)	341	Lewisohn, Eidman v. (Mem.)	1206
Kerfoot v. Farmers & M. Bank (218 U. S. 281)	1042	Lincoln Park Comrs. v. Westrumite Co. (Mem.) (215 U. S. 610) ..	347
Kerrch v. United States (Mem.) (215 U. S. 602)	344	Ling Su Fan v. United States (218 U. S. 302)	1049
Kidd, D. & P. Co. v. Musselman Gro- cer Co. (217 U. S. 461) ..	839	Liverpool & L. & G. Ins. Co. v. Mc- Fadden (Mem.) (215 U. S. 604)	345
King, Southern R. Co. v.	868	Loewy, Hutchinson, P. & Co. v.	838
v. West Virginia (Mem.) (215 U. S. 616)	350	Lord v. United States (217 U. S. 340)	790
v. West Virginia (216 U. S. 92)	396	Los Angeles, Los Angeles Farming & Milling Co. v.	736
Kinney v. Conant (Mem.) (218 U. S. 677)	1206	Los Angeles Farming & Milling Co. v. Los Angeles (217 U. S. 217)	736
Kirchberger v. American Lava Co. (215 U. S. 161)	139		
Kirven, Virginia-Carolina Chemical Co. v.	179		
Kissel, United States v.	1168		
Klepner, O. J. Lewis Mercantile Co. v. (Mem.)	641		

Louisiana ex rel. Hubert v. New Orleans (215 U. S. 170)....	144	Majors v. Williamson (Mem.) (215 U. S. 597)	342
Louisiana & A. R. Co., Arkansas S. R. Co. v.	1097	Mallors v. Commercial Loan & T. Co. (Mem.) (216 U. S. 613) ..	638
Louisville & N. R. Co. v. Gaston (216 U. S. 418)	542	Mallory S. S. Co., Ex parte (Mem.) (218 U. S. 667)	1202
v. Melton (218 U. S. 36)	921	Maner v. Penn Mut. L. Ins. Co. (Mem.) (216 U. S. 622) ..	641
Lowrey v. Hawaii (215 U. S. 554)...	325	Mankin v. United States use of Ludowici-Celadon Co. (215 U. S. 533)	315
Ludlow Valve Mfg. Co., Pittsburgh Mfg. Co. v. (Mem.)	901	Mann v. Dempster (Mem.) (218 U. S. 672)	1204
Ludowici-Celadon Co., United States use of, Mankin v.	315	Manning, Rhodus v. (Mem.)	896
Ludwig v. Chicago, R. I. & P. R. Co. (Mem.) (215 U. S. 615) ..	350	Marbles v. Creecy (215 U. S. 63)....	92
v. Western U. Teleg. Co. (216 U. S. 146)	423	Marion County, St. Benedict's Abbey v. (Mem.)	1210
Lund, Eagle Min. & Improv. Co. v. (Mem.)	1211	Maritime Ins. Co. v. M. S. Dollar S. S. Co. (Mem.) (218 U. S. 674)	1205
Lutcher & M. Lumber Co. v. Knight (217 U. S. 257)	757	Maroney, La Barre v. (Mem.)	1211
Lynch, International Text Book Co. v. (Mem.)	1201	Marrs v. Emrick (Mem.) (218 U. S. 671)	1204
M.		Martel v. Maine (Mem.) (218 U. S. 666)	1202
McBride, Nowell v. (Mem.)	344	Martin, Orgain v. (Mem.)	640
McChesney, Richardson v.	1121	Maryland, Watson v.	987
McClaughry, Childers v.	420	v. West Virginia (217 U. S. 1) ..	645
McClellan v. Carland (217 U. S. 268) ..	762	v. West Virginia (217 U. S. 577)	888
v. Carland (Mem.)	1213	Mason, United States v.	1133
McCoach v. Bamberger (Mem.) (218 U. S. 678)	1206	Mayer, Henderson v. (Mem.)	641
McCue, North Dakota ex rel., Great Northern R. Co. v.	625	Maytin, De Los Angeles v.	632
North Dakota ex rel., Great Northern R. Co. v. (Mem.) ..	1212	v. Vela (216 U. S. 598).....	632
North Dakota ex rel., Minneapolis, St. P. & S. Ste. M. R. Co. v.	625	Mazursky, Atlantic Coast Line R. Co. v.	411
North Dakota ex rel., Minneapolis, St. P. & S. Ste. M. R. Co. v. (Mem.)	1212	Mechanical Appliance Co. v. Castleman (215 U. S. 437).....	272
North Dakota ex rel., Northern P. R. Co. v.	624	Melrose, Dyer v. (Mem.)	341
Northwestern Mut. L. Ins. Co. v. (Mem.)	1213	Melton, Louisville & N. R. Co. v.	921
McCurtain, Fleming v.	88	Memphis v. Cumberland Teleph. & Teleg. Co. (218 U. S. 624) ..	1185
McFadden, Liverpool & L. & G. Ins. Co. v. (Mem.)	345	Mendezona v. United States (Mem.) (217 U. S. 609).....	901
Macfarland, Washington Gaslight Co. v. (Mem.)	349	Mengel v. Mengel (Mem.) (218 U. S. 694)	1212
McGilvra v. Ross (215 U. S. 70)	95	Mercantile Trust & D. Co., Columbus v.	1193
McGourin, Gallagher v.	1101	Merchants' Coal Co., Fairmont Coal Co. v. (Mem.)	349
Harlan v.	1101	Merillat, Hensey v. (Mem.)	1210
MacKenzie v. MacKenzie (Mem.) (215 U. S. 582)	337	Merrimack River Sav. Bank v. Clay Center (Mem.) (218 U. S. 665)	1201
McMaster, New York L. Ins. Co. v. (Mem.)	901	Mescall, United States v.	77
Macon Grocery Co. v. Atlantic Coast Line R. Co. (215 U. S. 501) ..	300	Messinger v. Anderson (Mem.)	1213
McTeer, Southern Exp. Co. v.	411	Metropolitan L. Ins. Co. v. Williamson (Mem.) (215 U. S. 608)	347
Madison Steele Co., Re. See RE ELKUS.		Metropolitan Securities Co. v. Ladd (Mem.) (215 U. S. 603) ..	345
Maine, Martel v. (Mem.)	1202	Metropolitan Street R. Co., Guaranty Trust Co. v. (Mem.)	339
		Guaranty Trust Co. v. (Mem.) ..	345

Metropolitan Trust Co., Re (218 U. S. 312)	1051	Moore Printing Typewriter Co. v. National Sav. & T. Co. (218 U. S. 422)	1093
Mexican C. R. Co., Pyman S. S. Co. v. (Mem.)	342	Morales v. Ramos (Mem.) (217 U. S. 610)	901
Mica Insulator Co., Commercial Mica Co. v. (Mem.)	345	Morgan's Louisiana & T. R. & S. S. Co. v. Street (Mem.) (217 U. S. 599)	897
Michigan ex rel. Ellis, Calder v.	1163	Morse, Ex parte (Mem.) (217 U. S. 596)	896
Midland Valley R. Co., West v. (Mem.)	1205	v. United States (Mem.) (215 U. S. 605)	340
Miller, Southern R. Co. v.	732	United States use of Hine v. . .	1123
Miller & Lux, Rickey Land & Cattle Co. v.	1032	Morton Trust Co. v. Guaranty Trust Co. (Mem.) (215 U. S. 603)	345
Mills v. Johnson (Mem.) (215 U. S. 590)	340	Mowinkel, Dewar v. (Mem.)	1205
Milwaukee Trust Co., Knapp v.	610	M. S. Dollar S. S. Co., Maritime Ins. Co. v. (Mem.)	1205
Minneapolis v. Minneapolis Street R. Co. (215 U. S. 417)	259	Mullen v. Fornoff (Mem.) (215 U. S. 615)	349
Minneapolis, St. P. & S. Ste. M. R. Co. v. North Dakota ex rel. McCue (216 U. S. 581)..	625	Murfreesboro, Nelson v. (Mem.)....	350
v. North Dakota ex rel. McCue (Mem.)	1212	Musselman Grocer Co., Kidd, D. & P. Co. v.	839
Minneapolis Street R. Co., Minneapolis v.	259	Mutual L. Ins. Co. v. Griesa (Mem.) (215 U. S. 600)	344
Minnesota, Chicago G. W. R. Co. v. . .	460	Mutual Reserve L. Ins. Co., Hunter v.	1155
Cudahy Packing Co. v. (Mem.)	351	Myers, Henley v.	240
Great Northern R. Co. v.	446		
Shevlin-Carpenter Co. v.	930	N.	
Mississippi, Grenada Lumber Co. v.	826	National Bank of Commerce v. Downie (218 U. S. 345)	1065
Grenada Lumber Co. v. (Mem.)	1213	National Sav. & T. Co., Moore Printing & Typewriter Co. v. . .	1093
Missouri ex rel. Hines, Scott County Macadamized Road Co. v..	221	National Surety Co. v. Kansas City Hydraulic Press Brick Co. (Mem.) (218 U. S. 682)	1208
Missouri, K. & T. R. Co. v. Blachley (Mem.) (218 U. S. 667) ..	1202	Nebraska, Missouri P. R. Co. v.	727
v. Hollan (Mem.) (216 U. S. 615)	639	Nebraska ex rel. Farmers' Elevator Co., Missouri P. R. Co. v.	727
West v. (Mem.)	1205	Nelson v. Murfreesboro (Mem.) (215 U. S. 617)	350
v. Wise (Mem.) (216 U. S. 616)	639	Newburyport v. Citizens Sav. Bank (Mem.) (215 U. S. 598)	342
Missouri P. R. Co. v. Kansas ex rel. Taylor (216 U. S. 262) ...	472	Newcomb Motor Co., United States ex rel., Moore v. (Mem.)	636
v. Nebraska (217 U. S. 196) ..	727	New Jersey v. Franklin Trust Co. (Mem.) (218 U. S. 681)	1207
v. Nebraska ex rel. Farmers' Elevator Co. (217 U. S. 196)	727	New York v. (Mem.)	1214
Model Land Co. v. Gilchrist (Mem.) (218 U. S. 687)	1209	New Liverpool Salt Co., California Development Co. v. (Mem.)	345
Moffitt v. Kelly (218 U. S. 400)	1086	v. California Development Co. (Mem.) (215 U. S. 606)	346
Monk, Lehigh Valley Transp. Co. v. (Mem.) (217 U. S. 608) ..	901	New Mexico ex rel. Coler, Board of County Comrs. v.	202
Monmouth Steamboat Co., Perth Amboy Dry Dock Co. v. (Mem.)	341	New Orleans, Fisher v.	1099
Monongahela Bridge Co. v. United States (216 U. S. 177) ..	435	Louisiana ex rel. Hubert v. . .	144
Monson, United States v. (Mem.)...	1208	New York v. New Jersey (Mem.) ..	1214
Montezuma Canal Co. v. Smithville Canal Co. (218 U. S. 371)	1074	New York ex rel. Cooper Union v. Gass (Mem.)	1213
Moore, Heany v. (Mem.)	642	New York C. & H. R. R. Co., Henry Du Bois Sons Co. v. (Mem.)	342
v. United States ex rel. Newcomb Motor Co. (Mem.) (216 U. S. 608)	636		
Moore Bros. v. A. Dreher & Co. (Mem.) (218 U. S. 676) ..	1206		

CASES REPORTED.

New York L. Ins. Co., Board of Assessors v.	597	Orgain v. Martin (Mem.) (216 U. S. 619)	640
v. McMaster (Mem.) (217 U. S. 610)	901	Osborn v. Froyseth (216 U. S. 571)	619
Slocum v. (Mem.)	899	Ottumwa, International Text-Book Co. v. (Mem.)	349
New York, N. H. & H. R. Co. v. The Calderon (Mem.) (215 U. S. 599)	343	Owen v. Dudley (217 U. S. 488) ..	851
Union Ferry Co. v. (Mem.) ..	1206		
Nicola, Ex parte (Mem.) (218 U. S. 668)	1203	P.	
Nollman v. Wentworth Lunch Co. (Mem.) (217 U. S. 591)	895	Pacific Mail S. S. Co., United States v. (Mem.)	1211
Nolte, Yordi v.	170	Parker v. Van Holt. See HAWAIIAN TRUST Co. v. VON HOLT.	
Norddeutscher Lloyd, Hohl v. (Mem.)	641	Parrish, Gill v. (Mem.)	1206
Norfolk & S. R. Co., Zell v. (Mem.)	899	Peale, P. & K. v. Graham (Mem.) (215 U. S. 607)	347
Norfolk & W. R. Co., Powhatan Coal & Coke Co. v. (Mem.) ..	1211	Peckham v. Henkel (216 U. S. 483)	579
North Carolina Min. Co. v. Westfeldt (Mem.) (215 U. S. 586)	339	Pendleton v. United States (216 U. S. 305)	491
North Dakota ex rel. McCue, Great Northern R. Co. v.	625	Penman v. St. Paul F. & M. Ins. Co. (216 U. S. 311)	493
McCue, Great Northern R. Co. v. (Mem.)	1212	Penn Mut. L. Ins. Co., Maner v. (Mem.)	641
Flaherty v. Hanson (215 U. S. 515)	307	People's United States Bank, Goodwin v. (Mem.)	1211
McCue, Minneapolis, St. P. & S. Ste. M. R. Co. v.	625	Perry Side Bearing Co., Chicago Railway Equipment Co. v. (Mem.)	640
McCue, Minneapolis, St. P. & S. S. M. R. Co. v. (Mem.)	1212	Perth Amboy Dry Dock Co. v. Monmouth Steamboat Co. (Mem.) (215 U. S. 592)	341
McCue, Northern P. R. Co. v.	624	Peters, Hopkins v. (Mem.)	899
Northern P. R. Co., Interstate Commerce Commission v.	608	United States ex rel. Kelley v. (Mem.)	900
v. North Dakota ex rel. McCue (216 U. S. 579)	624	Peterson, International Text Book Co. v.	1201
Northwestern Mut. L. Ins. Co. v. McCue (Mem.)	1213	Pfaelzer v. Bach Fur Co. (Mem.) (215 U. S. 584)	338
Novelty Incandescent Lamp Co. v. Edison Electric Light Co. (Mem.) (215 U. S. 596)	342	Philadelphia, B. & W. R. Co., Jennings v.	1031
Nowell v. International Trust Co. (Mem.) (217 U. S. 603)	899	Philadelphia Contributionship, Harrison v. (Mem.)	898
v. McBride (Mem.) (215 U. S. 602)	344	Philippine Islands, Roura v.	1080
Nugent, Stoffela v.	856	Phillips, Chase v. (Mem.)	639
		Pickens, Atchison, T. & S. F. R. Co. v. (Mem.)	350
O.		Pickett v. United States (216 U. S. 456)	566
Oceanica, The, Boland v. (Mem.) ..	343	Pierson v. Wabash R. Co. (Mem.) (215 U. S. 598)	343
O. J. Lewis Mercantile Co. v. Klepner (Mem.) (216 U. S. 620)	641	Pigg, International Text-Book Co. v.	678
Oklahoma ex rel. Haskell, Huston v. (Mem.)	340	Pitcairn Coal Co., United States ex rel., Baltimore & O. R. Co. v.	292
Old Nick Williams Co. v. United States (215 U. S. 541)	318	Pittsburgh Mfg. Co. v. Ludlow Valve Mfg. Co. (Mem.) (217 U. S. 608)	901
Olmsted v. Olmsted (216 U. S. 386)	530	Pitts Livery Co., Woodward Carriage Co. v. (Mem.)	351
Omaha v. Omaha Water Co. (218 U. S. 180)	991	Pla, San Juan Light & Transit Co. v. (Mem.)	1211
Omaha Water Co., Omaha v.	991	Plamondon v. Kansas (Mem.)	350
O'Neil, Illinois C. R. Co. v. (Mem.)	899	Plowman, United States v.	523
Ong Chang Wing v. United States (218 U. S. 272)	1040		
Openhym, Blake v.	498		

CASES REPORTED.

Pochin v. Denver (Mem.) (218 U. S. 666)	1201	Railroad Co., Baltimore & O. S. W., v. United States (Mem.) (216 U. S. 617)	639
Pollitz, Wabash R. Co. v. (Mem.) ..	1206	Chicago & A., Interstate Commerce Commission v. (215 U. S. 479)	291
Portland, Portland Railway, Light & P. Co. v. (Mem.)	1209	Chicago, B. & Q., Interstate Commerce Commission v. 959	
Portland Railway, Light & P. Co. v. Portland (Mem.) (218 U. S. 686)	1209	Cuba, v. Crosby (Mem.)	1212
Porto Rico, Aybar v. (Mem.)	1203	Delaware, L. & W., Interstate Commerce Commission v. 605	
v. Roman Catholic Apostolic Church (Mem.) (215 U. S. 611)	348	Great Falls & O. D., v. Hill (Mem.) (216 U. S. 619) 640	
Powhatan Coal & Coke Co. v. Norfolk & W. R. Co. (Mem.) (218 U. S. 690)	1211	Illinois C., Interstate Commerce Commission v. (215 U. S. 452)	280
Prame v. Ferrell (Mem.) (215 U. S. 605)	345	Illinois C., v. Kentucky (218 U. S. 551)	1147
Preston, Cochran v. (Mem.)	1211	Illinois C., v. O'Neil (Mem.) (217 U. S. 604)	899
Price v. Henkel (216 U. S. 488)	581	Illinois C., v. Sheegog (215 U. S. 308)	208
Pullman Co. v. Kansas ex rel. Coleman (216 U. S. 56)	378	Illinois C., v. Sheegog (Mem.) (217 U. S. 599)	897
Pyman S. S. Co. v. Mexican C. R. Co. (Mem.) (215 U. S. 597) 342		Lehigh Valley, v. Cornell Steamboat Co. (218 U. S. 264)	1039
Q.		Louisville & N., v. Gaston (216 U. S. 418)	542
Quillin v. Atlantic Mut. Ins. Co. (Mem.) (218 U. S. 682) 1208		Louisville & N., v. Melton (218 U. S. 36)	921
R.		Midland Valley, West v. (Mem.) (218 U. S. 675) 1205	
Railroad & Bkg. Co. Georgia, Wright v. (216 U. S. 420)	544	New York C. & H. R., Henry Du Bois Sons Co. v. (Mem.) (215 U. S. 596) 342	
Railroad & Electric Co., Washington, Brill v. (215 U. S. 527) ..	311	New York, N. H. & H., v. The Calderon (Mem.) (215 U. S. 599)	343
Railroad & S. S. Co., Morgan's Louisiana & T. v. Street (Mem.) (217 U. S. 599)	897	New York, N. H. & H., Union Ferry Co. v. (Mem.) (218 U. S. 676)	1206
Railroad Co., Albany & S., Delaware & H. Co. v. (Mem.) (215 U. S. 601)	344	St. Louis & S. F., West v. (Mem.) (218 U. S. 675) 1205	
Atlantic Coast Line, v. Charles (216 U. S. 122)	411	St. Louis, K. C. & C., v. Wabash R. Co. (217 U. S. 247)	752
Atlantic Coast Line, v. Geraty (Mem.) (215 U. S. 616) 350		Union P., v. Harris (215 U. S. 386)	246
Atlantic Coast Line, Huguley v. (Mem.) (216 U. S. 623) 642		Union P., Kuykendall v. (Mem.) (215 U. S. 602) 344	
Atlantic Coast Line, Macon Grocery Co. v. (215 U. S. 501)	300	Union P., Stuart v. (Mem.) (218 U. S. 673)	1204
Atlantic Coast Line, v. Mazursky (216 U. S. 122)	411	Wabash, Adelbert College v. (Mem.) (215 U. S. 598) 343	
Atlantic Coast Line, Von Lehe v. (216 U. S. 122)	411	Wabash, Pierson v. (Mem.) (215 U. S. 598)	343
Baltimore & O., Haynes v. (Mem.) (215 U. S. 608) 347		Wabash, v. Pollitz (Mem.) (218 U. S. 677)	1206
Baltimore & O., v. Interstate Commerce Commission (215 U. S. 216)	164	Wabash, St. Louis, K. C. & C. R. Co. v. (217 U. S. 247) 752	
Baltimore & O., v. United States ex rel. Pitcairn Coal Co. (215 U. S. 481) 292		Railway Co., Arkansas S., Louisiana & A. R. Co. v. (218 U. S. 431)	1097
Baltimore & O., v. Winters (Mem.) (218 U. S. 671) 1204			

CASES REPORTED.

Railway Co., Atchison, T. & S. F., v. Hamble (Mem.) (217 U. S. 004)	899
Atchison, T. & S. F., v. ickens (Mem.) (215 U. S. 617)	350
Atchison, T. & S. F., Roach v. (218 U. S. 159)	978
Atchison, T. & S. F., v. Se-well (Mem.) (215 U. S. 612)	348
Atchison, T. & S. F., United States v. (Mem.) (217 U. S. 604)	899
Atchison, T. & S. F., West v. (Mem.) (218 U. S. 675)	1205
Belt, v. United States (Mem.)	1213
Central of Ga., v. Wright (Mem.) (215 U. S. 617)	350
Chesapeake & O., Chiles v. (218 U. S. 71)	936
Chicago, B. & Q., v. United States (Mem.)	1213
Chicago City, Venner v. (Mem.) (218 U. S. 669)	1203
Chicago G. W., v. Minnesota (216 U. S. 234)	460
Chicago, M. & St. P., United States v. (218 U. S. 233)	1015
Chicago, R. I. & P., Burnham H. M. Dry Goods Co. v. (218 U. S. 88)	946
Chicago, R. I. & P., Herndon v. (218 U. S. 135)	970
Chicago, R. I. & P., Interstate Commerce Commission v. (218 U. S. 88)	946
Chicago, R. I. & P., Ludwig v. (Mem.) (215 U. S. 615)	350
Chicago, R. I. & P., West v. (Mem.) (218 U. S. 675)	1205
Chicago, St. P. M. & O., v. United States (217 U. S. 180)	721
Cincinnati, I. & W. v. Conners-ville (218 U. S. 336) ..	1060
Cincinnati, N. O. & T. P., v. Slade (216 U. S. 78)	390
Cleveland, C. C. & St. L., Davis v. (217 U. S. 157)	708
Colorado & S., v. United States (Mem.) (218 U. S. 689)	1210
El Paso & N. E., v. Gutierrez (215 U. S. 87)	106
Florida East Coast, v. Gil-christ (218 U. S. 687) ...	1210
Great Northern, v. Minnesota (216 U. S. 206)	446
Great Northern, v. North Da-kota ex rel. McCue (216 U. S. 581)	625
Great Northern, v. North Da-kota ex rel. McCue (Mem.)	1212

Railway Co., Great Northern, v. West-ern U. Teleg. Co. (Mem.) (216 U. S. 619)	640
Gulf, C. & S. F., West v. (Mem.) (218 U. S. 675)	1205
Kansas City S., West v. (Mem.) (218 U. S. 675)	1205
Louisiana & A. Arkansas S. R. Co. v. (218 U. S. 431) ..	1097
Metropolitan Street, Guaranty Trust Co. v. (Mem.) (215 U. S. 603)	345
Mexican C., Pyman S. S. Co. v. (Mem.) (215 U. S. 597)	342
Minneapolis, St. P. & S. Ste. M., v. North Dakota ex rel. McCue (216 U. S. 581) ..	625
Minneapolis, St. P. & S. Ste M., v. North Dakota ex rel. McCue (Mem.)	1212
Minneapolis Street, Minneapo-lis v. (215 U. S. 417)	259
Missouri, K. & T. v. Blach-ley (Mem.) (218 U. S. 667)	1202
Missouri, K. & T., v. Hollan (Mem.) (216 U. S. 615)	639
Missouri, K. & T., West v. (Mem.) (218 U. S. 675)	1205
Missouri, K. & T., v. Wise (Mem.) (216 U. S. 616)	639
Missouri P., v. Kansas ex rel. Taylor (216 U. S. 262) ...	472
Missouri P., v. Nebraska (217 U. S. 196)	727
Missouri P., v. Nebraska ex rel. Farmers' Elevator Co. (217 U. S. 196)	727
Norfolk & S., Zell v. (Mem.) (217 U. S. 604)	899
Norfolk & W., Powhatan Coal & Coke Co. v. (Mem.) (218 U. S. 690)	1211
Northern P., Interstate Com-merce Commission v. (216 U. S. 538)	608
Northern P., v. North Dakota ex rel. McCue (216 U. S. 579)	624
Philadelphia, B. & W., Jennings v. (218 U. S. 255)	1031
Richmond Street & Interurban, General Electric Co. v. (Mem.) (216 U. S. 620) ..	640
St. Louis S. W., v. Arkansas (217 U. S. 136)	698
San Antonio & A. P., v. Texas (Mem.) (218 U. S. 689) ..	1210
Southern, v. Greene (216 U. S. 400)	536
Southern, v. King (217 U. S. 524)	868
Southern, v. Miller (217 U. S. 209)	732

CASES REPORTED.

Railway, Metropolitan Street, Guaranty Trust Co. v. (Mem.) (215 U. S. 587)	339	Rudolph, Wallach v.	883
Ramirez, Elias v.	253	Columbia Heights Realty Co. v.	877
Ramos, Morales v. (Mem.) (217 U. S. 610)	901	Rumford Chemical Works, Hygienic Chemical Co. v.	137
Rand-McNally & Co. v. Kentucky (Mem.) (215 U. S. 582) ..	337	v. Hygienic Chemical Co. (215 U. S. 156)	137
Rankin v. Emigh (218 U. S. 27)	915	Rumsey, Sanders v. (Mem.)	1206
Ransome Concrete Machinery Co. v. United Concrete Machinery Co. (Mem.) (217 U. S. 607)	900	S.	
Re Cleland (217 U. S. 120)	962	St. Benedict's Abbey v. Marion County (Mem.) (218 U. S. 688)	1210
Elkus (216 U. S. 115)	407	St. Louis & S. F. R. Co., West v. (Mem.) (218 U. S. 675) ..	1205
Madison Steele Co. SEE RE ELKUS.		St. Louis, K. C. & C. R. Co. v. Wabash R. Co. (217 U. S. 247) ..	752
Metropolitan Trust Co. (218 U. S. 312)	1051	St. Louis S. W. R. Co. v. Arkansas (217 U. S. 136)	698
Stavrahn, (Mem.) (216 U. S. 621)	641	St. Paul F. & M. Ins. Co., Penman v.	493
Thatcher (Mem.) (216 U. S. 625)	642	San Antonio & A. P. R. Co. v. Texas (Mem.) (218 U. S. 689) ..	1210
Reavis v. Fianza (215 U. S. 16)	72	Sanders v. Rumsey (Mem.) (218 U. S. 678)	1206
Reeves, Richardson v. (Mem.)	351	Sandoval v. Albright (216 U. S. 331) ..	502
Remick v. Stern (Mem.) (215 U. S. 585)	338	Albright v.	502
Rhodus v. Manning (Mem.) (217 U. S. 597)	896	Albright v.	509
Richards v. United States (Mem.) (218 U. S. 670)	1203	San Francisco, Eddy v. (Mem.)	345
Richardson v. Ainsa (218 U. S. 289) ..	1044	Laurel Hill Cemetery v.	515
v. McChesney (218 U. S. 487) ..	1121	San Juan Light & Transit Co. v. Pla (Mem.) (218 U. S. 692) ..	1211
v. Reeves (Mem.) (215 U. S. 619)	351	Sargent, United States v. (Mem.) ...	351
Richmond Coal Co., Commercial Union Assur. Co. v. (Mem.)	347	Saxlehner v. Wagner (216 U. S. 375) ..	525
Richmond Street & Interurban R. Co., General Electric Co. v. (Mem.)	640	Schultz v. Diehl (Mem.) (217 U. S. 594)	896
Rickey Land & Cattle Co. v. Miller & Lux (218 U. S. 258) ..	1032	Scott County Macadamized Road Co. v. Missouri ex rel. Hines (215 U. S. 336)	221
v. Wood (218 U. S. 258)	1032	Scoville, Hadley v. (Mem.)	348
Rio Grande Dam & Irrig. Co. v. United States (215 U. S. 266) ..	190	Scully v. Squier (215 U. S. 144)	131
Ripper v. United States (Mem.) (218 U. S. 680)	1207	Seattle Nat. Bank v. Downie (218 U. S. 345)	1065
Riverside Trust Co., Gage v. (Mem.) ..	1210	Seeger Refrigerator Co., American Car & Foundry Co. v. (Mem.)	640
Roach v. Atchison, T. & S. F. R. Co. (218 U. S. 159)	978	Simple v. Lewis Construction Co. (Mem.) (218 U. S. 679) ..	1207
Rogers v. Clark Iron Co. (Mem.) (217 U. S. 589)	895	Sewell, Atchison, T. & S. F. R. Co. v. (Mem)	348
Roman Catholic Apostolic Church, Porto Rico v. (Mem.)	348	United States v. (Mem.)	897
Romeu, Todd v.	705	Shedd v. Illinois ex rel. Healy (Mem.) (217 U. S. 597)	896
Rosario Min. & Milling Co. v. Clark (Mem.) (218 U. S. 671) ..	1204	Sheegog, Illinois C. R. Co. v.	208
Rosenbaum, Snyder v.	186	Illinois C. R. Co. v. (Mem.) ..	897
Ross, McGilvra v.	95	Shepard, Eidman v. (Mem.)	1206
Rountree, Weir v. (Mem.)	635	Shevlin-Carpenter Co. v. Minnesota (218 U. S. 57)	930
Roura v. Philippine Islands (218 U. S. 386)	1080	Shine v. Fox Bros. Mfg. Co. (Mem.) (216 U. S. 609)	636
Rouss, United States v. (Mem.)	1206	Shipp, United States v. (Mem.)	337
		United States v. (Mem.)	1213
		Simmons v. The Steamship Jefferson (215 U. S. 130)	125
		Simon, United States v. (Mem.)	348

CASES REPORTED.

Singer Mfg. Co. v. Adams (Mem.) (216 U. S. 617)	639	Stevenson, United States v.	153
Sistare v. Sistare (218 U. S. 1)	905	Steward v. American Lava Co. (215 U. S. 161)	139
Skinner v. Wright (Mem.) (216 U. S. 623)	642	Stewart, Converse v. (Mem.)	1202
Slade, Cincinnati, N. O. & T. P. R. Co. v.	390	v. Griffith (217 U. S. 323) ..	782
Slocum v. New York L. Ins. Co. (Mem.) (217 U. S. 603) ..	899	Stickney, Interstate Commerce Com- mission v.	112
Smith v. Armour Packing Co. (Mem.) (217 U. S. 609)	901	Stoffela v. Nugent (217 U. S. 499) ..	856
David Kaufman & Sons Co. v. (Mem.)	636	Stott, United States v. (Mem.)	1208
Sweeney v. (Mem.)	343	Street, Morgan's Louisiana & T. R. & S. S. Co. v. (Mem.)	897
Smithville Canal Co., Montezuma Canal Co. v.	1074	Strong v. Gassert (Mem.) (215 U. S. 583)	338
Snyder v. Rosenbaum (215 U. S. 261)	186	Stuart v. Union P. R. Co. (Mem.) (218 U. S. 673)	1204
Sobrinosa de Ezquiaga, Ex parte (Mem.) (218 U. S. 668) ..	1203	Stubblefield v. Stubblefield (Mem.) (218 U. S. 694)	1212
Société Nouvelle d'Armement, United S. S. Co. v. (Mem.)	1205	Suddath, Hanover Nat. Bank v. ...	115
Souffront v. La Compagnie Des Sucreries de Porto Rico (217 U. S. 475)	846	Hanover Nat. Bank v.	120
South Carolina, Franklin v.	980	Sugarman, Thomas v.	967
Southern Exp. Co. v. McTeer (216 U. S. 122)	411	Supreme Council of the Royal Arca- num v. Brenizer (Mem.) (215 U. S. 612)	348
Southern P. Co. v. Da Costa (Mem.) (217 U. S. 606)	900	Sutton, United States v.	200
v. Interstate Commerce Com- mission (215 U. S. 226) ..	169	Sweeney v. Smith (Mem.) (215 U. S. 600)	343
Southern Pav. & Constr. Co. v. Greens- boro (Mem.) (217 U. S. 602)	898	Swift v. David (Mem.) (218 U. S. 679)	1207
Southern R. Co. v. Greene (216 U. S. 400)	536	Sylvester v. Washington (215 U. S. 80)	101
v. King (217 U. S. 524)	868		
v. Miller (217 U. S. 209)	732		
Southern States Land & Timber Co. v. Gilchrist (Mem.) (218 U. S. 686)	1209		
South Side Trust Co., Gold v. (Mem.)	1204		
Southwestern Oil Co. v. Texas (217 U. S. 114)	688		
Spencer v. Watkins (Mem.) (215 U. S. 605)	346		
Squier, Scully v.	131		
Stancil v. Fox (Mem.) (215 U. S. 619)	351		
Standard Oil Co. v. Brown (218 U. S. 78)	939		
v. Tennessee ex rel. Cates (217 U. S. 413)	817		
v. United States (Mem.) (218 U. S. 681)	1207		
Starkweather v. Jenner (216 U. S. 524)	602		
State Council of Virginia, Forbes v.	534		
State Mut. L. Ins. Co., Johnston v. (Mem.)	1205		
Stavrah, Re (Mem.) (216 U. S. 621)	641		
Stephenson, United States v.	157		
Stern, Remick v. (Mem.)	338		
Sternbergh, Duryea Power Co. v. ..	1047		

CASES REPORTED.

Tiglaio v. Insular Government of P. I. (215 U. S. 410)	257	United States v. Cafarelli (Mem.) (218 U. S. 683)	1208
Title Guaranty & S. Co. v. Wallace (Mem.) (217 U. S. 607)	900	Cardwell v. (Mem.)	343
Todd v. Romeu (217 U. S. 150)	705	v. Carter (217 U. S. 286)	769
Tornabells, Wills v.	660	v. Celestine (215 U. S. 278)	195
Toxaway Hotel Co. v. J. L. Smathers & Co. (216 U. S. 439)	558	Chicago, B. & Q. R. Co. v. (Mem.)	1213
Tracy, Berger v. (Mem.)	341	v. Chicago, M. & St. P. R. Co. (218 U. S. 233)	1015
Trimble v. Klugh (Mem.) (218 U. S. 669)	1203	Chicago, St. P. M. & O. R. Co. v.	721
Trinidad Shipping & Trading Co., Hal- ligan v. (Mem.)	349	Colorado & S. R. Co. v. (Mem.)	1210
Triplet v. United States (Mem.) (218 U. S. 671)	1204	Comstock v. (Mem.)	1203
Tunis Lumber Co. v. Cumberland Lumber Co. (Mem.) (215 U. S. 603)	345	v. Corbett (215 U. S. 233)	173
Turner, Jackson Lumber Co. v. (Mem.)	1209	Davis v. (Mem.)	346
Tweedie Trading Co., Herr v. (Mem.)	1207	Dufaur v. (Mem.)	350
Higgins v. (Mem.)	901	v. Duncan (Mem.) (218 U. S. 684)	1208
Western Assur. Co. v. (Mem.)	901	v. Durie (Mem.) (218 U. S. 683)	1208
U.		Franklin v.	615
Union Constr. & D. Co., Globe Asphalt Co. v. (Mem.)	900	v. Freeman (Mem.) (215 U. S. 602)	344
Union Ferry Co. v. New York, N. H. & H. R. Co. (Mem.) (218 U. S. 676)	1206	Freeman v.	874
Union P. R. Co. v. Harris (215 U. S. 386)	246	Gil v. (Mem.)	642
Kuykendall v. (Mem.)	344	v. Grimaud (Mem.) (216 U. S. 614)	639
Stuart v. (Mem.)	1204	v. Hampton (Mem.) (216 U. S. 619)	640
Union Supply Co., United States v.	87	v. Haug (Mem.) (216 U. S. 624)	642
Union Trust Co., American Wood- working Machinery Co. v. (Mem.)	342	v. Haviland (Mem.) (216 U. S. 618)	640
United Concrete Machinery Co., Ran- some Concrete Machinery Co. v. (Mem.)	900	Heike v.	821
United States, Ex parte (217 U. S. 286)	769	v. Heinze (218 U. S. 532)	1139
Alvarez y Sanchez v.	432	v. Heinze (218 U. S. 547)	1145
v. American Bonding Co. (Mem.) (215 U. S. 616)	350	Heinze v. (Mem.)	1205
Anderson v. (Mem.)	351	v. Hempstead (Mem.) (216 U. S. 618)	640
v. Ansonia Brass & C. Co. (218 U. S. 452)	1107	Holmgren v.	861
v. Atchison, T. & S. F. R. Co. (Mem.) (217 U. S. 604)	899	Holt v.	1021
v. Axman (Mem.) (215 U. S. 617)	250	Hooe v.	1055
Baltimore, & O. S. W. R. Co. v. (Mem.)	639	Hyde v. (Mem.)	1207
Bartholomew v. (Mem.)	901	v. Inda (Mem.) (216 U. S. 614)	639
v. Baruch (Mem.) (215 U. S. 610)	348	Jameson v. (Mem.)	1204
Belt R. Co. v. (Mem.)	1213	J. J. McCaskill Co. v.	590
v. Boeckman (Mem.) (218 U. S. 684)	1208	Kerreh v. (Mem.)	344
Bustos v. (Mem.)	1210	v. Kissel (218 U. S. 601)	1168
		Komada & Co. v.	249
		v. Lamson (Mem.) (218 U. S. 682)	1208
		v. Lavino (Mem.) (216 U. S. 618)	640
		Lewis v. (Mem.)	637
		Ling Su Fan v.	1049
		Lord v.	790
		v. Mason (218 U. S. 517)	1133
		Mendezona v. (Mem.)	901
		v. Mescall (215 U. S. 26)	77
		Monongahela Bridge Co. v.	435
		v. Monson (Mem.) (218 U. S. 683)	1208

CASES REPORTED.

United States, Morse v. (Mem.)	346	Unity Banking & Sav. Co. v. Bettman (217 U. S. 127)	695
Old Nick Williams Co. v.	318	V.	
Ong Chang Wing v.	1040	Valdes y Cobian v. Grahame (Mem.) (218 U. S. 684)	1209
Pacific Mail S. S. Co. (Mem.) (218 U. S. 692)	1211	Van Sice v. Ibex Min. Co. (Mem.) (215 U. S. 606)	346
Pendleton v.	491	Vasey, Woodside v. See WOODSIDE v. BECKHAM.	
Pickett v.	566	Vela, Maytin v.	632
v. Plowman (216 U. S. 372)	523	Venner v. Chicago City R. Co. (Mem.) (218 U. S. 669)	1203
Richards v. (Mem.)	1203	Vermont v. United States (Mem.) (217 U. S. 605)	899
Rio Grande Dam & Irrig. Co. v.	190	Virginia-Carolina Chemical Co. v. Kirven (215 U. S. 252)	179
Ripper v. (Mem.)	1207	Virginia Passenger & Power Co. v. Lane Bros. Co. (Mem.) (215 U. S. 610)	348
v. Rouss (Mem.) (218 U. S. 678)	1206	Von Holt, Hawaiian Trust Co. v.	519
v. Sargent (Mem.) (215 U. S. 618)	351	Von Lehe, Atlantic Coast Line R. Co. v.	411
v. Sewell (Mem.) (217 U. S. 601)	897	Vought v. Wisconsin (Mem.) (217 U. S. 590)	895
v. Shipp (Mem.) 215 U. S. 580)	337	W.	
v. Shipp (Mem.)	1213	Wabash R. Co., Adelbert College v. (Mem.)	343
v. Simon (Mem.) (215 U. S. 610)	348	Pierson v. (Mem.)	343
Standard Oil Co. v. (Mem.)	1207	v. Pollitz (Mem.) (218 U. S. 677)	1206
v. Stevenson (215 U. S. 190)	153	St. Louis, K. C. & C. R. Co. v.	752
v. Stevenson (215 U. S. 200)	157	Wagg v. Herbert (215 U. S. 546)	321
v. Stott (Mem.) (218 U. S. 683)	1208	Wagner, Saxlehner v.	525
v. Sutton (215 U. S. 291)	200	Wagner Electric Mfg. Co., Westing- house Electric & Mfg. Co. v.	347
v. Terminal Railroad Asso. (Mem.) (215 U. S. 595)	341	Wallace, General Fireproofing Co. v. (Mem.)	900
v. Tiffany & Co. (Mem.) (218 U. S. 675)	1205	Title Guaranty & S. Co. v. (Mem.)	900
Triplet v. (Mem.)	1204	Wallach v. Rudolph (217 U. S. 561)	883
v. Union Supply Co. (215 U. S. 50)	87	Walsh v. United States (Mem.) (215 U. S. 609)	347
Vermont v. (Mem.)	899	W. & A. Fletcher Co., American Trust Co. v. (Mem.)	343
Walsh v. (Mem.)	347	Ward Lumber Co. v. Henderson- White Mfg. Co. (Mem.) (215 U. S. 612)	349
Weems v.	793	Warfield v. Gaston (Mem.) (217 U. S. 610)	901
v. Welch (217 U. S. 333)	787	Washington, Sylvester v.	101
William Cramp & Sons Ship & E. Bldg. Co. v.	587	Washington Gaslight Co. v. Macfar- land (Mem.) (215 U. S. 614)	349
v. William R. Trigg Co. (Mem.) (215 U. S. 611)	348	Washington R. & Electric Co., Brill v.	311
Woods v. (Mem.)	641	Waskey v. Chambers (Mem.) (216 U. 622)	641
Wynne v.	748	v. Hammer (Mem.)	1212
United States ex rel. Frost, Ballinger v.	464	Waterman v. Canal-Louisiana Bank & Trust Co. (215 U. S. 33)	80
Pitcairn Coal Co., Baltimore & O. R. Co. v.	292		
Newcomb Motor Co., Moore v. (Mem.)	636		
Kelley v. Peters (Mem.) (217 U. S. 606)	900		
United States use of Ludowici-Celadon Co., Mankin v.	315		
Hine v. Morse (218 U. S. 493)	1123		
United States Consol. Seeded Raisin Co., Ex parte (Mem.) (215 U. S. 591)	340		
United S. S. Co. v. Société Nouvelle d'Armement (Mem.) (218 U. S. 674)	1205		
United Surety Co. v. Iowa Mfg. Co. (Mem.) (217 U. S. 606)	900		

Watkins, Spencer v. (Mem.)	346	Whitin Mach. Works v. Houghton	
Watson v. Greenwood (Mem.) (215		(Mem.) (217 U. S. 605) ..	899
U. S. 599) ..	343	Wilcoxon v. Wilcoxon (Mem.) (217	
v. Maryland (218 U. S. 173) ..	987	U. S. 609) ..	901
Wayne, Halligan v. (Mem.)	1207	Wildenfels, The, American Mfg. Co. v.	
Weber v. Grand Lodge of Kentucky F.		(Mem.)	342
& A. M. (Mem.) (215 U.		Will v. Tornabells (217 U. S. 47)	660
S. 606) ..	346	Willcox v. Jones (Mem.) (218 U. S.	
Weems v. United States (217 U. S.		679) ..	1207
349) ..	793	William Cramp & Sons Ship & E.	
Weir v. Rountree (Mem.) (216 U. S.		Bldg. Co. v. United States	
607) ..	635	(216 U. S. 494) ..	587
Welch, United States v.	787	William J. Moxley v. Hertz (216 U.	
Wenar v. Jones (Mem.) (217 U. S.		S. 344) ..	510
593) ..	896	William R. Bush Constr. Co., With-	
Wentworth Lunch Co., Nollman v.		nell v. (Mem.) ..	635
(Mem.) ..	895	William R. Trigg Co., First Nat.	
West v. Atchison, T. & S. F. R. Co.		Bank v. (Mem.) ..	1212
(Mem.) (218 U. S. 675) .	1205	United States v. (Mem.) ..	348
v. Chicago, R. I. & P. R. Co.		Williams v. Arkansas (217 U. S. 79) .	673
(Mem.) (218 U. S. 675) ..	1205	v. First Nat. Bank (216 U. S.	
v. Gulf, C. & S. F. R. Co.		582) ..	625
(Mem.) (218 U. S. 675) ..	1205	Lapina v. (Mem.) ..	1204
v. Kansas City S. R. Co.		Tarpenian v. (Mem.) ..	1212
(Mem.) (218 U. S. 675) ..	1205	Williamson, Majors v. (Mem.) ..	342
v. Midland Valley R. Co.		Metropolitan L. Ins. Co. v.	
(Mem.) (218 U. S. 675) .	1205	(Mem.) ..	347
v. Missouri K. & T. R. Co.		Wilmerton v. Wilmerton (Mem.) (217	
(Mem.) (218 U. S. 675) .	1205	U. S. 606) ..	900
v. St. Louis & S. F. R. Co.		Winters, Baltimore & O. R. Co. v.	
(Mem.) (218 U. S. 675) ..	1205	(Mem.) ..	1204
Western Assur. Co. v. Tweedie Trading		Wisconsin, Vought v. (Mem.) ..	895
Co. (Mem.) (217 U. S.		Wise, Missouri, K. & T. R. Co. v.	
608) ..	901	(Mem.) ..	639
Western Pocahontas Corp., Acord v.		Withnell v. William R. Bush Constr.	
(Mem.) ..	346	Co. (Mem.) (216 U. S.	
Western U. Teleg. Co. v. Andrews		603) ..	635
(216 U. S. 165) ..	430	Wood v. Browning (Mem.) (218 U.	
v. Commercial Milling Co. (218		S. 676) ..	1206
U. S. 406) ..	1088	Dinsmore v. (Mem.) ..	1210
Great Northern R. Co. v.		Rickey Land & Cattle Co. v. .	1032
(Mem.) ..	640	Woodman, Hertz v.	1001
v. Kansas ex rel. Coleman (216		Woods v. United States (Mem.) (216	
U. S. 1) ..	355	U. S. 620) ..	641
Ludwig v.	423	Woodside v. Beckham (216 U. S. 117) .	408
Westfeldt, North Carolina Min. Co.		v. Vasey. See WOODSIDE v.	
v. (Mem.) ..	339	BECKHAM.	
Westinghouse Electric & Mfg. Co. v.		Woodward Carriage Co. v. Pitts	
Wagner Electric Mfg. Co.		Livery Co. (Mem.) (215	
(Mem.) (215 U. S. 608) ..	347	U. S. 618) ..	351
Westrumite Co., Lincoln Park Comrs.		Wright, Central of Ga. R. Co. v.	
v. (Mem.) ..	347	(Mem.) ..	350
West Virginia, King v. (Mem.) (215		v. George R. & Bkg. Co. (216	
U. S. 616) ..	350	U. S. 420) ..	544
King v.	396	Skinner v. (Mem.) ..	642
Maryland v.	645	Wynne v. United States (217 U. S.	
Maryland v.	888	234) ..	748
Wetmore v. Tennessee Copper Co. (218			
U. S. 369) ..	1073		
White v. Connecticut General L. Ins.			
Co. (Mem.) (218 U. S.			
684) ..	1208		

CASES REPORTED.

Y.

Yellow Poplar Lumber Co. v. Chapman (Mem.) (215 U. S. 601)	344
Yordi v. Nolte (215 U. S. 227)	170

Z.

Zartman v. First Nat. Bank (216 U. S. 134)	418
Zell v. Norfolk & S. R. Co. (Mem.) (217 U. S. 604)	899

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

“

OCTOBER TERM, 1909.

Vol. 215.

REFERENCE TABLE
 OF SUCH CASES
 DECIDED IN U. S. SUPREME COURT,
 OCTOBER TERM, 1909,
 AND REPORTED HEREIN,

VOLUME 215,

 AS ALSO APPEAR IN
OFFICIAL REPORTER'S EDITION.

Off. Rep. 215 U. S.	Title.	Here in.	Off. Rep. 215 U. S.	Title.	Here in.
1	Fall v. Eastin	65	87	El Paso & N. E. R. Co. v. Gu-	
2-4	" "	67	tierrez	"	106
4-7	" "	68	90	" "	108
7-9	" "	69	90-93	" "	109
9-11	" "	70	93-95	" "	110
11-14	" "	71	95-98	" "	111
14-15	" "	72	98-99	Interstate Commerce Commis-	
16	Reavis v. Fianza	72	sion v. Stickney	"	112
21-22	" "	75	104-105	" "	113
22-24	" "	76	105-108	" "	114
24-25	" "	77	108-110	" "	115
26-27	United States v. Mescall	77	110	Hanover Nat. Bank v. Sud-	
27-28	" "	78	dath	"	115
31-32	" "	79	112-114	" "	117
32-33	" "	80	114-117	" "	118
33	Waterman v. Canal-La. Bank		117-119	" "	119
	& T. Co.	80	119-122	" "	120
38-40	" "	82	122	Hanover Nat. Bank v. Sud-	
40-42	" "	83	dath	"	120
42-45	" "	84	123-124	" "	121
45-47	" "	85	124-125	" "	122
47-50	" "	86	125	Kenney v. Craven	122
50	" "	87	126-128	" "	123
50	United States v. Union Supply		129-130	" "	124
	Co.	87	130	" "	125
53-55	" "	88	130	The Steamship Jefferson (Sim-	
56	Fleming v. McCurtain	88	mons v. The Steamship Jef-		
56-59	" "	90	fereson)	"	125
59-61	" "	91	133-136	" "	127
61-63	" "	92	136-138	" "	128
63	Marbles v. Creecy	92	138-141	" "	129
65	" "	93	141-143	" "	130
65-68	" "	94	143	" "	131
68-70	" "	95	144	Scully v. Squier	131
70	McGivra v. Ross	95	148-150	" "	134
71-72	" "	96	150-152	" "	135
72-74	" "	97	152-155	" "	136
74-76	" "	98	155	" "	137
76-77	" "	99	156	{ Rumford Chemical Works v.	
77-79	" "	100		Hygienic Chemical Co.	
79-80	" "	101		Hygienic Chemical Co. v.	
80	Sylvester v. Washington	101		Rumford Chemical Works	137
83-84	" "	104	158-159	" "	138
84-86	" "	105	159-160	" "	139
86-87	" "	106			

REFERENCE TABLE.

Off. Rep. 215 U. S.	Title.	Here in.	Off. Rep. 215 U. S.	Title.	Here in.
161	Steward v. American Lava Co.		278-279	United States v. Celestine	195
	Kirchberger v. American Lava Co.	139	280-283	" "	196
161	" "	140	283-286	" "	197
161-164	" "	141	286-288	" "	198
164-166	" "	142	288-291	" "	199
166-168	" "	143	291	" "	200
168-170	" "	144	291-292	United States v. Sutton	200
170	Louisiana ex rel. Hubert v. New Orleans	144	292-294	" "	201
171-174	" "	146	294-296	" "	202
174-176	" "	147	296	Bd. of County Comrs. v. New Mexico ex rel. Coler	202
176-178	" "	148	239	" "	204
178-181	" "	149	299-302	" "	205
181	" "	150	302-304	" "	206
182	Caliga v. Inter Ocean Newspaper Co.	150	304-306	" "	207
186-188	" "	151	307	" "	208
188-190	" "	152	308	Illinois C. R. Co. v. Sheegog	208
190	United States v. Stevenson	153	315-317	" "	211
194-195	" "	155	317-319	" "	212
195-198	" "	156	319-322	" "	213
198-200	" "	157	322-324	" "	214
200	United States v. Stevenson	157	324-327	" "	215
202-203	" "	158	327-329	" "	216
203	Everett v. Everett	158	329-331	" "	217
204	" "	160	331	Graves v. Ashburn	217
204-206	" "	161	332-334	" "	220
206-209	" "	162	334-335	" "	221
209-216	" "	163	336	Scott County Macadamized Road Co. v. Missouri ex rel. Hines	221
216	" "	164	339-341	" "	223
216-217	Baltimore & O. R. Co. v. Interstate Commerce Commission	164	341	First Nat. Bank v. Easterville	223
217-218	" "	165	344	" "	226
218-219	" "	166	344-347	" "	227
219-221	" "	167	347-348	" "	228
221-224	" "	168	349	Kuhn v. Fairmont Coal Co.	228
224-225	" "	169	353	" "	231
226	Southern P. R. Co. v. Interstate Commerce Commission	169	353-356	" "	232
226-227	" "	170	356-359	" "	233
227-228	Yordi v. Nolte	170	359-360	" "	234
228-230	" "	171	360-363	" "	235
230-233	" "	172	363-365	" "	236
233-237	United States v. Corbett	173	365-368	" "	237
237-239	" "	174	368-370	" "	238
239-242	" "	175	370-372	" "	239
242-244	" "	176	373	Henley v. Myers	240
244-246	" "	177	378-382	" "	243
246-247	Lathrop, S. & H. Co. v. Interior Constr. & Imp. Co.	177	382-383	" "	244
247-249	" "	178	383-384	" "	245
249-251	" "	179	384-385	" "	246
252	Virginia-Carolina Chemical Co. v. Kirven	179	386-387	Union P. R. Co. v. Harris	246
255-256	" "	183	387-388	" "	247
256-258	" "	184	388-390	" "	248
258-260	" "	185	390-391	" "	249
261	Snyder v. Rosenbaum	186	392	Komada & Co. v. United States	249
261-263	" "	188	392-393	" "	250
263-266	" "	189	396-398	" "	252
266	" "	190	398-400	Elias v. Ramirez	253
266	Rio Grande Dam & Irrig. Co. v. United States	190	400-403	" "	254
267	" "	191	403-405	" "	255
267-269	" "	192	405-407	" "	256
269-275	" "	193	407-409	" "	257
275-276	" "	194	410	Liglao v. Insular Government	257
276	" "	195	414-415	" "	258
			415-417	" "	259
			417	Minneapolis v. Minneapolis Street R. Co.	259
			420-422	" "	265
			423-424	" "	266

REFERENCE TABLE.

Off. Rep. 215 U. S.	Title.	Here in.	Off. Rep. 215 U. S.	Title.	Here in.
424-427	Minneapolis v. Minneapolis Street R. Co.	267	502-503	Macon Grocery Co. v. Atlan- tic C. L. R. Co.	301
427-429	" "	268	503-505	" "	302
429-432	" "	269	505-507	" "	303
432-434	" "	270	507-510	" "	304
434-437	" "	271	510-512	" "	305
437	" "	272	512-514	" "	306
437	Mechanical Appliance Co. v. Castleman	272	515-518	North Dakota ex rel. Flaherty v. Hanson	307
438-439	" "	274	518-522	" "	308
439-441	" "	275	522-523	" "	309
441-444	" "	276	523-525	" "	310
444-446	" "	277	525-527	" "	311
446	Haffner v. Dobrinski	277	527	Brill v. Washington R. & E. Co.	311
446-449	" "	278	528-530	" "	313
449-450	" "	279	530-533	" "	314
450-452	" "	280	533	" "	315
452	Interstate Commerce Commis- sion v. Illinois C. R. Co.	280	533	Mankin v. United States, use of Ludowici Celadon Co.	315
459-460	" "	283	535-537	" "	316
460-462	" "	284	537-540	" "	317
462-465	" "	285	540	" "	318
465-468	" "	286	541	Old Nick Williams Co. v. United States	318
468-470	" "	287	541-542	" "	319
470-472	" "	288	542-544	" "	320
472-475	" "	289	544-545	" "	321
475-477	" "	290	546	Wagg v. Herbert	321
477-478	" "	291	546-548	" "	322
479-480	Interstate Commerce Commis- sion v. Chicago & A. R. Co.	291	550-552	" "	324
480-481	" "	292	552-553	" "	325
481-482	Baltimore & O. R. Co. v. Unit- ed States ex rel. Pitcairn Coal Co.	292	554	Lowrey v. Hawaii	325
482-485	" "	293	559-561	" "	328
485-487	" "	294	561-564	" "	329
488-490	" "	295	564-566	" "	330
490-492	" "	296	566-569	" "	331
492-495	" "	297	569-571	" "	332
495-497	" "	298	571-574	" "	333
497-500	" "	299	574-576	" "	334
500	" "	300	576-579	" "	335
501	Macon Grocery Co. v. Atlantic C. L. R. Co.	300	579-580	" "	336
			581-619	Memorandum Decisions	337-351

THE DECISIONS
OF THE
Supreme Court of the United States

AT
OCTOBER TERM, 1909.

1] *SARAH S. FALL, Plff. in Err.,
v.
ELIZABETH EASTIN.

(See S. C. Reporter's ed. 1-15.)

Courts—chancery power to affect foreign property—full faith and credit.

A deed to land situated in Nebraska, made by a commissioner under a decree of a court of another state in an action of divorce, in which, in determining the equities of the parties, conformably to the practice in that state, the land was set apart to the wife as her own separate property, need not be recognized in Nebraska, under the full faith and credit clause of the Federal Constitution.

[For other cases, see Courts, 61-74; Judgment, VI. b, 3, in Digest Sup. Ct. 1908.]

[No. 24.]

Submitted April 30, 1909. Decided November 1, 1909.

NOTE.—On jurisdiction of equity over suits affecting real property in another state or country—see notes to Proctor v. Proctor, 69 L.R.A. 673, and Fall v. Eastin, 23 L.R.A. (N.S.) 924.

As to full faith and credit to be given to state records and judicial proceedings—see notes to Lindley v. O'Reilly, 1 L.R.A. 79; Cummington v. Belchertown, 4 L.R.A. 131; Rand v. Hanson, 12 L.R.A. 574; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; Mills v. Duryee, 3 L. ed. U. S. 411; D'Arcy v. Ketchum, 13 L. ed. U. S. 643; and Huntington v. Attrill, 36 L. ed. U. S. 1123.

Conveyance by officer of court as affecting real property in another state.

The rule is well settled that when a case otherwise properly cognizable in equity is presented, a court of equity having personal jurisdiction of the parties may, in the exercise of its discretion, assume jurisdiction, although land in another state may

54 L. ed.

IN ERROR to the Supreme Court of the State of Nebraska to review a decree which, on rehearing, reversed a decree of the District Court of Hamilton County, in that state, in favor of plaintiff in a suit to quiet title to land, which had been conveyed to plaintiff by a commissioner under a decree of a court of the state of Washington, in an action for divorce, in which the land was set apart to the plaintiff as her separate property. Affirmed.

See same case below, 75 Neb. 104, 106 N. W. 412; on rehearing, 75 Neb. 120, 121 Am. St. Rep. 767, 113 N. W. 175.

The facts are stated in the opinion.

Messrs. Charles J. Greene and Ralph W. Breckenridge submitted the cause for plaintiff in error. Mr. Thomas H. Matters was on the brief:

The suggestion of the Nebraska supreme court that the full faith and credit provision of the Federal Constitution establishes

be affected, if it can grant effective relief by a decree acting solely upon the person whose title or interest in the land is to be affected, as distinguished from a decree acting directly upon the land. See note to Proctor v. Proctor, supra.

But the decree is ineffectual without a conveyance by the holder of the title pursuant to the requisition of the decree. Watkins v. Holman, 16 Pet. 25, 10 L. ed. 873; Corbett v. Nutt, 10 Wall. 464, 19 L. ed. 976; Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; Tardy v. Morgan, 3 McLean, 358, Fed. Cas. No. 13,752; Bullock v. Bullock, 52 N. J. Eq. 561, 27 L.R.A. 213, 46 Am. St. Rep. 528, 30 Atl. 676; Lindley v. O'Reilly, 50 N. J. L. 636, 1 L.R.A. 79, 7 Am. St. Rep. 802, 15 Atl. 379; Johnson v. Kimbro, 3 Head, 557, 75 Am. Dec. 781; Paschal v. Acklin, 27 Tex. 173; Morris v. Hand, 70 Tex. 481, 8 S. W. 210; and see note to Proctor v. Proctor, supra.

And a conveyance by a master or commissioner, or other officer appointed by the

65

a rule of evidence rather than of jurisdiction did not give the Nebraska court the right to disregard the evidence of the wife's equities in the land, established by the decree of the Washington court.

Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242. See also Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370.

If the state court declines to give full faith and credit to a judgment of another state, because of its opinion as to the nature of the cause of action on which the judgment was recovered, the Federal Supreme Court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability.

Huntington v. Attrill, 146 U. S. 684, 36 L. ed. 1133, 13 Sup. Ct. Rep. 224.

The objects of this clause of the Constitution are, first, to declare, and by its own force establish, that full faith and credit should be given to the judgments of every other state; second, to authorize Congress to prescribe the manner of authenticating them; and third, to authorize Congress to prescribe their effect when so authenticated.

Story, Const. §§ 1307, 1308.

Not only did Congress, in the exercise of that power, prescribe the manner in which records and judicial proceedings of any state shall be authenticated, but it has defined the effect thereof by enacting that the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.

Huntington v. Attrill, *supra*.

When, as in the case at bar, judgments

court for that purpose, is ineffectual. *FALL v. EASTIN*; *Watkins v. Holman*; and *Corbett v. Nutt*,—*supra*; *Watts v. Waddle*, 1 McLean, 200, Fed. Cas. No. 17,295; *Farmers' Loan & T. Co. v. Postal Teleg. Co.* 55 Conn. 334, 3 Am. St. Rep. 53, 11 Atl. 184; *McLawrin v. Salmon*, 11 B. Mon. 96, 52 Am. Dec. 563; *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621; *Moseby v. Burrow*, 52 Tex. 396; *Morris v. Hand*, *supra*.

This point is also illustrated by cases holding that a trustee appointed by a court of one state cannot pass title to real estate in another state. *Corbett v. Nutt*, *supra*; *Contee v. Lyons*, 8 Mackey, 207; *West v. Fitz*, 109 Ill. 425; *Glen v. Gibson*, 9 Barb. 634; *Henry v. Doctor*, 9 Ohio, 49; *Williams v. Maus*, 6 Watts, 278, 31 Am. Dec. 465. *Contra*, *Smith v. Davis*, 90 Cal. 25, 25 Am. St. Rep. 92, 27 Pac. 26.

But a court of equity has power to substitute its master for a faithless trustee, who will be trustee *pro hac vice*, and direct

of one state are duly pleaded and proved in the courts of another, they have the effect of being not merely *prima facie* evidence, but conclusive proof, of the rights thereby adjudicated; and a refusal to give them the force and effect, in this respect, which they had in the state in which they were rendered, denies to the party a right secured to him by the Constitution and laws of the United States.

Huntington v. Attrill, *supra*; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604.

Where there have been attempts to impeach, by collateral attack, the judgments of one court when sought to be enforced in another, the court has required evidence establishing the want of jurisdiction.

German Sav. & L. Soc. v. Dormitzer, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221; *Rogers v. Alabama*, 192 U. S. 226, 231, 48 L. ed. 417, 419, 24 Sup. Ct. Rep. 257.

Where a court of equity, clothed with full power not only to dissolve the marriage, but to dissolve the property interest, however involved, or wherever located, makes a decree based upon the application of both parties, separating their joint rights and equities in their property, such decree should, by every rule and principle, receive full faith and credit in the courts of this country.

Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067; *Shanks v. Klein*, 104 U. S. 19, 26 L. ed. 635; *Polson v. Stewart*, 167 Mass. 211, 36 L.R.A. 771, 57 Am. St. Rep. 452, 45 N. E. 737.

The commands of the constitutional requirement invoked in this litigation, and the laws enacted by Congress to aid in its execution, have uniformly been enforced in this court.

Jaster v. Currie, 198 U. S. 144, 49 L. ed.

him to make the sale and conveyance of real estate beyond its jurisdiction, requisite to execute the trust. *Byrne v. Jones*, 90 C. C. A. 101, 159 Fed. 321.

Analogous cases, too, are those holding that a court of one country cannot confer upon an administrator power to sell the real property of the decedent in another. *Watkins v. Holman*, 16 Pet. 26, 10 L. ed. 874; *Sheldon v. Rice*, 30 Mich. 296, 18 Am. Rep. 136; *Nowler v. Coit*, 1 Ohio, 519, 13 Am. Dec. 640; *Allen v. Shanks*, 90 Tenn. 359, 16 S. W. 715; *Brown v. Edson*, 23 Vt. 435.

A curatrix acting under authority of the probate court of Louisiana cannot make a valid conveyance of land belonging to the ward in Texas. *Wren v. Howland*, 33 Tex. Civ. App. 87, 75 S. W. 894.

A committee of a lunatic, appointed in one state, cannot convey land in another. *Morris v. Hand*, *supra*; *Hotchkiss v. Middlekauf*, 96 Va. 649, 43 L.R.A. 806, 32 S. E. 36.

988, 25 Sup. Ct. Rep. 614; *Harris v. Balk*, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 A. & E. Ann. Cas. 1084; *Harding v. Harding*, 198 U. S. 317, 49 L. ed. 1066, 25 Sup. Ct. Rep. 679.

No brief was filed for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

The question in this case is whether a deed to land situate in Nebraska, made by a commissioner under the decree of a court of the state of Washington in an action for divorce, must be recognized in Nebraska under the due faith and credit clause of the Constitution of the United States.

The action was begun in Hamilton county, Nebraska, in 1897, to quiet title to the land and to cancel a certain mortgage thereon, given by E. W. Fall to W. H. Fall, and to cancel a deed executed therefor to defendant in error, Elizabeth Eastin.

Plaintiff alleged the following facts: She and E. W. Fall, who was a defendant in the trial court, were married in Indiana in 1876. Subsequently they went to Nebraska, and, while living there, "by their joint efforts, accumulations, and earnings, acquired jointly and by the same conveyance" the land in controversy. In 1889 they removed to the state of Washington, and continued to reside there as husband and wife until January, 1895, when they separated. On the 27th of February, 1895, her husband, she and he then being residents of King county, Washington, brought suit against her for divorce in the superior court of that county. He alleged in his complaint that he and plaintiff were bona fide residents of King county, and that he was the owner of the land in controversy, it being, as he alleged, "his separate property, purchased by money received from his parents." He prayed for a divorce and "for a just and equitable division of the property."

Plaintiff appeared in the action by answer 3] and cross complaint, *in which she denied the allegations of the complaint, and alleged that the property was community property, and "was purchased by and with the money and proceeds of the joint labor" of herself and husband after their marriage. She prayed that a divorce be denied him, and that the property be set apart to her as separate property, subject only to a mortgage of \$1,000, which she alleged was given by him and her. In a reply to her answer and cross complaint, he denied that she was the "owner as a member of the community in conjunction" with him of the property, and repeated the prayer of his complaint.

Plaintiff also alleges that the Code of Washington contained the following provision:

54 L. ed.

"Sec. 2007. In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage."

She further alleges that that provision had been construed by the supreme court of the state, requiring of the parties to an action for divorce to bring into court all of "their property, and a complete showing must be made," and that it was decided that § 2007 conferred upon the court "the power, in its discretion, to make a division of the separate property of the wife or husband."

She further alleges that a decree was entered, granting her a divorce, and setting apart to her the land in controversy as her own separate property forever, free and unencumbered from any claim of the plaintiff thereto, and that he was ordered and directed by the court to convey all his right, title, and interest in and to the land within five days from the date of the decree.

*She also alleges the execution of the [4 deed to her by the commissioner appointed by the court, the execution and recording of the mortgage to W. H. Fall, and the deed to defendant; that the deed and mortgage were each made without consideration, and for the purpose of defrauding her, and that they cast a cloud upon her title derived by her under the decree of divorce and the commissioner's deed. She prays that her title be quieted, and that the deed and mortgage be declared null and void.

W. H. Fall disclaimed any interest in the premises, and executed a release of the mortgage made to him by E. W. Fall. Defendant answered, putting in issue the legal sufficiency of the complaint, and, in addition, set forth the fact of the loan of \$1,000 to E. W. Fall, the taking of a note therefor signed by him and William H. Fall, the giving of an indemnity mortgage to the latter, and the execution subsequently of a deed by E. W. Fall in satisfaction of the debt. No personal service was had upon E. W. Fall, and he did not appear. A decree was passed in favor of plaintiff, which was affirmed by the supreme court. 75 Neb. 104, 106 N. W. 412. A rehearing was granted and the decree was reversed [75 Neb. 120, 121 Am. St. Rep. 767, 113 N. W. 175], Judge Sedgwick, who delivered the first opinion, dissenting.

There is no brief for defendant in this

court, but the contentions of the parties and the argument by which they are supported are exhibited in the opinions of the supreme court.

The question is in narrow compass. The full faith and credit clause of the Constitution of the United States is invoked by plaintiff to sustain the deed executed under the decree of the court of the state of Washington. The argument in support of this is that the Washington court, having had jurisdiction of the parties and the subject-matter, in determination of the equities between the parties to the lands in controversy, decreed a conveyance to be made to her. This conveyance, it is contended, was decreed upon equities, and was as effectual as though her "husband and she had been strangers, and she had bought the land from 5] him and *paid for it, and he had then refused to convey it to her." In other words, that the decree of divorce in the state of Washington, which was made in consummation of equities which arose between the parties under the law of Washington, was "evidence of her right to the legal title of at least as much weight and value as a contract in writing, reciting the payment of the consideration for the land, would be."

The defendant, on the other hand, contends, as we gather from his petition for a rehearing in the supreme court of the state, and from the opinions of the court, that "the Washington court had neither power nor jurisdiction to affect in the least, either legally or equitably," lands situated in Nebraska. And contends further that, by the provision of chap. 25, p. 276, Comp. Stat. (Neb.) 1901, a court had no jurisdiction to award the real estate of the husband to the wife in fee as alimony, and a decree, in so far as it attempts to do so, is void and subject to collateral attack. For this view are cited *Cizek v. Cizek*, 69 Neb. 800, 96 N. W. 657, 99 N. W. 28; 5 A. & E. Ann. Cas. 464; *Aldrich v. Steen*, 71 Neb. 33, 98 N. W. 445, 100 N. W. 312.

The contentions of the parties, it will be observed, put in prominence and as controlling, different propositions. Plaintiff urges the equities which arose between her and her husband, on account of their relation as husband and wife, in the state of Washington, and under the laws of that state. The defendant urges the policy of the state of Nebraska, and the inability of the court of Washington, by its decree alone or the deed executed through the commissioners, to convey the land situate in Nebraska. To the defendant's view the supreme court of the state finally gave its assent, as we have seen.

In considering these propositions, we must start with a concession of jurisdiction in

the Washington court over both the parties and the subject-matter. Jurisdiction in that court is the first essential, but the ultimate question is, What is the effect of the decree upon the land, and of the deed executed under it? The supreme court of the state concedes, as we understand *its [6 opinion, the jurisdiction in the Washington court to render the decree. The court said:

"We think there can be no doubt, where a court of chancery has, by its decree, ordered and directed persons properly within its jurisdiction to do or refrain from doing a certain act, it may compel obedience to this decree by appropriate proceedings, and that any action taken by reason of such compulsion is valid and effectual wherever it may be assailed. In the instant case, if Fall had obeyed the order of the Washington court, and made a deed of conveyance to his wife of the Nebraska land, even under the threat of contempt proceedings, or after duress by imprisonment, the title thereby conveyed to Mrs. Fall would have been of equal weight and dignity with that which he himself possessed at the time of the execution of the deed."

But Fall, not having executed a deed, the court's conclusion was, to quote its language, that "neither the decree nor the commissioner's deed conferred any right or title upon her." This conclusion was deduced, not only from the absence of power generally of the courts of one state over lands situate in another, but also from the laws of Nebraska providing for the disposition of real estate in divorce proceedings. The court said:

"Under the laws of this state, the courts have no power or jurisdiction in a divorce proceeding, except as derived from the statute providing for such actions, and, in such an action, have no power or jurisdiction to divide or apportion the real estate of the parties. *Nygren v. Nygren*, 42 Neb. 408, 60 N. W. 885; *Brotherton v. Brotherton*, 14 Neb. 186, 15 N. W. 347; *Cizek v. Cizek*, supra; *Aldrich v. Steen*, 71 Neb. 33, 57, 98 N. W. 445, 100 N. W. 311. In the *Cizek Case*, *Cizek* brought an action for divorce, and his wife filed a cross bill, and asked for alimony. The court dismissed the husband's bill, found in favor of the wife, and, by stipulation of the parties, set off to the wife the homestead, and ordered her to execute to the husband a mortgage thereon, thus endeavoring to make an equitable division of the property. *Afterwards, in a contest [7 arising between the parties as to the right of possession of the property, the decree was pleaded as a source of title in the wife, but it was held that that portion of the decree which set off the homestead to the wife

was absolutely void and subject to collateral attack, for the reason that no jurisdiction was given to the district court in a divorce proceeding to award the husband's real estate to the wife in fee as alimony. The courts of this state, in divorce proceedings, must look for their authority to the statute; and so far as they attempt to act in excess of the powers therein granted, their action is void and subject to collateral attack. A judgment or decree of the nature of the Washington decree, so far as affects the real estate, if rendered by the courts of this state, would be void.

* * * * *

"The decree is inoperative to affect the title to the Nebraska land, and is given no binding force or effect so far as the courts of this state are concerned, by the provisions of the Constitution of the United States with reference to full faith and credit. Since the decree upon which the plaintiff bases her right to recover did not affect the title to the land, it remained in E. W. Fall until divested by operation of law or by his voluntary act. He has parted with it to Elizabeth Eastin; and whether any consideration was ever paid for it or not is immaterial so far as the plaintiff is concerned, for she is in no position to question the transaction, whatever a creditor of Fall might be able to do."

It is somewhat difficult to state precisely and succinctly wherein plaintiff disagrees with the conclusions of the supreme court. Counsel says:

"It is not claimed that the Washington court could create an equity in lands in Nebraska by any finding or decree it might make, and thus bind the courts of a sister state; but it is claimed that, where rights and equities already exist, the parties being within the jurisdiction of the court, it can divide them and apportion them by a [8] judgment or decree which *would be conclusive upon the parties in any subsequent proceeding in a court having jurisdiction of the lands, for the purpose of quieting the title in the equitable owner."

If we may regard this as not expressing a complete opposition to the views of the supreme court, we must at least treat it as contradicting their fundamental principle, that is, that the decree, as such, has no extraterritorial operation.

The territorial limitation of the jurisdiction of courts of a state over property in another state has a limited exception in the jurisdiction of a court of equity, but it is an exception well defined. A court of equity, having authority to act upon the person, may indirectly act upon real estate in another state, through the instrumentality of this authority over the person. Whatever

it may do through the party, it may do to give effect to its decree respecting property, whether it goes to the entire disposition of it or only to affect it with liens or burdens. Story, Conf. L. § 544. In *French v. Hay* (*French v. Stewart*), 22 Wall. 250-252, 22 L. ed. 857, 858, this court said that a court of equity, having jurisdiction *in personam*, has power to require a defendant "to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory." The extent of this power this court has also defined. *Watts v. Waddle*, 6 Pet. 389, 8 L. ed. 437, has features like the case at bar. The suit was for the specific performance of a contract for the conveyance of land. It became necessary to pass upon the effect of a decree requiring the conveyance of the lands concerned. The decree appointed a commissioner under a statute of the state to make the conveyance in case the defendants or any of them failed to make the conveyance. This court said: "A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt." In reply to the contention that the deed of the commissioner was a legal conveyance, it was said: "The deed executed by the commissioner in this case *must be considered as forming a [9] part of the proceedings in the court of chancery, and no greater effect can be given to it than if the decree itself, by statute, was made to operate as a conveyance in Kentucky as it does in Ohio."

In *Watkins v. Holman*, 16 Pet. 25, 57, 10 L. ed. 873, 886, passing on a decree made by the supreme court in Massachusetts by virtue of a statute of that state, it was said:

"No principle is better established than that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the state where the land is situated."

And further:

"A court of chancery, acting *in personam*, may well decree the conveyance of land in any other state, and may enforce their decree by process against the defendant. But neither the decree itself nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court."

See, also, *Massie v. Watts*, 6 Cranch, 148, 3 L. ed. 181, and *Miller v. Sherry*, 2 Wall. 237, 248, 249, 17 L. ed. 827, 829, 830.

In *Corbett v. Nutt*, 10 Wall. 464, 475, 19 L. ed. 976, 979, the doctrine was repeated that a court of equity, acting upon the per-

son of the defendant, may decree a conveyance of land situated in another jurisdiction, and even in a foreign country, and enforce the execution of the decree by process against the defendant; but, it was said: "Neither its decree nor any conveyance under it, except by the party to whom the title is vested, is of any efficacy beyond the jurisdiction of the court." This, the court declared, was familiar law, citing *Watkins v. Holman*, supra. See also, *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 635, 24 L. ed. 858, 861; *Phelps v. McDonald*, 99 U. S. at page, 308, 25 L. ed. at p. 476.

In *Boone v. Chiles*, 10 Pet. 177, 245, 9 L. ed. 388, 412, it is said that a commissioner is in no sense an agent of the party, but is an officer of the court, and acts strictly under its authority.

Later cases assert the same doctrine. In *Carpenter v. Strange*, 141 U. S. 87, 105, 35 L. ed. 640, 647, 11 Sup. Ct. Rep. 960, 966, a court of New York had declared a [10] deed for real estate situate in Tennessee null and void. This court said to concede such power would be "to attribute to that decree the force and effect of a judgment *in rem* by a court having no jurisdiction over the *res*." And, explaining the power of a court of equity, said that, "by means of its power over the person of a party, a court of equity may, in a proper case, compel him to act in relation to property not within its jurisdiction; its decree does not operate directly upon the property nor affect the title, but is made effectual through the coercion of the defendant; as, for instance, by directing a deed to be executed or canceled by or on behalf of the party. The court 'has no inherent power, by the mere force of its decree, to annul a deed or to establish a title.' *Hart v. Sansom*, 110 U. S. 151, 155, 28 L. ed. 101, 103, 3 Sup. Ct. Rep. 586."

Whether the doctrine that a decree of a court rendered in consummation of equities, or the deed of a master under it, will not convey title, and that the deed of a party coerced by the decree will have such effect, is illogical or inconsequent, we need not inquire, nor consider whether the other view would not more completely fulfil the Constitution of the United States, and that whatever may be done between the parties in one state may be adjudged to be done by the courts of another, and that the decree might be regarded to have the same legal effect as the act of the party which was ordered to be done. The policy of a state would not be violated. Besides, this court found no impediment in the policy of a state in the way of enforcing, under the due faith and credit clause of the Constitution of the United States, a judgment obtained in Missouri,

sued upon in Mississippi. The defense was that the cause of action arose in Mississippi, and was one that the courts of the state, under its laws, were forbidden to enforce. The defense was adjudged good by the supreme court of Mississippi, and its judgment was reversed by this court. *Fauntleroy v. Lum*, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641.

In *Hart v. Sansom*, supra, it was directly recognized that it was within the power of the state in which the land lies to *pro- [11 vide, by statute, that, if the defendant is not found within the jurisdiction, or refuses to perform, performance in his behalf may be had by a trustee appointed by the court for that purpose.

In *Dull v. Blackman*, 169 U. S. 243, 246, 247, 42 L. ed. 733, 734, 18 Sup. Ct. Rep. 333, 334, while recognizing that litigation in regard to the title of land belongs to the courts of the state where the land is so located, it was said: "Although, if all the parties interested in the land were brought personally before a court of another state, its decree would be conclusive upon them, and thus, in effect, determine the title."

But, however plausibly the contrary view may be sustained, we think that the doctrine that the court, not having jurisdiction of the *res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree, is firmly established. The embarrassment which sometimes results from it has been obviated by legislation in many states. In some states the decree is made to operate *per se* as a source of title. This operation is given a decree in Nebraska. In other states, power is given to certain officers to carry the decree into effect. Such power is given in Washington to commissioners appointed by the court. It was in pursuance of this power that the deed in the suit at bar was executed. But this legislation does not affect the doctrine which we have expressed, which rests, as we have said, on the well-recognized principle that, when the subject-matter of a suit in a court of equity is within another state or country, but the parties within the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately but *indirectly* affected by the relief granted. In such case, the decree is not of itself legal title, nor does it transfer the legal title. It must be executed by the party, and obedience is compelled by proceedings in the nature of contempt, attachment, or sequestration. On the

12] other hand, where the suit is *strictly local, the subject-matter is specific property, and the relief, when granted, is such that it *must* act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated. 3 Pom. Eq. Jur. §§ 1317, 1318, and notes.

This doctrine is entirely consistent with the provision of the Constitution of the United States, which requires a judgment in any state to be given full faith and credit in the courts of every other state. This provision does not extend the jurisdiction of the courts of one state to property situated in another, but only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit. "It does not carry with it into another state the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there; and can only be executed in the latter as its laws may permit." *McElmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177.

Plaintiff seems to contend for a greater efficacy for a decree in equity affecting real property than is given to a judgment at law for the recovery of money simply. The case of *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621, in a sense sustains her. The action was brought in one of the courts of Ohio for the recovery of the possession of certain lands. The defendant set up in defense a conveyance of the same lands, made by a master commissioner, in accordance with a decree of a court in Kentucky, in a suit for specific performance of a contract concerning the lands. The defendant in *Burnley v. Stevenson* claimed title under the master's deed. The court declared the principle that a court of equity, having the parties before it, could enforce specific performance of a contract for lands situate in another jurisdiction by compelling the parties to make a conveyance of them, but said that it did not follow that the court could "make its own decree operate as such conveyance." And it was decided that the decree could not have such effect, and, as it could not, it was "clear that a deed executed 13] cited *by a master, under the direction of the court," could "have no greater effect." *Watts v. Waddle*, 6 Pet. 389, 8 L. ed. 437, and *Page v. McKee*, 3 Bush, 135, 96 Am. Dec. 201, were cited, and the master's deed, the court said, "must, therefore, be regarded as a nullity." But the court decided that the "decree was *in personam*, and bound the consciences of those against whom it was rendered." It became, it was in effect said, a record of the equities which preceded it, and of the fact that it had become, and it 54 L. ed.

was, the duty of the defendants in the suit to convey the legal title to the plaintiff. This duty, it was further said, could have been enforced "by attachment as for contempt; and the fact that the conveyance was not made in pursuance of the order does not affect the validity of the decree, in so far as it determined the equitable rights of the parties in the land in controversy. In our judgment, the parties, and those holding under them with notice, are still bound thereby."

The court proceeded to say that it might be admitted that the decree would not constitute a good defense at law, but that it was a good defense in equity, as, under the Code of Ohio, equitable as well as legal defenses might be set up in an action for the recovery of land, and from this, and the other propositions that were expressed, concluded that, as the decree had the effect in Kentucky of determining the equities of the parties to the land in Ohio, the courts of the latter state "must accord to it the same effect," in obedience to the due faith and credit clause of the Constitution of the United States. "True," the court observed, "the courts of this state cannot enforce the performance of that decree, by compelling the conveyance through its process of attachment; but, when pleaded in our courts as a cause of action, or as a ground of defense, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein, unless it be impeached for fraud. See cases *supra*; also *Davis v. Headley*, 22 N. J. Eq. 115; *Brown v. Lexington & D. R. Co.* 13 N. J. Eq. 191; *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152; *Bank of United States v. Merchants' Bank*, 7 Gill, 415."

*It may be doubted if the cases cited [14 by the learned court sustain its conclusion. But we will not stop to review them, or to trace their accordance with or their distinction from the cases which we have cited. The latter certainly accord with the weight of authority. There is, however, much temptation in the facts of this case to follow the ruling of the supreme court of Ohio. As we have seen, the husband of the plaintiff brought suit against her in Washington for divorce, and, attempting to avail himself of the laws of Washington, prayed also that the land now in controversy be awarded to him. She appeared in the action, and, submitting to the jurisdiction which he had invoked, made counter charges and prayers for relief. She established her charges, she was granted a divorce, and the land decreed to her. He, then, to defeat the decree, and in fraud of her rights, conveyed the land to the defendant in this suit. This is the finding of the trial court. It is not

questioned by the supreme court; but, as the ruling of the latter court, that the decree in Washington gave no such equities as could be recognized in Nebraska as justifying an action to quiet title, does not offend the Constitution of the United States, we are constrained to affirm its judgment. So ordered.

Mr. Justice Harlan and Mr. Justice Brewer dissent.

Mr. Justice Holmes, concurring specially:

I am not prepared to dissent from the judgment of the court, but my reasons are different from those that have been stated.

The real question concerns the effect of the Washington decree. As between the parties to it, that decree established in Washington a personal obligation of the husband to convey to his former wife. A personal obligation goes with the person. If the husband had made a contract, valid by the law of Washington, to do the same thing, I think there is no doubt that the contract would have been binding in 15]Nebraska. *Ex parte Pollard*, 4 Deacon, Bankr. 27, 40; *Polson v. Stewart*, 167 Mass. 211, 36 L.R.A. 771, 57 Am. St. Rep. 452, 45 N. E. 737. So I conceive that a Washington decree for the specific performance of such a contract would be entitled to full faith and credit as between the parties in Nebraska. But it does not matter to its constitutional effect what the ground of the decree may be, whether a contract or something else. *Fauntleroy v. Lum*, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641. (In this case it may have been that the wife contributed equally to the accumulation of the property, and so had an equitable claim.) A personal decree is equally within the jurisdiction of a court having the person within its power, whatever its ground and whatever it orders the defendant to do. Therefore I think that this decree was entitled to full faith and credit in Nebraska.

But the Nebraska court carefully avoids saying that the decree would not be binding between the original parties, had the husband been before the court. The ground on which it goes is that to allow the judgment to affect the conscience of purchasers would be giving it an effect *in rem*. It treats the case as standing on the same footing as that of an innocent purchaser. Now, if the court saw fit to deny the effect of a judgment upon privies in title, or if it considered the defendant an innocent purchaser, I do not see what we have to do with its decision, however wrong. I do not see why it is not within the power of the

state to do away with equity or with the equitable doctrine as to purchasers with notice if it sees fit. Still less do I see how a mistake as to notice could give us jurisdiction. If the judgment binds the defendant, it is not by its own operation, even with the Constitution behind it, but by the obligation imposed by equity upon a purchaser with notice. The ground of decision below was that there was no such obligation. The decision, even if wrong, did not deny to the Washington decree its full effect. *Bagley v. General Fire Extinguisher Co.* 212 U. S. 477, 480, 53 L. ed. 605, 613, 29 Sup. Ct. Rep. 341.

*JOHN F. REAVIS, Appt., [16

v.

JOSÉ FIANZA et al.

(See S. C. Reporter's ed. 16-25.)

Appeal — from supreme court of Philippines — jurisdiction.

1. A suit to restrain the defendant from setting up title to certain gold mines in the Philippine Islands, or interfering with the same, and to obtain an accounting, in which the meaning and effect of the provisions of the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369), § 45, concerning mining titles, are in question, is one in which a statute of the United States is "involved," within the meaning of § 10 of that act (U. S. Comp. Stat. Supp. 1907, p. 214), defining the appellate jurisdiction of the Supreme Court of the United States over the supreme court of the Philippine Islands.

[For other cases, see Appeal and Error, III. d, 5, in Digest Sup. Ct. 1908.]

Appeal — review of facts — concurrent findings.

2. Concurrent findings of fact by the two lower courts in support of a claim of certain natives of the Philippine Islands to have held possession of certain mines, and to have worked them to the exclusion of all others down to the bringing of suit, will not be disturbed by the Supreme Court of the United States on appeal from the supreme court of the Philippine Islands, if there is some evidence of the facts found.

[For other cases, see Appeal and Error, 4889-4891, 4931-4959, in Digest Sup. Ct. 1908.]

Adverse possession — mining claim in Philippine Islands — adverse claim.

3. An adverse claim which will defeat the right to a patent under the act of July 1, 1902, § 45, when natives and their ancestors have held possession and worked mining claims in the Philippine Islands for the period required by that section, cannot be based upon entry and staking of claim and

NOTE.—On color of title in adverse possession—see notes to *Ricard v. Williams*, 5 L. ed. U. S. 398, and *United States v. Chaves*, 40 L. ed. U. S. 215.

filing notice of location, where such possession was continuous down to the bringing of suit to restrain the person relying upon such acts as amounting to an adverse claim from setting up title or interfering with the claims.

[Adverse possession of public lands, see Adverse Possession, I. h, in Digest Sup. Ct. 1908.]

Adverse possession — of mining claim in Philippine Islands — claim of title.

4. The possession and working of a mining claim in the Philippine Islands for the time requisite, under the act of July 1, 1902, § 45, in order to establish a right to patent, need not have been under a claim of title.

[Color of title in adverse possession, see Adverse Possession, I. i, in Digest Sup. Ct. 1908.]

Appeal — question not raised below — mistaken remedy.

5. The objection that possession and working of mining claims in the Philippine Islands for the time required under the act of July 1, 1902, § 45, to establish a right to patent, will not support a suit to enjoin setting up title or interfering with the same, comes too late after a trial upon the merits.

[For other cases, see Appeal and Error, 4550-4555, in Digest Sup. Ct. 1908.]

Appeal — harmless error — excluding evidence.

6. The exclusion of evidence in an equity cause, even if erroneous, is not ground for reversal, where, if admitted, it could not have affected the result.

[For other cases, see Appeal and Error, 5051-5065, in Digest Sup. Ct. 1908.]

[No. 16.]

Argued April 26, 27, 1909. Decided November 1, 1909.

APPEAL from the Supreme Court of the Philippine Islands to review a decree which affirmed a decree of the court of First Instance of the Province of Benguet, enjoining the setting up of title to certain gold mines in that province, or any interference with the same. Affirmed.

See same case below, 7 Philippine, 610.

The facts are stated in the opinion.

Messrs. **Frederick R. Condert** and **Howard Thayer Kingsbury** argued the cause, and, with Mr. Paul Fuller, filed a brief for appellant:

This court has jurisdiction on this appeal to review the facts.

De la Rama v. De la Rama, 201 U. S. 309, 50 L. ed. 767, 26 Sup. Ct. Rep. 485.

In view of the indefinite and uncertain character of the boundaries of plaintiff's claim, whatever might be its validity otherwise, it, like other indefinite and uncertain interests in lands, will be void for uncertainty, and thus wholly insufficient to support an injunction.

United States v. Castellero, 2 Black, 1, 191, 17 L. ed. 360, 387.

54 L. ed.

Both under our system and that of Spain, mines of precious metal constitute a species of property especially subject to the control of the government, and can be acquired in private ownership only by compliance with such regulations as the government may prescribe.

See *Philippine Mining Laws & Regulations*, War Department Translation, July, 1900. See also *United States v. Castellero*, 2 Black, 1, 17 L. ed. 360, *passim*.

Under neither system of law does ownership or possession of the surface confer ownership of the minerals below the surface, or vest the possessor of the surface with mining rights (*United States v. Castellero*, 2 Black, 166-168, 17 L. ed. 379, 380). Moreover, it does not appear that plaintiffs ever asserted any claim to the property except for mining purposes.

Plaintiffs have no present rights of ownership whatever in the property, directly enforceable by any court. Whether they may still have a right to apply for and obtain a patent is a wholly different question, not before this court for decision.

The Young Mechanic, 2 Curt. C. C. 404, Fed. Cas. No. 18,180. See also *The Carlos F. Roses*, 177 U. S. 655, 666, 44 L. ed. 929, 933, 20 Sup. Ct. Rep. 803.

One basing his right to a patent on the ground that he has held the claim for a period which satisfies the statute of limitations of his state or territory must proceed to obtain his patent the same as if his right vested on location, with the exception of the manner by which he proves his title.

2 Lindley, Mines, § 688, p. 1276; *Re Smith Bros.* 7 Copp's L. O. 4.

The purpose and effect of U. S. Rev. Stat. § 2332, U. S. Comp. Stat. 1901, p. 1433, has been held to be to raise a presumption of regularity of the original location from the fact of long and unquestioned possession, and to enable proof of such possession to be accepted by the Land Office in lieu of proof of compliance with all the detailed statutory requirements of a valid location.

Buffalo Zine & Copper Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572; *Cleary v. Skiffich*, 28 Colo. 362, 89 Am. St. Rep. 207, 69 Pac. 59; *McCowan v. Maclay*, 16 Mont. 234, 40 Pac. 602.

It is very significant that there appears to be no case in the books in which a party claiming simply by naked adverse possession, with no attempt at location under the statutes, has been awarded relief, either legal or equitable, against an adverse claimant who has made a statutory location. The general rule is that rights founded on mere possession must yield to rights created by compliance with the statutory requirements.

Horswell v. Ruiz, 67 Cal. 111, 7 Pac. 197;

Kendall v. San Juan Silver Min. Co. 144 U. S. 658, 36 L. ed. 583, 12 Sup. Ct. Rep. 779.

As Reavis's adverse entry was expressly found to have been peaceable, it necessarily operated as an ouster which broke the continuity of plaintiffs' holding.

Belk v. Meagher, 104 U. S. 287, 26 L. ed. 738.

An injunction should not be granted in support of doubtful and disputed rights, or where there is an adequate remedy at law. Moreover, the plaintiffs must succeed, if at all, on the strength of their own right or title, not on the weakness of their adversary's.

Lawson v. United States Min. Co. 207 U. S. 1, 52 L. ed. 65, 28 Sup. Ct. Rep. 15; Gwillim v. Donnellan, 115 U. S. 45, 29 L. ed. 348, 5 Sup. Ct. Rep. 1110.

It is contrary to the principles of equity to grant an injunction to a complainant for the protection of rights which are disputed and the subject of litigation, when there is no threatened irreparable mischief to be prevented.

Tacoma R. & P. Co. v. Pacific Traction Co. 155 Fed. 259.

By plaintiffs' own bill, they were out of possession when the suit was brought. This also defeats their claim for an injunction.

Lacassagne v. Chapuis, 144 U. S. 119, 124, 36 L. ed. 368, 370, 12 Sup. Ct. Rep. 659; 1 High, Inj. 2d ed. § 355. See also Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276.

Plaintiffs had no legal rights of ownership in the mining property in question, unless they acquired them under the act of July 1, 1902, and that act provided a regular and orderly procedure for their assertion and establishment. There is nothing in the record to indicate that such procedure is in any way inadequate to protect whatever rights plaintiffs may have, and to that course they should have been, and should now be, remitted.

In addition to proceeding directly under that act, plaintiffs might also have brought an action for forcible entry and detainer, under § 80 of the Philippine Code of Procedure, or an action in the nature of ejectment, to determine the title, under such decisions as—

Bago v. Garcia, 5 Philippine, 524; Cebu v. Mangaron, 6 Philippine, 286; Barlin v. Ramirez, 7 Philippine, 41.

If plaintiffs had any title, it was inchoate and incomplete, since they had obtained no patent. This court has held that a person having such a claim is not entitled to an injunction against an adverse claimant, where there is an adequate remedy available in an action at law to recover possession.

Black v. Jackson, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648; Potts v. Hollen, 177 U. S. 365, 44 L. ed. 808, 20 Sup. Ct. Rep. 654.

The judgment of the trial court should have been reversed for errors in the exclusion of evidence.

Buckstaff v. Russell & Co. 151 U. S. 626, 637, 38 L. ed. 292, 296, 14 Sup. Ct. Rep. 448.

There is a presumption of harm from the exclusion of material evidence, and the absence of harm must be clearly shown by the record to obviate reversal on this ground.

Crawford v. United States, 212 U. S. 183, 203, 53 L. ed. 465, 473, 29 Sup. Ct. Rep. 260.

Mr. Henry E. Davis argued the cause and filed a brief for appellees:

If the right of possession does not involve any question under the law, but involves only a mere matter of fact, no Federal question is presented.

Shoshone Min. Co. v. Rutter, 177 U. S. 505, 508, 44 L. ed. 864, 865, 20 Sup. Ct. Rep. 726.

On every principle, the act of July 1, 1902, is to be read, construed, and applied as was the earlier act (U. S. Rev. Stat. § 2332), to the states and territories mentioned.

The object of this section was to permit a party applying for patent to make a prima facie case before the Land Office by proving that the claim upon which the application for patent was made had been in possession of himself and grantors for a period equal to the statute of limitations of the jurisdiction in which the claim was situated, provided no adverse claim was interposed. In other words, proof of possession for the statutory period, in the absence of any adverse claim, was to be taken by the Land Department as equivalent to an establishment in detail of all the facts necessary to constitute a valid location.

Cleary v. Skiffich, 28 Colo. 364, 89 Am. St. Rep. 207, 65 Pac. 59.

The section provides an additional mode of acquisition of mineral land from the government.

Anthony v. Jillson, 83 Cal. 302, 23 Pac. 419.

Adverse claim means a claim filed in the United States Land Office, opposing an application for patent to mining premises, made by another person. The claimant applies for patent. The adverse claimant opposes him. The land office adverse claim.

McCowan v. Maclay, 16 Mont. 239, 40 Pac. 602; Altoona Quicksilver Min. Co. v.

Integral Quicksilver Min. Co. 114 Cal. 105, 45 Pac. 1047.

Where possession has continued for the prescribed period before the adverse right exists, it is equivalent to a location under the laws of Congress.

Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co. supra; 420 Min. Co. v. *Bullion Min. Co.* 3 Sawy. 657, Fed. Cas. No. 4,989; *Harris v. Equator Min. & Smelting Co.* 3 McCrary, 14, 8 Fed. 863; *Belk v. Meagher*, 104 U. S. 279, 287, 26 L. ed. 735, 738; *Lavagnino v. Uhlig*, 26 Utah, 25, 99 Am. St. Rep. 808, 71 Pac. 1046.

Upon completion of a location, and until patent issues, the government holds the title in trust for the locator.

Noyes v. Mantle, 127 U. S. 348, 351, 32 L. ed. 168, 169, 8 Sup. Ct. Rep. 1132.

A title so acquired will be quieted on a bill in equity, even against the holder of a correct paper title.

420 Min. Co. v. *Bullion Min. Co.* supra.

In dealing with the Philippines, the United States did not mean to treat its inhabitants as less entitled to the just and beneficent principle adopted towards the inhabitants of our former Mexican territory, but rather intended to put them on an even more favored footing.

Cariño v. Insular Government, 212 U. S. 449, 53 L. ed. 594, 29 Sup. Ct. Rep. 334.

The defendant, by his action in the premises, in making answer as he did, and filing his petition or cross complaint, asking for affirmative relief, as he did, closed the door upon any question as to the propriety of the proceedings themselves, or the jurisdiction to determine the same of the tribunal in which they were instituted. Moreover, the defendant, equally with the plaintiffs, went through the course of taking testimony, preparing the case for hearing, and submitting it to the court for determination as a case pending in and before a court competent and adequate to adjudge the controversy.

16 Cyc. Law & Proc. pp. 117, 129, 131; *Perego v. Dodge*, 163 U. S. 160, 164, 41 L. ed. 113, 115, 16 Sup. Ct. Rep. 971.

The acts of mining on the part of the plaintiffs have been as continuous as the nature of the business and the customs of the country permitted, and this meets all requirements.

Stephenson v. Wilson, 37 Wis. 482; 2 *Lindley, Mines*, § 688.

The strict rule of pleading which formerly required exact accuracy in the description of premises sought to be recovered has in modern practice been relaxed and a general description of the property held to be good. The provisions of state statutes as to the description of the premises by metes and

bounds have been held to be only directory, and a description by name, where the property is well known, is often sufficient.

Glacier Mountain Silver Min. Co. v. Willis, 127 U. S. 471, 480, 32 L. ed. 172, 174, 8 Sup. Ct. Rep. 1217.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity, brought by the appellees to restrain the appellant from setting up title to certain gold mines in the province of Benguet, or interfering with the same, and to obtain an account of the gold heretofore taken from the mines. The trial court rendered a judgment or decree granting an injunction as prayed. Exceptions were taken on the grounds that the findings of fact were against the weight of evidence, and that the judgment was against the law. The supreme court re-examined the evidence, and affirmed the decree below. Then the case was brought here by appeal.

The appellees make a preliminary argument against the jurisdiction of this court, while the appellant asks us to re-examine the evidence, and to reverse the decree on the facts as well as the law. We cannot accede to either of these contentions. We are of opinion that this court has jurisdiction. For, if the affidavits of value should be held to apply to the whole of Reavis's claims, and not to only that part of them that are in controversy here, still, a statute of the United States, *namely, a section of the [22 organic act (§ 45, concerning mining titles in the Philippines)], is "involved," within the meaning of § 10 of the same act, which determines the jurisdiction of this court. Act of July 1, 1902, chap. 1369. 32 Stat. at L. 691, 695, U. S. Comp. Stat. Supp. 1907, p. 214. The meaning and effect of that section are in question, and our construction even has some bearing upon our opinion that the findings of the two courts below should not be reopened. For, apart from the general rule prevailing in such cases (*De la Rama v. De la Rama*, 201 U. S. 303, 309, 50 L. ed. 765, 26 Sup. Ct. Rep. 485), we shall refer to the law for special reasons why those findings should not be disturbed in a case like this.

The appellees are Igorrots, and it is found that, for fifty years, and probably for many more, Fianza and his ancestors have held possession of these mines. He now claims title under the Philippine act of July 1, 1902, chap. 1369, § 45, 32 Stat. at L. 691. This section reads as follows:

"That where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations of the Philippine Islands, evidence of

such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this act, in the absence of any adverse claim; but nothing in this act shall be deemed to impair any lien which may have attached in any way whatever prior to the issuance of a patent."

It is not disputed that this section applies to possession maintained for a sufficient time before and until the statute went into effect. See *Soper v. Lawrence Bros. Co.* 201 U. S. 359, 50 L. ed. 788, 26 Sup. Ct. Rep. 473. The period of prescription at that time was ten years. Code of Procedure in Civil Actions. August 7, 1901. No. 190, § 40. 1 Pub. Laws of Philippine Commission, 378, 384. Therefore, as the United States had not had the sovereignty of the Philippines for ten years, the section, notwithstanding its similarity to Rev. Stat. § 2332, U. S. Comp. Stat. 1901, p. 1433, must be taken to refer to the conditions as they were before the United States had come into power. Especially must it be supposed to have had in view 23] the natives of *the islands, and to have intended to do liberal justice to them. By § 16, their occupancy of public lands is respected and made to confer rights. In dealing with an Igorrot of the province of Benguet, it would be absurd to expect technical niceties, and the courts below were quite justified in their liberal mode of dealing with the evidence of possession and the possibly rather gradual settling of the precise boundaries of the appellees' claim. See *Cariño v. Insular Government*, 212 U. S. 449, 53 L. ed. 594, 29 Sup. Ct. Rep. 334. At all events, they found that the appellees and their ancestors had held the claim and worked it to the exclusion of all others down to the bringing of this suit, and that the boundaries were as shown in a plan that was filed and seems to have been put in evidence before the trial came to an end.

It cannot be said that there was no evidence of the facts found, for the plaintiff Fianza testified, in terms, that his grandfather and father had owned the mines in question, and that he and the other appellees owned them in their turn; that they had all worked the mines, that no one else had claimed them, and that the appellant had interfered with his possession, and, when he put up a sign, had torn it down. No doubt his working of the mines was slight and superficial according to our notions, and the possession may not have been sharply asserted as it would have been with us, whether from Igorrot habits or from the absence of legal title under Spanish law. But it sufficiently appears that the appellee's family had held the place in Igorrot fashion, and to deny them possession in fa-

vor of Western intruders probably would be to say that the natives had no rights under the section that an American was bound to respect. Whatever vagueness there may have been in the boundaries, it is plain that the appellant attempted to locate a claim within them, and Fianza testified that the plan to which we have referred followed the boundaries that his father showed to him. It is said that the claim is larger than is allowed by § 22. But the limitation of that section applies only to claims "located after the passage of this act."

It is to be assumed, then, that the appellees and their ancestors *had held pos- [24 session and had worked their claims for much more than the period required by § 45, before the moment when the statute went into effect. It is to be assumed that the possession and working continued down to within two months of that moment. But the appellant says that he entered and staked his claims before that time, and then was in possession of them. On this ground, as well as others that are disposed of by the findings below, he contends that there was an adverse claim within the meaning of the act. But the ground in question was not unoccupied, and therefore he could not make a valid claim under § 28. See also act of March 2, 1901, chap. 803, 31 Stat. at L. 895, 910, U. S. Comp. Stat. 1901, p. 2799. He refiled a location in October, 1902, but he did not and could not make the required affidavit because of the prior occupation; and, at that date, Fianza was within the act, unless he already had been deprived of its benefits. Moreover, it is found that Fianza's possession continued down to the bringing of this suit. This is justified by the evidence, and is not contradicted by the bill. The bill, to be sure, alleges that Reavis, in 1900, illegally entered and deprived the appellees of their mines, and that he still continues to maintain his unjust claim. But further on it alleges that, in the spring of 1902, Reavis was directed by the governor of Benguet not to molest the appellees; that he then waited in Manila, and, after the promulgation of the law, "again entered," set stakes, and filed a notice of location. So that the bill does not mean that he was continuously in possession, or that he was in possession when the law took effect. We are of opinion that there was no adverse claim that would have prevented the appellees from getting a patent under § 45. See *Belk v. Meagher*, 104 U. S. 279, 284, 26 L. ed. 735, 737; *Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.* 114 Cal. 100, 105, 45 Pac. 1047. See also *McCowan v. Maclay*, 16 Mont. 234, 239, 240, 40 Pac. 602.

It is suggested that the possession of Fi-

anza was not under a claim of title, since he could have no title under Spanish law. But, whatever may be the construction of Rev. Stat. § 2332, the corresponding § 45 of 25] the Philippine act cannot be taken *to adopt from the local law any other requirement as to the possession than the length of time for which it must be maintained. Otherwise, in view of the Spanish and American law before July 1, 1902, no rights could be acquired, and the section would be empty words; whereas, as we have said before, another section of the act, § 16, still further shows the intention of Congress to respect native occupation of public lands.

Again, it is urged that the section, of itself, confers no right other than to apply for a patent. But a right to an instrument that will confer a title in a thing is a right to have the thing. That is to say, it is a right of the kind that equity specifically enforces. It may or may not be true that, if the objection had been taken at the outset, the plaintiffs would have been turned over to another remedy, and left to apply for a patent; but, after a trial on the merits, the objection comes too late. See *Perego v. Dodge*, 163 U. S. 160, 164, 41 L. ed. 113, 116, 16 Sup. Ct. Rep. 971; *Reynes v. Dumont*, 130 U. S. 354, 395, 32 L. ed. 934, 945, 9 Sup. Ct. Rep. 486.

Some objections were taken to the exclusion of evidence. But, apart from the fact that they do not appear to have been saved in the exceptions taken to the supreme court and irrespective of its admissibility, the evidence offered could not have affected the result. An inquiry of Fianza, whether he claimed the mines mentioned in the suit or those measured by the surveyor who made the plan to which we have referred, was met by the allowance of an amendment, claiming according to the plan. A question to another of the plaintiffs, whether she saw any Igorrots working for Reavis, would have brought out nothing not admitted by the bill, that Reavis did, for a time, intrude upon the mines in suit. Upon the whole case we are of opinion that no sufficient ground is shown for reversing the decree, and it is affirmed.

Decree affirmed.

26] *UNITED STATES, Plff. in Err.,

v.

SIMON J. MESCALL.

(See S. C. Reporter's ed. 26-33.)

Duties — criminal prosecutions — false entry — ejusdem generis.

An employee in the customs service of the United States who makes and returns

false weights in connection with an entry of imported merchandise is comprehended by the words "other person" in the provisions of the customs administration act of June 10, 1890 (26 Stat. at L. 131-135, chap. 407, U. S. Comp. Stat. 1901, pp. 1886-1895), § 9, for the forfeiture of goods or their value where "any owner, importer, consignee, agent, or other person" shall make an entry by means of false and fraudulent practices, or shall be guilty of any unlawful act or omission whereby the United States is deprived of the lawful duties, and for the punishment of such person by fine or imprisonment or both.

[For other cases, see Duties, XII. e, in Digest Sup. Ct. 1908.]

[No. 278.]

Argued October 14, 1909. Decided November 8, 1909.

IN ERROR to the Circuit Court of the United States for the Eastern District of New York to review a judgment sustaining a demurrer to an indictment charging an employee in the customs service with making and returning false weights in connection with an entry of imported merchandise. Reversed and remanded for further proceedings.

See same case below, 164 Fed. 580.

Statement by Mr. Justice **Brewer**:

Section 9, chapter 407, Laws of June 10, 1890 (26 Stat. at L. 131-135, U. S. Comp. Stat. 1901, pp. 1886-1895), known as the customs administration act, under which defendant was indicted, reads as follows:

"That if any owner, importer, consignee, agent, or other person shall make, or attempt to make, any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, . . . embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture *shall only apply to the whole of the [27 merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates; and such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court."

The indictment, in the first count, alleges that the steamship *Alice* arrived at the port of New York on November 2, 1907, from Greece, having on board eighty cases of cheese, consigned to one Stamatopoulos; that the said cheese was unloaded and an invoice and entry thereof filed with the collector of customs of the port of New York by the said Stamatopoulos; that the defendant was, at the time, an assistant weigher of the United States in the customs service at the port of New York, and engaged in the performance of his duties as such assistant weigher; that it was his duty to weigh accurately the said cheese, and make return thereof to the collector of customs, and, upon the weight so returned, the said entry was to be liquidated; that the said defendant "did knowingly, wilfully, and unlawfully make and attempt to make an entry of imported merchandise, to wit, the said eighty cases of cheese, by means of a false and fraudulent practice, by means whereof the United States was to be deprived of the lawful duties, or a portion thereof, accruing upon the said merchandise;" that he did knowingly, wilfully, and unlawfully return the net weight of said cheese as 13,358 pounds, whereas the true weight thereof, and the weight upon which the entry should have been liquidated and the duties paid, was 17,577 pounds. The second and third counts contain the same statement of facts, but it is averred in the one that the defendant was "guilty of a wilful act and omission, by means whereof the United States was to be deprived of the lawful duties," or a portion thereof, and, in the other, that he unlawfully made and attempted to make the entry "by means of a false written statement." To this indictment a demurrer was filed and sustained, the court, after discussing several matters, saying:

"But it is apparent from the allegations of the indictment that the defendant is not in fact any of the persons within the contemplation of § 9 with relation to these particular importations, and cannot be considered either an owner, importer, consignee, agent, or other person.

"The defendant, Mescall, was not making or attempting to make an entry of these goods. According to the charge, he was, contrary to his duty, rendering assistance to the importer, who was the 'person' making the entry."

The case is here under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), which authorizes a writ of error "direct to the Supreme Court of the United States" in a criminal case wherein there has been a decision or judgment sustaining a demurrer

to an indictment, when such decision or judgment is based upon the invalidity or construction of a statute upon which the indictment is founded.

Assistant Attorney General Fowler argued the cause and filed a brief for plaintiff in error:

An entry of goods, within the meaning of the act of July 24, 1897, embraces the entire transaction, from the time the vessel enters port until the importer obtains an entrance of his goods into the body of the merchandise of the United States.

United States v. Baker, 5 Ben. 25, Fed. Cas. No. 14,500; *United States v. Cargo of Sugar*, 3 Sawy. 46, Fed. Cas. No. 14,722; *United States v. Legg*, 45 C. C. A. 134, 105 Fed. 933.

The offense created by the statute is not a felony, but a misdemeanor.

Bannon v. United States, 156 U. S. 464, 39 L. ed. 494, 15 Sup. Ct. Rep. 467; *Considine v. United States*, 50 C. C. A. 272, 112 Fed. 342; *United States v. Falkenhainer*, 21 Fed. 624; *United States v. Copersmith*, 4 Fed. 198; 1 Bishop, New Crim. Law, § 617a; 12 Cyc. Law & Proc. p. 131.

There are no aiders and abettors in misdemeanors, but all who are connected with offenses of this character must be indicted as principals. This rule applies even to accessories.

1 Bishop, New Crim. Law, § 685.

To hold that defendant does not fall within the meaning of the words "other person," as used in the statute, would be to deprive such words of all meaning; and the doctrine of *ejusdem generis* must yield to the rule of construction that every word in a statute should be given some meaning.

2 Lewis's *Sutherland*, Stat. Constr. 2d ed. pp. 831, 833-835; 26 Cyc. Law & Proc. p. 610.

The principle of *ejusdem generis* is used only as an aid in ascertaining the legislative intent, and not for the purpose of controlling the intention of or of confining the operation of a statute within narrower limits than was intended by the lawmaker.

State ex rel. Walker v. Corkins, 123 Mo. 67, 27 S. W. 363; *National Bank v. Ripley*, 161 Mo. 131, 61 S. W. 587; *Willis v. Mabon* (*Willis v. St. Paul Sanitation Co.*) 48 Minn. 156, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; *Winters v. Duluth*, 82 Minn. 127, 84 N. W. 788; *Foster v. Blount*, 18 Ala. 689; *Misch v. Russell*, 136 Ill. 25, 12 L.R.A. 125, 26 N. E. 528; *Webber v. Chicago*, 148 Ill. 316, 36 N. E. 70; *Maxwell v. People*, 158 Ill. 253, 41 N. E. 995; *Gillock v. People*, 171 Ill. 308, 49 N. E. 712; *Matthews v. Kimball*, 70 Ark. 463, 66 S. W. 651, 69 S. W. 547; *State v. Woodman*,

26 Mont. 353, 67 Pac. 1118; *Randolph v. State*, 9 Tex. 523; *State v. Solomon*, 33 Ind. 450; *Re La Société Française D'Epargnes et de Prevoyance Mutuelle*, 123 Cal. 530, 56 Pac. 458; *State v. Holman*, 3 M'Cord L. 306; *State v. Williams*, 2 Strobb. L. 474; *Tisdell v. Combe*, 7 Ad. & El. 792; *Young v. Grattridge*, L. R. 4 Q. B. 166; *R. v. Double-day*, 3 El. & El. 500.

Mr. George F. Hickey submitted the cause for defendant in error:

Section 9 of the customs administrative act, Laws of June 10, 1890, chap. 407, is a penal statute, and should be construed strictly.

United States v. 75 Bales of Tobacco, 77 C. C. A. 353, 147 Fed. 127; *Andrews v. United States*, 2 Story, 302, Fed. Cas. No. 381; *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37; *United States v. 84 Boxes of Sugar*, 7 Pet. 453, 8 L. ed. 745; *Sutherland*, Stat. Constr. § 353; *United States v. Morris*, 14 Pet. 464, 10 L. ed. 543.

If the statute is ambiguous, the construction adopted should be that most favorable to the accused.

The Enterprise, 1 Paine, 32, Fed. Cas. No. 4,499; *Sutherland*, Stat. Constr. § 353.

Under § 9, indictments may not be brought against others than owners, importers, consignees, agents, or other persons of the same class.

United States v. Seidenberg, 17 Fed. 227; *Harris v. Dennie*, 3 Pet. 292, 7 L. ed. 683; *United States v. One Silk Rug*, 86 C. C. A. 178, 158 Fed. 974; *United States v. 99 Diamonds*, 132 Fed. 579, 2 L.R.A.(N.S.) 185, 72 C. C. A. 9, 139 Fed. 961; *United States v. 1,150½ Pounds of Celluloid*, 27 C. C. A. 231, 54 U. S. App. 273, 82 Fed. 627; 21 Am. & Eng. Enc. Law, title "Other," 2d ed. p. 1012; *Re Davison*, 4 Fed. 509; *Crystal Spring Distillery Co. v. Cox*, 1 C. C. A. 365, 6 U. S. App. 42, 49 Fed. 555; *Newport News & M. Valley Co. v. United States*, 9 C. C. A. 579, 22 U. S. App. 145, 61 Fed. 488; *Crowther v. Fidelity Ins. Trust & S. D. Co.* 29 C. C. A. 1, 47 U. S. App. 701, 85 Fed. 41; *Alabama v. Montague*, 117 U. S. 602, 29 L. ed. 1000, 6 Sup. Ct. Rep. 911; *State ex rel. Kennedy v. McGarry*, 21 Wis. 502; *Sedgwick*, Stat. & Const. Law, p. 361; *East Oakland Twp. v. Skinner*, 94 U. S. 255, 24 L. ed. 155; *White v. Ivey*, 34 Ga. 186; *McIntyre v. Ingraham*, 35 Miss. 25; *Bucher v. Com.* 103 Pa. 528; *Hermance v. Ulster County*, 71 N. Y. 481; *Renick v. Boyd*, 99 Pa. 555, 44 Am. Rep. 124; *People v. New York & M. B. R. Co.* 84 N. Y. 565; *Sullivan's Appeal*, 77 Pa. 107; *People v. Richards*, 108 N. Y. 137, 2 Am. St. Rep. 373, 15 N. E. 371; *Sutherland*, Stat. Constr. §§ 268-277.

54 L. ed.

*Mr. Justice Brewer delivered the [31 opinion of the court:

It appears that the trial court sustained the demurrer on the ground that, as to the offense charged, the statute, properly construed, does not include the defendant. The case is, therefore, one which may be brought to this court. *United States v. Keitel*, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123. But our inquiry is limited to the particular question decided by the court below. Id. 398.

Counsel for defendant invokes what is sometimes known as Lord Tenderden's rule,—that, where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described,—*ejusdem generis*. The particular words of description, it is urged, are "owner, importer, consignee, agent." The general term is "other person," and should be read as referring to someone similar to those named, whereas the defendant was not owner, importer, consignee, or agent, or of like class with either. He was not making, or attempting to make, an entry. He represented the government, and, contrary to his duties, was rendering assistance to the consignee, who was making the entry. But, as said in *National Bank v. Ripley*, 161 Mo. 126, 132, 61 S. W. 587, 588, in reference to the rule:

"But this is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument. . . . Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the genus, there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning *outside of the class indicated by the [32 particular words, or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose."

See also *Gillock v. People*, 171 Ill. 307, 49 N. E. 712, and the cases cited in the opinion; *Winters v. Duluth*, 82 Minn. 127, 84 N. W. 788; *Matthews v. Kimball*, 70 Ark. 451, 462, 66 S. W. 651, 69 S. W. 547. Now, the party who makes an entry, using the term "entry" in its narrower sense, is the owner, importer, consignee, or agent; and

it must be used in that sense to give any force to the argument of counsel for defendant; but, used in that sense, the term "other person" becomes surplusage. In § 1 of chap. 76, Laws of 1863 (12 Stat. at L. 738), is found a provision of like character to that in the first part of the section under which this indictment was found, but the language of the description there is "owner, consignee, or agent." This was changed by § 12, chap. 391, Laws 1874 (18 Stat. at L. 188), to read "owner, importer, consignee, agent, or other person," and that description has been continued in subsequent legislation. Evidently the addition in 1874 of the phrase "other person" was intended to include persons having a different relation to the importation than the owner, importer, consignee, or agent. Congress was broadening the scope of the legislation and meaning to reach other persons having something to do in respect to the entry beyond that which was done by the owner, importer, consignee, or agent, or else the term "other person" was a meaningless addition. Now, the defendant was a person, other than the owner, importer, consignee, or agent, by whose act the United States was deprived of a portion of its lawful duties. His act comes within the letter of the statute as well as within its purpose; and the intent of Congress in the legislation is the ultimate matter to be determined.

The fact that he could not be punished in all respects as fully as the owner, in that he had no goods to be forfeited, is immaterial. *United States v. Union Supply Co.* 215 U. S. 50, post, 87, 30 Sup. Ct. Rep. 15.

33] *We are of opinion, therefore, that the trial court erred in sustaining the demurrer. The judgment is reversed and the case remanded for further proceedings.

MRS. FRANCES E. WATERMAN, Wife of
Charles A. Crane, Appt.,
v.

CANAL-LOUISIANA BANK & TRUST
COMPANY. Executor of the Last Will
and Testament of Caroline Stannard
Tilton, Deceased, et al.

(See S. C. Reporter's ed. 33-50.)

Federal courts—conflicting jurisdiction—probate and administration proceedings.

1. A Federal court of chancery has ju-

NOTE.—As to conflict of jurisdiction between Federal and state courts—see notes to *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 356, and *J. I. Case Plow Works v. Finks*, 26 C. C. A. 50.

On jurisdiction of equity as affected by party beyond jurisdiction—see note to *Marshall v. Beverley*, 5 L. ed. U. S. 97.

isdiction, where the proper diversity of citizenship exists, to determine the interest of an heir in an alleged lapsed legacy and the consequent increase in the residuary estate, although the bill also asks other relief which cannot be granted because it would interfere with the ordinary settlement of the estate in the state probate court.

[For other cases, see *Courts*, 1397-1406, in *Digest Sup. Ct.* 1908.]

Parties — in equity — party beyond jurisdiction.

2. A nonresident heir cannot be regarded as such an indispensable party defendant that his absence will defeat the jurisdiction of a Federal court of chancery over a suit brought by an heir against the executor and other heirs, to determine her interest in an alleged lapsed legacy and the consequent increase in the residuary estate, in view of the provisions of U. S. Rev. Stat. § 737, U. S. Comp. Stat. 1901, p. 587, and of equity rule 47, which permit the court to proceed with the trial and adjudication of a suit as between the parties who are properly before it, and preserve the rights of parties not voluntarily appearing, providing their rights are not prejudiced by the decree to be rendered.

[For other cases, see *Parties*, II. a, in *Digest Sup. Ct.* 1908.]

[No. 306.]

Submitted February 23, 1909. Decided November 8, 1909.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana to review a decree dismissing, for want of jurisdiction, a bill filed by an heir against an executor and other heirs, for the determination of the former's interest in an alleged lapsed legacy and the consequent increase in the residuary estate. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. **E. Howard McCaleb** and **E. Howard McCaleb, Jr.**, submitted the cause for appeal:

Any creditor, heir, or legatee who is a citizen of another state, has the right to institute his suit in the Federal court, against executors and administrators and all other parties interested, who are citizens of the same state as decedent, to determine the validity and extent of his rights and claims in the property of the estate; nor is he deprived of his original right to maintain and to try his suit in the Federal court by his failure to present his claim to the state court, as provided by the administration statutes of the state.

Suydam v. Broadnax, 14 Pet. 67, 10 L. ed. 357; *Union Bank v. Vaiden*, 18 How. 503, 15 L. ed. 472; *Borer v. Chapman*, 119

215 U. S.

U. S. 587-589, 30 L. ed. 532, 533, 7 Sup. Ct. Rep. 342; *Payne v. Hook*, 7 Wall. 425, 430, 19 L. ed. 260, 261; *Lawrence v. Nelson*, 143 U. S. 215, 224, 36 L. ed. 130, 134, 12 Sup. Ct. Rep. 440; *Hayes v. Pratt*, 147 U. S. 557, 570, 37 L. ed. 279, 284, 13 Sup. Ct. Rep. 503; *Hess v. Reynolds*, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 377; *Hyde v. Stone*, 20 How. 170, 15 L. ed. 874; *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Green v. Creighton* (*Kendall v. Creighton*) 23 How. 90, 16 L. ed. 419; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906.

Nothing in this bill or in the demurrer suggests that there is pending in the state court any controversy between complainant and defendants. No claim has been asserted, no relief prayed for there, which could possibly form the basis of *res judicata*. No proceeding or judgment in the state court, looking to the construction of the will or the determination of complainant's rights, could bind her, as long as she has not voluntarily appeared or been made a party thereto.

Buck v. Colbath, 3 Wall. 334, 347, 18 L. ed. 257, 262; *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666.

The court may deny relief for an accounting, and still, under the prayer for general relief, grant the other or any relief consistent with the allegations of the bill.

Watson v. Jones, *supra*.

Mr. E. Howard McCaleb also filed a separate brief for appellant:

The right of action for the establishment of plaintiff's claim, as well as her interests, is separable from that of her coheirs.

Tugwell v. Tugwell, 32 La. Ann. 848; *Durbridge v. Crawley*, 43 La. Ann. 507, 9 So. 95; *Glasscock v. Clark*, 33 La. Ann. 586; *Burney v. Ludeling*, 41 La. Ann. 632, 6 So. 248; *Labadie v. Guerin*, 5 La. 430; *Prevost v. Simeon*, 4 La. 472; *Compton v. Mathews*, 3 La. 134, 22 Am. Dec. 167; *O'Donald v. Lobdell*, 2 La. 300; *Duggan v. Di Lizardi*, 5 Rob. (La.) 224; *Denegre v. Denegre*, 33 La. Ann. 689; *Skipwith v. Glathary*, 34 La. Ann. 28.

The real question is one not of Federal but of general equity jurisdiction.

Elmendorf v. Taylor, 10 Wheat. 167, 168, 6 L. ed. 294; *Mallow v. Hinde*, 12 Wheat. 197, 198, 6 L. ed. 600.

Louisiana jurisprudence should control the question upon which equity jurisdiction as to parties is founded, concerning the character of an heir's interest in the estate, as separate from that of his coheir. At least, it is persuasive, since it fully accords with equity jurisdiction as to parties, and the decision in *Payne v. Hook*, 7 Wall. 425, 433, 19 L. ed. 260, 262.

54 L. ed.

Story, Eq. Pl. 10th ed. pp. 94, 205, 210, §§ 89, 207a, 212; *Cooper*, Eq. Pl. 35.

The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever.

West v. Randall, 2 Mason, 181, Fed. Cas. No. 17,424; *Story*, Eq. Pl. § 89; *Wood v. Dummer*, 3 Mason, 317, Fed. Cas. No. 17,944.

By no stretch of reasoning can it be claimed that either the Watermans or Davis are indispensable parties to the main and independent cause of action. But even should it be determined that they may incidentally have an interest in the controversy between the immediate litigants, such interest is so separable that a decree may be entered without injuriously affecting their interests.

Payne v. Hook, *supra*; *Omaha Hotel Co. v. Wade*, 97 U. S. 13-24, 24 L. ed. 917-920; *Van Bokkelen v. Cook*, 5 Sawy. 587, Fed. Cas. No. 16,831; *Elmendorf v. Taylor*, *supra*.

It can never be indispensable to make one a party who disclaims interest in the subject-matter or the suit by an express renunciation of his rights.

Vattier v. Hinde, 7 Pet. 252, 258, 8 L. ed. 675, 677; *Delaware County v. Diebold Safe & Lock Co.* 133 U. S. 473, 33 L. ed. 674, 10 Sup. Ct. Rep. 399.

Complainant may be required to waive her allegations as to Davis, and still the court has jurisdiction.

Northey v. Northey, 2 Atk. 77; *Williams v. Williams*, 9 Mod. 299.

As we have dismissed Davis because his presence would oust the jurisdiction, complainant will still be entitled to a decree for her share as against the principal parties.

Hook v. Payne, 14 Wall. 252, 20 L. ed. 887; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Harding v. Handy*, 11 Wheat. 103, 132, 133, 6 L. ed. 429, 437.

Messrs. Edgar H. Farrar, James McConnell, Charles E. Fenner, George C. Walsh, George H. Terriberry, H. Garland Dupre, Walter Guion, and Victor Leovy submitted the cause for appellees. Messrs. William C. Dufour and S. McC. Lawrason were on the brief:

This court is without jurisdiction to entertain the suit as propounded by the complainant.

Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Farrell v.*

O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727.

Under the laws of Louisiana, a contest or any other action looking to settlement under the will can be prosecuted only in the court which has jurisdiction over the succession.

Denegre v. Denegre, 33 La. Ann. 689; Burnside's Succession, 34 La. Ann. 730.

It was not competent for a Federal court, on the ground of diversity of citizenship, to withdraw from the jurisdiction of the state court any matter which was properly within the jurisdiction of that court, and which that court was proceeding in a regular way to determine.

Westfeldt v. North Carolina Min. Co. 92 C. C. A. 378, 166 Fed. 706.

Prentis v. Atlantic Coast Line R. Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67, also strongly illustrates the disinclination of this court to permit Federal courts to interfere with proceedings going on in state courts, so as to withdraw from the state court, on the mere ground of diversity of citizenship, any question properly and necessarily involved in proceedings before the state court.

Messrs. William C. Dufour, Edgar H. Farrar, James McConnell, Charles E. Fenner, George C. Walsh, George H. Terriberry, H. Garland Dupre, S. McC. Lawrason, Walter Guion, Victor Leovy, Pierre Crabites, and H. Generes Dufour also filed a brief for appellees:

Frederick Tilton Davis is an indispensable party to these proceedings.

Minnesota v. Northern Securities Co. 184 U. S. 199, 46 L. ed. 499, 22 Sup. Ct. Rep. 308; Shields v. Barrow, 17 How. 130, 15 L. ed. 158; Garzot v. Rios de Rubio, 209 U. S. 283, 52 L. ed. 794, 28 Sup. Ct. Rep. 548.

Mr. Justice Day delivered the opinion of the court:

This case presents a question of jurisdiction concerning the right of the United States circuit court to entertain a certain bill in equity. Frances E. Waterman, wife of Charles A. Crane, a resident of Chicago, in the state of Illinois, and a citizen of that state, joined by her husband, also a citizen of Illinois, brought the suit in the United States circuit court against the Canal-Louisiana Bank & Trust Company, executor of the last will and testament of Caroline Stannard Tilton, deceased, a citizen of the state of Louisiana and an inhabitant of [39] the eastern *district of Louisiana, and also against the Charity Hospital of New Orleans, St. Ann's Asylum, Protestant Episcopal Orphan Asylum, Home for Incurables,

Christian Woman's Exchange, State Insane Asylum of Jackson, Louisiana, city of New Orleans, and Louisiana Retreat, conducted by the Society of the Daughters of St. Vincent de Paul, all and each of them being institutions established under the laws of Louisiana, and citizens of the state of Louisiana, and inhabitants of the eastern district of Louisiana; also against Robert Waterman and Frederick Waterman, citizens of the state of Louisiana, and inhabitants of the eastern district thereof. The bill set forth in substance: That Caroline Stannard Tilton, widow of Frederick W. Tilton, late of the city of New Orleans, duly made and published her last will and testament and codicils thereunto annexed, and by said will and codicils said Caroline Stannard Tilton gave and bequeathed to Robert Waterman the sum of \$3,000; to the said Robert Waterman and his wife, fifteen premium bonds; to Frederick Waterman, \$3,000; to Frederick Tilton Davis, \$1,000, and the whole series of No. 5,963 premium bonds. That the said Caroline Stannard Tilton departed this life on or about the 6th of July, 1908; that the Canal-Louisiana Bank & Trust Company, executor in said will named, duly proved the same in the court of probate jurisdiction in and for the parish of Orleans, in the state of Louisiana, and undertook the executorship thereof, and possessed itself of the personal estate and effects to the said testatrix to a very considerable amount, and more than sufficient to discharge her just debts, funeral expenses, and legacies.

The complainant further avers that she is the sole surviving niece, and that Robert and Frederick Waterman and Frederick Tilton Davis are the sole surviving nephews, of said Caroline Stannard Tilton, and that there are no other persons within the nearest degree of kinship of the said testatrix; and that the said Frederick Tilton Davis resides in the state of Alabama, outside of the court's jurisdiction.

She avers that the said Robert Waterman, Frederick Waterman, *and Frederick [40] Tilton Davis, legatees in said will, became entitled to have and receive their said respective legacies, and did receive the same, and, accordingly, by receiving said bequests, have renounced the succession of said Caroline Stannard Tilton, deceased, and, by taking said legacies, have renounced all their rights as heirs at law, and are estopped and debarred from claiming any portion of the estate undisposed of, because of certain provisions of the will, which are set forth in the bill.

It is further averred by the complainant that, by reason of the renunciation and es-

toppel of said legatees, the complainant remains the sole heir at law of Caroline Stannard Tilton, and, as such, is entitled to the shares which would have gone to Frederick and Robert Waterman and Frederick Tilton Davis, of the same degree and collateral line, by right of accretion.

She further avers that said will bequeathed to the Charity Hospital of New Orleans, \$2,000; St. Ann's Asylum, \$2,000; Protestant Episcopal Orphan Asylum, \$2,000; Home for Incurables, \$2,000; Home for Insane, \$3,000; and to the Christian Woman's Exchange, \$1,000; and that after satisfaction of the foregoing special legacies and bequests, and after payment of all costs and expenses of settlement of the estate, if any remained thereof undisposed of, the testatrix willed and directed that such residue should be divided between the beneficiaries of the charitable bequests heretofore made to the various institutions, the divisions to be made *pro rata*, in proportion to the amount of special legacies already made to them, respectively. She avers that at the time of making said will, and at the time of the death of said testatrix, there was no such institution or corporation in existence known as Home for Insane, nor was the testatrix capable of incorporating any such institution under her will; and that said special legacy for \$3,000, and the *pro rata* share of the residue, remained undisposed of because of the facts stated, and thereby the sum of \$3,000 and the *pro rata* share of the proportion of the estate undisposed of devolved upon the complainant as sole legal heir and next of kin to said Caroline Stannard Tilton. And 41] it was averred that *the Christian Woman's Exchange was not entitled to share in the residue, because the bequest to it of \$1,000 was not a charitable bequest, and the said Christian Woman's Exchange was not one of the institutions mentioned in the will to share in the residue.

Complainant states that the insane asylum situated at Jackson, Louisiana, the Louisiana Retreat, conducted by the Society of the Daughters of Charity of St. Vincent de Paul, and the city of New Orleans, claim and assert their right to take and receive the amount of said lapsed and caducous legacies, asserting that the testatrix intended them as beneficiaries of her bounty, and as particular legacies under her will, instead of the Home for Insane. And the plaintiff denies, for reasons stated in the bill, that either of them is entitled to receive such legacies intended for the Home for Insane, and she charges that the amount falling to her as sole legal heir and next of kin, because of her right to the lapsed legacies bequeathed to the nonexisting Home

for Insane's share in the residue, together with that part and proportion of the estate accessory and appurtenant thereto, exceeds the sum of \$90,000, which she is entitled to out of the estate. She charges that the estate, after payment of the special legacies, charges, and costs of administration, will amount to more than a residue of \$350,000. She charges that the executor refuses to do or make any satisfaction whatever in respect to her just demands, and the complainant avers that she has no sufficient remedy under the rules of common law, and must resort to a court of equity for adequate relief. And the prayer of the bill is: "Wherefore, your oratrix prays that this court do order, adjudge, and decree that (1) that the particular legacy contained in the last will and testament of Caroline Stannard Tilton, deceased, to so-called 'Home for Insane,' and also the interest of said legatee in the residue or residuum of said testatrix's estate, be declared caducous, to have lapsed, because of the uncertainty and nonexistence of said legatee; (2) that it be further declared and decreed that Robert Waterman and Frederick *Waterman have renounced and aban- [42] doned all their right, title, and interest as heirs of said Caroline Stannard Tilton, deceased, in the said lapsed and caducous legacy made in favor of the so-called 'Home for Insane;' (3) that it be further adjudged and decreed that your oratrix, as the nearest sole heir and next of kin of said Caroline Stannard Tilton, deceased, capable of inheriting, is alone entitled to the amount of the caducous and lapsed special legacy bequeathed to the said so-called 'Home for Insane,' for the sum of three thousand dollars (\$3,000), and to the proportionate share of said non-existing and uncertain legatee in the residue of the estate of said Caroline Stannard Tilton, and that the Canal-Louisiana Bank & Trust Company, executor of said deceased, Caroline Stannard Tilton, be condemned to pay over and deliver to your oratrix the whole amount of said caducous special legacy, together with the proportionate share and interest to said so-called 'Home for Insane' in the residue of the estate of said deceased remaining after the payment of the particular legacies and the costs of administration of her estate, and for such further sum as the court may find to be justly due and owing unto your oratrix as legal heir and next of kin of the said Caroline Stannard Tilton; (4) and that it be further ordered and decreed that the Christian Woman's Exchange is not a charitable institution, or entitled, as such, under said will, to participate or receive any share or portion of the residue of the estate of said de-

ceased; (5) and that an account be taken of the personal estate and effects of the said testatrix coming to the hands of the said executor, or of any person or persons by its order or for its use, and also of the said testatrix's funeral expenses, debts, legacies, and costs of administration, and especially showing the residue remaining in the hands of the said executor after making the aforesaid deduction, and that the same may be applied in due course of administration, and that, for these purposes, proper directions may be given.

"And your oratrix further prays for all general and equitable relief, as well as all costs."

43] *From an early period in the history of this court, cases have arisen requiring a consideration and determination of the jurisdiction of the courts of the United States to entertain suits against administrators and executors for the purpose of establishing claims against estates, and to have a determination of the rights of persons claiming an interest therein. And this court has had occasion to consider how far the jurisdiction in equity of the courts of the United States in such matters may be affected by the statutes of the states providing for courts of probate for the establishment of wills and the settlement of estates. We will not stop to analyze or review in detail all these cases, as they have been the subject of frequent and recent consideration in this court. The general rule to be deduced from them is that, inasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that, in so far as controversies between citizens of different states arise which are within the established equity jurisdiction of the Federal courts, which is like unto the high court of chancery in England at the time of the adoption of the judiciary act of 1789 [1 Stat. at L. 73, chap. 20], the jurisdiction may be exercised, and is not subject to limitations or restraint by state legislation establishing courts of probate, and giving them jurisdiction over similar matters. This court has uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor of creditors, legatees, and heirs, to establish their claims and have a proper execution of the trust as to them. In various forms these principles have been asserted in the following, among other, cases: *Suydam v. Broadnax*, 14 Pet. 67, 10 L. ed. 357; *Hyde v. Stone*, 20 How. 170, 175, 15 L. ed. 874, 875; *Green v. Creighton* (*Kendall v. Creighton*) 23 How. 90, 16 L. ed. 419; *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *Lawrence v. Nelson*, 143 U. S. 215, 36 L. ed. 130, 12 Sup. Ct. Rep.

440; *Hayes v. Pratt*, 147 U. S. 557, 570, 37 L. ed. 279, 284, 13 Sup. Ct. Rep. 503; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Ingersoll v. Coram*, 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 92.

The rule stated in many cases in this court affirms the jurisdiction of the Federal courts to give relief of the nature stated, *notwithstanding the statutes of the [44 state undertake to give to state probate courts exclusive jurisdiction over all matters concerning the settlement of accounts of executors and administrators in the distribution of estates. This rule is subject to certain qualifications, which we may now notice. The courts of the United States, while they may exercise the jurisdiction, and may make decrees binding upon the parties, cannot seize and control the property which is in the possession of the state court. In *Byers v. McAuley*, supra, the rule was thus tersely stated by Mr. Justice Brewer, delivering the opinion of the court:

"A citizen of another state may establish a debt against the estate. *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Hess v. Reynolds*, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 377. But the debt thus established must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent. *Yonley v. Lavender*, supra. In like manner, a distributee, citizen of another state, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties (*Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260); or against any other parties subject to liability (*Borer v. Chapman*, 119 U. S. 587, 30 L. ed. 532, 7 Sup. Ct. Rep. 342), or in any other way which does not disturb the possession of the property by the state court. (See the many cases heretofore cited.)"

In a late case, where the subject was given consideration in this court (*Farrell v. O'Brien* [*O'Callaghan v. O'Brien*] 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727), while the rule of the earlier cases was stated and their binding force admitted, it was laid down that the circuit court of the United States could not entertain jurisdiction of a bill to set aside the probate of a will in the state of Washington, because, by the statutes of that state, the proceeding was one purely *in rem*, and not a suit *inter partes*, sustainable in a court of equity. That case recognized what previous cases had held,—that, in proceedings purely of a probate character, there was no jurisdiction in the Federal courts. This was in harmony with the rule *therefore laid down in *Byers* [45

v. McAuley, supra, in which it was held that the Federal court could not exercise original jurisdiction to draw to itself the entire settlement of the estate of the decedent and the accounts of administration, or the power to determine all claims against the estate. But it was there decided that a circuit court of the United States could entertain jurisdiction in favor of citizens of other states, to determine and award by decrees binding *in personam* their shares in the estates.

In view of the cases cited, and the rules thus established, it is evident that the bill in this case goes too far in asking to have an accounting of the estate, such as can only be had in the probate court having jurisdiction of the matter; for it is the result of the cases that, in so far as the probate administration of the estate is concerned in the payment of debts, and the settlement of the accounts by the executor or administrator, the jurisdiction, of the probate court may not be interfered with. It is also true, as was held in the court below in the case at bar, that the prior possession of the state probate court cannot be interfered with by the decree of the Federal court. Still, we think there is an aspect of this case within the Federal jurisdiction, and for which relief may be granted to the complainant, if she makes out the allegations of her bill under the other prayers, and the prayer for general relief therein contained. Under such prayer, a court of equity will shape its decree according to the equity of the case. *Walden v. Bodley*, 14 Pet. 164, 10 L. ed. 401.

The complainant, a citizen of a different state, brings her bill against the executor and certain legatees named, who are likewise citizens of another state, and are all citizens of Louisiana, where the bill was filed, except one, who was beyond the jurisdiction of the court; and, for the reasons stated in her bill, she asks to have her interest in the legacy alleged to be lapsed and the residuary portion of the estate established.

This controversy is within the equity jurisdiction of the courts of the United States, [46] as heretofore recognized in this *court, and such jurisdiction cannot be limited or in anywise curtailed by state legislation as to its own courts. The complainant, it is to be noted, does not seek to set aside the probate of the will, which the bill alleges was duly established and admitted to probate in the proper court of the state.

The United States circuit court, by granting this relief, need not interfere with the ordinary settlement of the estate, the payment of the debts and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, 54 L. ed.

and we think has the right to, determine, as between the parties before the court, the interest of the complainant in the alleged lapsed legacy and residuary estate, because of the facts presented in the bill. The decree to be granted cannot interfere with the possession of the estate in the hands of the executor, while being administered in the probate court, but it will be binding upon the executor, and may be enforced against it personally. If the Federal court finds that the complainant is entitled to the alleged lapsed legacy and the residue of the estate, while it cannot interfere with the probate court in determining the amount of the residue arising from the settlement of the estate in the court of probate, the decree can find the amount of the residue, as determined by the administration in the probate court in the hands of the executor, to belong to the complainant, and to be held in trust for her, thus binding the executor personally, as was the case in *Payne v. Hook and Ingersoll v. Coram*, supra.

It is to be presumed that the probate court will respect any adjudication which might be made in settling the rights of parties in this suit in the Federal court. It has been frequently held in this court that a judgment of a Federal court awarding property or rights, when set up in a state court, if its effect is denied, presents a claim of Federal right which may be protected in this court.

The circuit court in this case construed the bill, in view of its broad prayer for relief, as one which undertook to take the *en- [47] tire settlement of the estate from the hands of the probate court, and denied the jurisdiction of the circuit court of the United States in the premises. We are of opinion that, to the extent stated, the bill set up a valid ground for relief; and, while all that it asks cannot be granted, enough was stated in it to make a case within the jurisdiction of the Federal courts within the principles we have stated.

At the last term of the court, counsel in this case were invited to file, on or before the first day of the present term of court, briefs upon the question whether Frederick Tilton Davis, averred in the bill to be a resident of the state of Alabama, and outside of the jurisdiction of the court, is an indispensable party to the suit, and, in his absence, a dismissal of the cause required for want of jurisdiction in the court to proceed without him. These briefs have been filed and we come now to consider this branch of the case. In so doing, it is essential to remember that the complainant's cause of action is primarily against the executor of the estate for a decree against it concerning the right of the complainant to

recover because of the alleged lapse of the legacy to the Home for the Insane, and the consequent increase in the residuary portion of the estate to be distributed to the heirs of Mrs. Tilton because of the allegations contained in the bill. The Watermans and Davis are made parties to the bill, and asked to be excluded from a participation in the recovery because of the alleged renunciation of their rights in the succession to Mrs. Tilton. If it shall be found that they have not thus renounced their interest, and a decree be rendered in complainant's favor, they are entitled to participate in the recovery. They have no interest in common, however, with the complainant, and the shares of the complainant and other heirs are separate and distinct. The question is, therefore, Is Davis an indispensable party to this suit, his absence creating a want of jurisdiction in the Federal court to proceed without him?

Section 737 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 587) provides:

48] "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer."

To the same effect is the 47th equity rule. This statute and rule permit the court to proceed with the trial and adjudication of the suit, as between parties who are properly before it, and preserves the rights of parties not voluntarily appearing, providing their rights are not prejudiced by the decree to be rendered in the case. This rule has been said to be declaratory of the already-established equity practice. *Shields v. Arrow*, 17 How. 130; 15 L. ed. 158; 1 Street, Fed. Eq. Pr. § 533, and cases there cited. This rule does not permit a Federal court to proceed to a decree in that class of cases in which there is an absence of indispensable, as distinguished from proper, or even necessary, parties, for neither the absence of formal, nor such as are commonly termed necessary, parties, will defeat the jurisdiction of the court; provided, in the case of necessary parties, their interests are such and so far separable from those of parties before the court, that the decree can be so shaped that the rights of those actually before the court may be determined without necessarily affecting other persons not within the jurisdiction. After pointing out that

there may be formal parties, of whose omission the court takes no account, Mr. Justice Miller, in delivering the opinion in *Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825, went on to say:

"There is another class of persons whose relations to the suit are such that, if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties, if within its jurisdiction, before deciding the case; but, if this cannot be done, it will proceed to *administer such relief as may [49 be in its power between the parties before it. And there is a third class whose interests in the subject-matter of the suit and in the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of such absent party. 1 Street, Fed. Eq. Pr. § 519.

If the court can do justice to the parties before it without injuring absent persons, it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons. *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260.

Applying these principles to the case at bar, we are of opinion that the presence of Frederick T. Davis as a party to the suit is not essential to the jurisdiction of the Federal court to proceed to determine the case as to the parties actually before it. In other words, that, while Davis is a necessary party, in the sense that he has an interest in the controversy, his interest is not that of an indispensable party, without whose presence a court of equity cannot do justice between the parties before it, and whose interest must be so affected by any decree to be rendered as to oust the jurisdiction of the court.

With the parties before it, the court may proceed to determine whether, because of the acts alleged in the bill, the heirs at law of Mrs. Tilton were entitled to recover because of the lapsed legacy. If it finds the issue in favor of the complainant, it may proceed to determine the proportion in which the complainant *and the Water- [50

mans are entitled to share, without prejudice to the rights of Davis. It may direct the retention of his share in the hands of the executors, to be adjudicated in some other suit, or may otherwise shape its relief so as to do justice to the parties before the court without affecting his interest.

Upon the whole case, we are of opinion that the Federal court has jurisdiction for the purpose of ascertaining the rights of the complainant to recover as against the executor, and the interest of the persons before the court in the fund. While the court could make no decree which would interfere with the possession of the probate court, it had jurisdiction to entertain the bill and to render a judgment binding upon the parties to the extent and in the manner which we have already stated. We are, therefore, of the opinion that the court below erred in holding that there was no jurisdiction to entertain this suit, and the decree is reversed and the cause remanded to the Circuit Court of the United States for the Eastern District of Louisiana for further proceedings in accordance with this opinion.

Mr. Justice White dissents.

UNITED STATES, Plff. in Err.,
v.
UNION SUPPLY COMPANY.

(See S. C. Reporter's ed. 50-55.)

Internal revenue — criminal prosecution — corporation as person — oleomargarine dealers.

A corporation is a "person" within the meaning of the act of May 9, 1902 (32 Stat. at L. 193, chap. 784, U. S. Comp. Stat. Supp. 1907, pp. 636, 641), § 6, requiring wholesale dealers in oleomargarine to keep certain books and make certain returns, and providing for punishing by fine and imprisonment "any person who wilfully violates any of the provisions of this section," although § 5 of the same act applies in express terms to corporations, and gives the court discretionary power to punish either by fine or imprisonment or both.

[For other cases, see Internal Revenue, VI. d; Corporations, 11-22, in Digest Sup. Ct. 1908.]

[No. 120.]

Argued October 13, 14, 1909. Decided November 8, 1909.

IN ERROR to the District Court of the United States for the District of New Jersey to review a judgment quashing an
54 L. ed.

indictment of a corporation for violating the statutory requirement that wholesale dealers in oleomargarine shall keep certain books and make certain returns. Reversed.

The facts are stated in the opinion.

Solicitor General Bowers argued the cause and filed a brief for plaintiff in error:

There is no difficulty in including corporations within the designation "persons," even in a criminal act.

United States v. Amedy, 11 Wheat. 392, 412, 6 L. ed. 502, 507; 1 Clark & M. Priv. Corp. § 252; State v. Security Bank, 2 S. D. 538, 51 N. W. 337; State v. Baltimore & O. R. Co. 15 W. Va. 362, 36 Am. Rep. 803; United States v. Baltimore & O. R. Co. Fed. Cas. No. 14,509; United States v. John Kelso Co. 86 Fed. 304; Beaston v. Farmers' Bank, 12 Pet. 102, 135, 9 L. ed. 1017, 1030; Bank of Augusta v. Earle, 13 Pet. 519, 588, 10 L. ed. 274, 307.

If the penalty prescribed for an offense is both fine and imprisonment, the statute cannot be applied to a corporation, in so far as regards the imprisonment, but the inability to punish by imprisonment does not prevent an indictment against a corporation, and its punishment by fine.

1 Clark & M. Priv. Corp. § 251, p. 657; Com. v. Pulaski County Agri. & Mechanical Asso. 92 Ky. 197, 17 S. W. 442.

The idea of the court below, that a corporation cannot be guilty of "wilfulness" in omitting to keep books or make returns, needs no more attention than a reference to New York C. & H. R. R. Co. v. United States, 212 U. S. 481, 492-496, 53 L. ed. 613, 621-623, 29 Sup. Ct. Rep. 304.

Mr. Isaac R. Hitt, Jr., argued the cause and filed a brief for defendant in error:

Section 5 of the act of May 9, 1902, applies in express terms to corporations, and gives the court discretionary power to punish either by fine or imprisonment, or both. Since a corporation cannot be imprisoned, may the court, under § 6, disregard so much of that section as prescribes punishment by imprisonment and punish only by fine? One may not easily discover a reason for including corporations in the provisions of § 5 and excluding them from § 6.

United States v. Braun & Fitts, 158 Fed. 456.

In a case in which the statute prescribed a penalty of fine and imprisonment, a sentence of imprisonment only was erroneous.

Woodruff v. United States, 58 Fed. 766.

If the penalty prescribed for the act be both fine and imprisonment, then, so far as the punishment cannot, from the nature of the offender, be carried out, the statute is, of course, inoperative.

Com. v. Pulaski County Agri. & Me-

chanical Asso. 92 Ky. 197, 17 S. W. 442; Clark, Crim. Law, 2d ed. p. 79.

Mr. Justice Holmes delivered the opinion of the court:

This is an indictment of a corporation for 54] wilfully violating *the 6th section of the act of Congress of May 9, 1902, chap. 784, § 6, 32 Stat. at L. 193, 197, U. S. Comp. Stat. Supp. 1907, pp. 636, 641. That section requires "wholesale dealers" in oleomargarine, etc., to keep certain books and to make certain returns. It then goes on as follows: "And any person who wilfully violates any of the provisions of this section shall, for each such offense, be fined not less than fifty dollars and not exceeding five hundred dollars, and imprisoned not less than thirty days nor more than six months." The corporation moved to quash the indictment, and the district court quashed it on the ground that the section is not applicable to corporations. Thereupon the United States brought this writ of error.

The argument for the defendant in error is drawn from an earlier decision by the same court. It is that § 5 applies in express terms to corporations, and gives the court discretionary power to punish by either fine or imprisonment, or both; whereas, in § 6, both punishments are imposed in all cases, and corporations are not mentioned; that it is impossible to imprison a corporation, and that the statute warrants no sentence that does not comply with its terms. *United States v. Braun & Fitts*, 158 Fed. 456. We are of opinion that this reasoning is unsound. In the first place, taking up the argument drawn from § 5, that corporations were omitted intentionally from the requirements of § 6, it is to be noticed that the 6th section of the present act copies its requirements from the act of October 1, 1890, chap. 1244, § 41, 26 Stat. at L. 567, 621, U. S. Comp. Stat. 1901, p. 2235, which did not contain the penal clause. In its earlier form the enactment clearly applied to corporations, and when the same words were repeated in the later act it is not to be supposed that their meaning was changed. The words "wholesale dealers" are as apt to embrace corporations here as they are in § 2, requiring such dealers to pay certain taxes. We have no doubt that they were intended to embrace them. The words "any person" in the penal clause are as broad as "wholesale dealers" in the part prescribing the duties. U. S. Rev. Stat. § 1, U. S. Comp. Stat. 1901, p. 3. It is impossible to believe that corporations 55] were intentionally *excluded. They are as much within the mischief aimed at as private persons, and as capable of a "wilful" breach of the law. *New York C. & H. R. R.*

Co. v. United States, 212 U. S. 481, 53 L. ed. 613, 29 Sup. Ct. Rep. 304. If the defendant escapes, it does so on the single ground that, as it cannot suffer both parts of the punishment, it need not suffer one.

It seems to us that a reasonable interpretation of the words used does not lead to such a result. If we compare § 5, the application of one of the penalties rather than of both is made to depend, not on the character of the defendant, but on the discretion of the judge; yet, there, corporations are mentioned in terms. See *Hawke v. E. Hulton & Co.* [1909] 2 K. B. 93, 98. And, if we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that, if one of them is impossible, it does not mean, on that account, to let the defendant escape. See *Com. v. Pulaski County Agri. & Mechanical Asso.* 92 Ky. 197, 201, 17 S. W. 442. In *Hawke v. E. Hulton & Co.* [1909] 2 K. B. 93, it was held that the words "any person" in one section of a penal act did not embrace a corporation, notwithstanding a statute like our Rev. Stat. § 1. But that was not so much on the ground that imprisonment was contemplated as a punishment, as because the person convicted was to be "deemed a rogue and a vagabond." Moreover, it was thought that corporations could be reached under another section of the act.

Judgment reversed.

*J. E. FLEMING et al., Appts., [56 v.

GREEN McCURTAIN, Douglas B. Johnston, George Mansfield, et al.

(See S. C. Reporter's ed. 56-63.)

Indians — trust in tribal lands — grant to Nation and 'their' descendants.

No trust in favor of the then-existing members of the tribe and their descendants was created by letters patent which, following the language of the Choctaw treaty of September 27, 1830 (7 Stat. at L. 333), art. 2, under the authority of which the patent was made, granted to the Choctaw Nation a tract of land "in fee simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it," but such grant was one to the Nation only, limited in point of time to the corporate existence of the Nation.

[For other cases, see *Indians*, VIII., in *Digest Sup. Ct.* 1908.]

[No. 253.]

Argued October 21, 22, 1909. Decided November 8, 1909.

APPEAL from the Circuit Court of the United States for the Eastern District of Oklahoma to review a decree sustaining a demurrer to, and dismissing, a bill brought by and on behalf of persons of Choctaw or Chickasaw Indian blood and descent, to establish their right to certain lands under a treaty with and patent from the United States. Affirmed.

The facts are stated in the opinion.

Messrs. **Frank Hagerman** and **John G. Carlisle** argued the cause, and, with Messrs. Webster Ballinger and Albert J. Lee, filed a brief for appellants:

Appellants are entitled to have the language of the treaty construed most favorably to them as Indians, and therefore in favor of vested individual interests. The language upon which their claim is based is stronger than that heretofore construed as vesting an interest.

United States v. Choctaw Nation, 179 U. S. 494, 531, 45 L. ed. 291, 306, 21 Sup. Ct. Rep. 149; *New York Indians v. United States*, 170 U. S. 1, 15, 42 L. ed. 927, 932, 18 Sup. Ct. Rep. 531; *United States v. New York Indians*, 173 U. S. 464, 471, 43 L. ed. 769, 772, 19 Sup. Ct. Rep. 464, 40 Ct. Cl. 448; *Jones v. Meehan*, 175 U. S. 1, 12, 44 L. ed. 49, 54, 20 Sup. Ct. Rep. 1; *Shulthis v. McDougal*, 95 C. C. A. 615, 170 Fed. 533; *Wallace v. Adams*, 74 C. C. A. 540, 143 Fed. 722.

The language in the treaties and patent indicates an intention to convey the property in fee simple to the nation for its then members and their descendants, thus clearly creating a trust.

Randolph v. East Birmingham Lamp Co. 104 Ala. 355, 53 Am. St. Rep. 64, 16 So. 126; *Sinking Fund Comrs. v. Walker*, 6 How. (Miss.) 143, 38 Am. Dec. 435; *Smith's Estate*, 144 Pa. 428, 27 Am. St. Rep. 641, 22 Atl. 916; *Salem Capital Flour Mills Co. v. Stayton Water-Ditch & Canal Co.* 33 Fed. 153; *Heermans v. Schmaltz*, 10 Biss. 323, 7 Fed. 573.

The use of the words "there be and is hereby granted" conclusively shows a purpose to vest a personal title.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; *Missouri, K. & T. R. Co. v. Kansas P. R. Co.* 97 U. S. 491, 24 L. ed. 1095; *St. Joseph. & D. C. R. Co. v. Baldwin*, 103 U. S. 427, 26 L. ed. 579; *New York Indians v. United States*, 170 U. S. 17, 42 L. ed. 933, 18 Sup. Ct. Rep. 531.

The word "descendants" has a well-defined legal meaning, different from heirs, successors, citizens, or residents. It means
54 L. ed.

one who descends as an offspring, however remotely.

13 Cyc. Law & Proc. pp. 1047, 1049; 9 Am. & Eng. Enc. Law, 2d ed. p. 399; 1 *Bouvier's Law Dict.* Rawle's Rev. p. 550; 1 *Black's Law Dict.* p. 359; *Ralph v. Carrick*, L. R. 11 Ch. Div. 873, 25 Eng. Rul. Cas. 669; *Van Beuren v. Dash*, 30 N. Y. 418; *Bates v. Gillett*, 132 Ill. 297, 24 N. E. 612; *Hillen v. Iselin*, 144 N. Y. 374, 39 N. E. 371; *Tichenor v. Brewer*, 98 Ky. 352, 33 S. W. 87; *Waldron v. Taylor*, 52 W. Va. 289, 45 S. E. 338; *Levering v. Orrick*, 97 Md. 139, 54 Atl. 622.

In view of the negotiations leading up to the original treaty, the words "heirs and successors" were used in the sense of descendants.

13 Cyc. Law & Proc. p. 1049; 15 Am. & Eng. Enc. Law, 2d ed. pp. 318, 319; 27 Am. & Eng. Enc. Law, 2d ed. p. 360.

Solicitor General **Bowers** argued the cause and filed a brief for appellees:

The title granted by the patent of 1842, pursuant to the treaty of 1830, vested in the Indian nation or tribe as a whole; and no private estate or right was conveyed to any individual member of the tribe, or to any particular class or group of members of the tribe.

Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307, 47 L. ed. 183, 190, 23 Sup. Ct. Rep. 115; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 564, 567, 568, 47 L. ed. 299, 305, 307, 23 Sup. Ct. Rep. 216; *Cherokee Nation v. Journeycake*, 155 U. S. 196, 207, 39 L. ed. 120, 124, 15 Sup. Ct. Rep. 55; *The Cherokee Trust Funds*, 117 U. S. 288, 29 L. ed. 880, 6 Sup. Ct. Rep. 718; *New York Indians v. United States*, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531; *Ligon v. Johnston*, 90 C. C. A. 486, 164 Fed. 670.

The patent's language followed strictly the treaty provision, and Indian treaties are to be construed as the Indians, in their unlettered way, would naturally understand the matter. The nice rules of an artificial and elaborate system of law are not to be applied to them.

United States v. Choctaw Nation, 179 U. S. 494, 531, 532, 45 L. ed. 291, 305, 306, 21 Sup. Ct. Rep. 149; *Jones v. Meehan*, 175 U. S. 1, 11, 44 L. ed. 49, 54, 20 Sup. Ct. Rep. 1; *Choctaw Nation v. United States*, 119 U. S. 1, 27, 38, 30 L. ed. 306, 314, 318, 7 Sup. Ct. Rep. 75; *Worcester v. Georgia*, 6 Pet. 515, 582, 8 L. ed. 483, 508.

Mr. **Edward P. Hill** also argued the cause, and, with Mr. **David C. McCurtain**, filed a brief for appellees:

The lands and moneys of these tribes are

public lands and public moneys, and are not held in individual ownership.

Stephens v. Cherokee Nation, 174 U. S. 488, 43 L. ed. 1056, 19 Sup. Ct. Rep. 722; *Cherokee Nation v. Hiteheock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *Wallace v. Adams*, 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity purporting to be [57] brought by and on *behalf of some thirteen thousand persons, "all persons of Choctaw or Chickasaw Indian blood and descent, and members of a designated class of persons for whose exclusive use and benefit a special grant was made" of certain property in Oklahoma. The principal defendants are, the Secretary of the Interior; McCurtain, chief of the Choctaws; Johnston, governor of the Chickasaws, and all persons whose names appear with theirs on the rolls of "citizens" of the Choctaw and Chickasaw Nations, respectively, and all persons whose names appear upon the "freedmen" rolls of those Nations, as approved by the Secretary of the Interior on or before March 4, 1907, these being the persons to whom the Secretary of the Interior is proceeding to allot the above-mentioned property, being all the property of the tribe. The main object of the bill is to restrain the allotment to the defendants, and to undo it so far as it has taken place, to establish the title of the plaintiffs for the purpose of allotment, and to have a new distribution decreed. A firm of lawyers is joined, on the allegation that they have received a portion of the property under a fraudulent arrangement. The bill was demurred to for want of equity and for want of jurisdiction in the court.

The circuit court examined the treaty and conveyance under which the plaintiffs claim, and held that they did not confer the rights alleged in the bill; that the right to share in the distribution depended on membership in one of the two tribes, except in the case of freedmen, specially provided for; that who were members of the respective tribes, and entitled to enrolment as such, was a matter for Congress to determine; that Congress had adopted certain rolls when finally approved by the Secretary of the Interior; that the Secretary had acted and the plaintiffs had been excluded; that his action was final, and that the court had no jurisdiction in the case. The demurrer to the jurisdiction was sustained, the bill was dismissed, and the plaintiffs appealed to this court.

The plaintiffs found their claim upon the Choctaw treaty of Dancing Rabbit creek, September 27, 1830, article 2, 7 Stat. at L.

333, *and letters patent of March 23, [58] 1842, coupled with a treaty between the Choctaws and Chickasaws of January 17, 1837, ratified by the Senate March 24, 1837, 11 Stat. at L. 573. By article 2 of the treaty of 1830, "the United States, under a grant specially to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi river, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it;" with the boundaries. The letters patent recite this article, and, "in execution of the agreement," grant the described tract, to have and to hold the same "as intended to be conveyed by the aforesaid article 'in fee simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it,' liable to no transfer or alienation except to the United States or with their consent." The treaty with the Chickasaws gave the Chickasaws a district within the limits of the Choctaws' country, "to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw Nation." The plaintiffs say that the patent conveyed the legal title to the Choctaw Nation in trust for such persons as were members of the tribe at the date of the treaty, or of the Chickasaw tribe at the date of the treaty with them, and their respective descendants, and that, upon the dissolution of the Nation, the legal title merged with the equitable title, and the designated class became the absolute owners of the property as tenants in common.

The plaintiffs, in aid of their view, refer to various indications that the policy of the United States already was looking toward the disintegration of the Indian tribes, point out that the words on which they rely were interlined in the government draft at the instance of the Indians, and from these and other circumstances argue that their construction is confirmed. They say that the dominant phrase is "in fee simple to them and their descendants," and that the use of the plural "them" *shows a trans- [59] sition from the Nation as formal grantee to the members as beneficiaries. They say that "descendants" was used instead of "heirs" or "children," to avoid questions of legitimacy, or giving an absolute title to living members and their children, and to establish a principle of devolution suitable to the mode of life and unions in those Indian tribes. They conclude that the words "inure to them while they shall exist as a nation and live on it" only mark the duration

of the legal title, and do not cut down the equitable right conferred by the earlier words.

As we cannot agree with this construction, it will be unnecessary to consider many of the further allegations of the bill. The foundation of the plaintiffs' case is upon the words of the treaty and the patent that we have set forth. Those words seem to us to convey a different meaning on their face,—a meaning that would not be changed, but rather confirmed, if we were to refer at length to the earlier and later dealings with the tribes, which we shall not need to do. We should mention, however, that the United States already had ceded this tract to the Choctaw Nation, with no qualifying words, by the treaty of October 18, 1820, article 2, 7 Stat. at L. 210. *Choctaw Nation v. United States*, 119 U. S. 1, 38, 30 L. ed. 306, 318, 7 Sup. Ct. Rep. 75. The treaty of 1830 only varied the description a little, and provided for a special patent. But it would not better the plaintiffs' case if the treaty of 1830 were the single root of their grant. In a grant to the Choctaw Nation as a nation, it was natural, as in other cases, to use some words of perpetuity. Of course, the United States could use what words it saw fit to manifest its purpose, but the habit derived from private conveyances would be likely to prevail, and as, in such instruments, the gift of a fee is expressed by adding to the name of the grantee the words "and his heirs," or, in case of a corporation, although unnecessary, "its successors and assigns," here, also, some addition was to be expected to the mere name of the grantee. The word "Nation" is used in the treaty as a collective noun, and, as such, according to a common usage, is accompanied by a plural *verb in the very next article. ("The Choctaw Nation of Indians consent and hereby cede.") Therefore, the second article says "to them" rather than "to it," just as it says "while they [*i. e.*, the Nation] shall exist as a nation," and it adds to the untechnical "in fee simple" untechnical words of limitation of a kind that would indicate the intent to confine the grant to the Nation, which "successors" would not, and, at the same time, to imply nothing as to the rules for inheritance of tribal rights, as "heirs" might have seemed to do. We may compare "for the government of the Choctaw Nation of red people and their descendants," in article 4. The word was addressed to the Indian mind.

There is not a suggestion of any trust in the language to either the technical or the unlearned reader, and it is most unlikely that the United States would have attempted to impose one upon the Choctaws in favor of the existing members of the tribe

in the very "treaty" that dealt with them as a quasi independent nation, recognized by article 5 as having the right to make war, and that, by the 4th article, bound the United States to secure to that nation "the jurisdiction and government of all the persons and property that may be within their limits west," etc. It is true that, in further promising to secure the Nation from all laws except those enacted by their own national councils, the 4th article adds, "not inconsistent with the Constitution, treaties, and laws of the United States;" but this addition is far from suggesting that a constitutional right of property has been conferred upon a designated class, that might be enforced in a circuit court of the United States by a bill in equity against what was called a Nation. How far anyone was from that understanding, or from doubting that all the rights granted by the United States were in the Choctaw Nation, is shown by the treaty with the Chickasaws upon which the plaintiffs rely. The Nation had no right to make that treaty as it did, if it was subject to the trust supposed. Again, the limitation of time, "while they shall exist as a nation and live on it," shows that "the [61 grant has reference to the corporate existence of the Nation as such, and very plainly qualifies the absoluteness of the earlier words, "in fee simple." The suggestion that it limits the duration of the legal title only, but leaves a trust outstanding, is simply arbitrary. If the plural signifies the members of a class constituted *cetuis que trust*, the limitation would attach to the trust. But the only answer necessary is that no such separation or intent can be discovered in the words.

What we have said shows another sufficient answer to the plaintiffs' claim. They say and argue, as they must, in order to make out their right to a distribution to themselves, that the Choctaws and Chickasaws no longer exist as nations. But, if so, the grant also was at an end when the nations ceased to be, and it rested with the bounty of the United States to decide what should be done with the land, except so far as it already had been decided by treaties or statutes upon which the plaintiffs do not and cannot rely. It is said that, by article 18, in case of any well-founded doubt as to the construction of the treaty, it is to be construed most favorably toward the Choctaws; but there is no well-founded doubt, except whether the construction contended for would have been regarded as favorable to the Choctaws, since it would have cut down the autonomy that the treaty so carefully expressed. See, further, *Stephens v. Cherokee Nation*, 174 U. S. 445, 488, 43 L. ed. 1041, 1056, 19 Sup. Ct. Rep. 722; *Cherokee*

Nation v. Hitchcock, 187 U. S. 294, 307, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; Lone Wolf v. Hitchcock, 187 U. S. 553, 568, 47 L. ed. 299, 307, 23 Sup. Ct. Rep. 216.

The residue of the bill becomes immaterial upon the failure of the plaintiffs to make out a title under the treaty and patent. It refers to the act of June 28, 1898, chap. 517, 30 Stat. at L. 495, and the earlier statutes leading up to it, which established a commission, ordered it to prepare correct rolls of citizenship, and provided, by § 21 of the act of 1898, that the rolls so made, when approved by the Secretary of the Interior, should be final (see also acts of March 3, 1901, chap. 832, 31 Stat. at L. 1058, 1077, U. S. Comp. Stat. 1901, p. 1620; April 26, 1906, chap. 1876, 34 Stat. at L. 62] 137). By § 11, a division *was to be made among the "citizens" of the tribes according to the rolls, and by § 12 the allottees were to have undisturbed possession when the report of the allotments had been made to the Secretary of the Interior and confirmed by him. By § 29 an agreement with the Choctaws and Chickasaws on the matter was ratified, and, by act of July 1, 1902, chap. 1362, 32 Stat. at L. 641, a further agreement was ratified, which again excluded all except those whose names were on the roll. Art. 35. The bill charges that these agreements, as well as a part of the act of 1898, were void as excluding some of the plaintiffs who were not residents of the Nation on June 28, 1898, and as not having been approved by the class, or a majority of the class, alleged to have been designated by the treaty and patent that we have discussed. The bill goes on to allege that rolls were prepared by the commission, and approved by the Secretary, within the time allowed by the statutes (act of April 26, 1906, chap. 1876, § 2, 34 Stat. at L. 137), and that the time has expired, but the rolls were not made in conformity to the act of 1898, and are not correct, but fraudulent, in various particulars set forth.

But these allegations make out no case for the plaintiffs. It is said that the statutes recognize individual rights as already existing. It is true that, by a treaty of June 22, 1855, 11 Stat. at L. 611, the United States guaranteed the lands "to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole," with provisos. But the plaintiffs do not claim under this treaty, or mention it in their bill, or a treaty of April 28, 1866, 14 Stat. at L. 769, by articles 11-36 of which the change from common to individual ownership was agreed,

and it was provided that unselected land should "be the common property of the Choctaw and Chickasaw Nations, in their corporate capacities," etc. Art. 33. They might be descendants or the members of the tribe as it was in 1839 or 1842, and yet not members or heirs of members of the tribe *of 1854; therefore, it is unnecessary to [63 construe this treaty. Neither do the plaintiffs claim under any title to be derived from the statute providing for distribution according to the rolls of citizenship. They do not allege that they are citizens, or attempt to bring themselves within any grant later than the treaty and patent that we have discussed. They disclose that their names are not upon the rolls, and that the decision of the Secretary of the Interior has been against them, and they show no reason for our not accepting the rolls and decision as final according to the terms of distributing acts. See *United States ex rel. West v. Hitchcock*, 205 U. S. 80, 51 L. ed. 718, 27 Sup. Ct. Rep. 423; *Garfield v. United States*, 211 U. S. 249, 259, 53 L. ed. 168, 173, 29 Sup. Ct. Rep. 62.

Decree affirmed.

ALBERT MARBLES, Appt.,
v.

EDMUND P. CREECY, Chief of Police of the City of St. Louis, and Casper J. Wolff, City Jailer of Said City.

(See S. C. Reporter's ed. 63-70.)

Interstate extradition — sufficiency of requisition papers — other proof.

1. An extradition requisition reciting that the accused was charged by indictment with a specified crime against the laws of the state, and had become a fugitive from the justice of that state, accompanied by a certified copy of the indictment, makes a prima facie case against the accused as an alleged fugitive from justice, and, in the absence of proof to the contrary,

NOTE. — On interstate extradition — see notes to *Cook v. Hart*, 36 L. ed. U. S. 934, and *Iasigi v. Van de Carr*, 41 L. ed. U. S. 1046.

As to sufficiency of extradition papers — see note to *Ex parte Hart*, 28 L.R.A. 801.

As to scope of review on habeas corpus in extradition proceedings — see notes to *Bruce v. Rayner*, 62 C. C. A. 506, and *Oteiza y Cortes v. Jacobus*, 34 L. ed. U. S. 464.

As to questions reviewable by habeas corpus — see notes to *State v. Jackson*, 1 L.R.A. 373; *Bion's Appeal*, 11 L.R.A. 694; *Glass v. The Betsey*, 1 L. ed. U. S. 489; *United States v. Hamilton*, 1 L. ed. U. S. 490; *Ex parte Carll*, 27 L. ed. U. S. 288; and *Oteiza y Cortes v. Jacobus*, supra.

authorizes the executive of the surrendering state to issue his warrant for the arrest and delivery of the alleged criminal to the agent of the demanding state.

[For other cases, see Extradition, IV. b, in Digest Sup. Ct. 1908.]

Interstate extradition—absence of accused—notice.

2. The executive of the surrendering state may act upon the requisition papers in the absence of the accused, and without previous notice to him.

[For other cases, see Extradition, IV. b, in Digest Sup. Ct. 1908.]

Habeas corpus—review of extradition proceedings.

3. The objection that an extradition requisition contains a clause that the demanding state will not be responsible for any expense attending the arrest and delivery of the alleged fugitive is not available to the accused on habeas corpus to inquire into the legality of the extradition proceedings, but is a matter for the consideration of the executive of the surrendering state when he receives the official demand for the surrender of the alleged fugitive criminal.

[For other cases, see Habeas Corpus, 127-139, in Digest Sup. Ct. 1908.]

Interstate extradition—race prejudice—habeas corpus.

4. The mere suggestion that the alleged fugitive from the justice of another state, because of his race and color, will not receive a fair and impartial trial in the court of the demanding state, and will not be adequately protected against violence while in the custody of that state, does not require the executive of the state in which he may be found to refuse to surrender him on demand made in conformity with the Federal Constitution and laws, nor furnish a ground for his release on habeas corpus.

[For other cases, see Extradition, III.; Habeas Corpus, 127-139, in Digest Sup. Ct. 1908.]

[No. 23.]

Submitted November 5, 1909. Decided November 15, 1909.

APPEAL from the Circuit Court²² of the United States for the Eastern District of Missouri to review a judgment refusing relief by habeas corpus to a person in custody under an extradition warrant issued by the executive of that state. Affirmed.

The facts are stated in the opinion.

Mr. George D. Reynolds submitted the cause for appellant:

The provisions of U. S. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597, will be strictly construed, and all the requirements of the statute must be respected.

Ex parte Hart, 28 L.R.A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 259; Ex parte Morgan, 20 Fed. 298; Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717.

If the warrant omits to state that the

54 L. ed.

person has fled from justice, or that he is found in the asylum, it is defective.

Re Romaine, 23 Cal. 592.

The executive of the asylum state is not required by the act of Congress to cause the arrest of appellant and his delivery to the agent appointed to receive him without proof of the fact that he was a fugitive from justice.

Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148.

A warrant for arrest and return must recite and set forth the evidence necessary to authorize the state executive to issue it; and unless it does, it is illegal and void; and the warrant issued by the governor of the state of Missouri should have stated that he had found the appellant to be a fugitive from justice.

Re Doo Woon, 9 Sawy. 417, 18 Fed. 898; Kentucky v. Dennison, supra; Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12,968.

Where the warrant alone is before the court, and is insufficient on its face, the prisoner must necessarily be discharged.

State ex rel. Stundahl v. Richardson, 34 Minn. 115, 24 N. W. 354; Ex parte Powell, 20 Fla. 806.

The warrant must recite that the person charged is a fugitive from justice; and it is not enough that it state that the demanding executive has represented him to be such.

Re Jackson, 2 Flipp. 183, Fed. Cas. No. 7,125.

In a petition for a writ of habeas corpus, verified by the oath of the petitioner, as required by U. S. Rev. Stat. § 754, U. S. Comp. Stat. 1901, p. 593, facts duly alleged may be taken to be true unless denied by the return or controlled by other evidence; and in this case the return of the jailer did not deny that the prisoner was not present in the state of Mississippi at the time when the crime was alleged to have been committed.

Whitten v. Tomlinson, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297.

No brief was filed for appellees.

Mr. Justice Harlan delivered the opinion of the court:

The appellant, Marbles, was indicted in the circuit court of Warren county, Mississippi, for the crime of having, in violation of the laws of Mississippi, made a deadly assault with the wilful and felonious intent to kill and murder the person assaulted. Miss. Code, § 1043. The deputy sheriff of the county furnished a certified copy of the indictment to the governor of Mississippi, as well as his affidavit that Marbles was a

fugitive from the justice of that state, and had taken refuge in Missouri, and applied for a requisition upon the governor of Missouri for the arrest of the alleged criminal and his delivery to the agent of Mississippi, 66] to be conveyed to the latter state and there dealt with according to law. Thereupon the governor of Mississippi issued his requisition, in the ordinary form, except that there was in it this unusual, not to say, extraordinary, provision: "This state will not be responsible for any expense attending the execution of this requisition for the arrest and delivery of fugitives from justice."

The governor of Missouri honored the requisition made upon him, and issued his warrant for the arrest of Marbles, and his delivery to the designated agent of Mississippi. That warrant recited the fact that the accused was proceeded against as a fugitive from justice, and that the governor of Mississippi had, as required by the statute of the United States, produced to the governor of Missouri a copy of the indictment, certified to be authentic, and charging the fugitive with having committed the crime of assault to kill. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597.

Marbles was arrested under this warrant, and, being in custody, sued out a writ of habeas corpus from one of the judges of the circuit court of the United States for his discharge, upon the ground that he was deprived of his liberty in violation of the Constitution of the United States. The application for the writ was heard in that court. The reasons assigned in support of the contention just stated were: That the governor of Missouri had no jurisdiction to issue a warrant for his arrest, in that it was not shown before that officer that the accused was a fugitive from the justice of Mississippi, or had fled from that state, nor was there any evidence before the governor of Missouri that the petitioner was personally or had been continuously present in Mississippi when the crime in question was alleged to have been committed; that it appeared on the face of the indictment accompanying the requisition that no crime under the laws of Mississippi was legally charged or had been committed by the accused; that it did not appear before the governor of Missouri, when the requisition was presented to him, that the petitioner was, in fact, a fugitive from the justice of Mississippi; that said 67] requisition was not certified to as required by the laws of the United States; that there was not produced to that executive a copy of any indictment or affidavit certified as authentic by the governor of Mississippi; and that the petitioner was not present before the governor of Missouri

at the hearing before him of the warrant of extradition, nor was he given an opportunity to meet the witnesses face to face.

No reason whatever was shown on the hearing of the application for habeas corpus for the discharge of the accused from custody—nothing that showed any failure to conform to the requirements of the Constitution or laws of the United States. The material allegations of fact set forth in the application for the writ are wholly unsupported by anything in the record; indeed, some of them are affirmatively disproved by the record. No proof at all appears to have been made by the accused of any essential fact, and the decision of the court must have been based altogether upon the same official documents that were presented to the governor of Missouri, supported by the legal inferences to be drawn from their contents. It was made to appear by those documents that the accused was charged by indictment with a specified crime against the laws of Mississippi (Miss. Code, § 1043) and had become a fugitive from the justice of that state. That was legally sufficient, without more, to authorize a requisition, and when the governor of Missouri was furnished, as he was, with a copy of the indictment against Marbles, certified by the governor of Mississippi to be authentic, it then became the duty of the governor of Missouri, under the Constitution and laws of the United States, to cause the arrest of the alleged fugitive. So reads the statute enacted in execution of the constitutional provision relating to fugitives from justice. Rev. Stat. § 5278. It is true that it does not appear from the record before us that there was any evidence before the governor of Missouri other than the requisition of the governor of Mississippi and a copy of the indictment against the alleged fugitive, certified to be authentic. It is also true that, so far as the Constitution and laws of [68] the United States are concerned, the governor of Missouri could not legally have issued his warrant of arrest unless the accused was charged with what was made by Mississippi a crime against its laws, and was a fugitive from justice. But those facts were determinable in any way deemed satisfactory by that executive, and he was not bound to demand—although he may have required if the circumstances made it proper to do so—proof apart from proper requisition papers that the accused was so charged and was a fugitive from justice. He was, no doubt, at liberty to hear independent evidence showing that the act with which the accused was charged by indictment was not made criminal by the laws of Mississippi, and that he was not a fugitive from justice. No such proof appears to have been offered to the governor

or to the court below. But the official documents, reasonably interpreted, made a prima facie case against the accused as an alleged fugitive from justice, and authorized that executive to issue his warrant of arrest as requested by the governor of Mississippi. The contention that the governor of Missouri could not act at all on the requisition papers in the absence of the accused, and without previous notice to him, is unsupported by reason or authority, and need only be stated to be rejected as unsound.

The principles here announced are firmly established by the decisions of this court. *Illinois ex rel. McNichols v. Pease*, 207 U. S. 100, 52 L. ed. 121, 28 Sup. Ct. Rep. 58; *Ex parte Reggel*, 114 U. S. 642, 652, 653, 29 L. ed. 250, 253, 254, 5 Sup. Ct. Rep. 1148; *Roberts v. Reilly*, 116 U. S. 80, 95, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291; *Hyatt v. New York*, 188 U. S. 691, 719, 47 L. ed. 657, 664, 23 Sup. Ct. Rep. 456; *Munsey v. Clough*, 196 U. S. 364, 372, 49 L. ed. 515, 516, 25 Sup. Ct. Rep. 282; *Pettibone v. Nichols*, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111, 7 A. & E. Ann. Cas. 1047; and *Appleyard v. Massachusetts*, 203 U. S. 222, 51 L. ed. 161, 27 Sup. Ct. Rep. 122, 7 A. & E. Ann. Cas. 1073.

Other questions may be noticed. One is, in effect, that the requisition of the governor of Mississippi was invalid because of the clause or provision therein that that state would not be responsible for any expense attending the arrest and delivery of the alleged fugitive. We will not indulge in conjecture as to the object of inserting that clause in the requisition; particularly, as the state of Mississippi is not represented 69] in *this court by counsel. It is sufficient now to say that the warning given to the governor of Missouri that Mississippi would not be responsible for any expense attending the arrest and delivery of the alleged fugitive was a matter for the consideration of the governor of the former state when he received the official demand for the arrest and delivery of the appellant as a fugitive from justice and a copy of the indictment against Marbles, certified as authentic. It was not a matter that could legally affect the inquiry before the circuit court on habeas corpus, whether the requisition of the demanding state and the action thereon by the governor of Missouri were in substantial conformity with the Constitution and the laws of the United States, and, therefore, not, in any legal sense, hostile to the liberty of the accused.

The other question to be noticed is that raised by the following averments in the application for the writ of habeas corpus: "Your petitioner further states that he is

54 L. ed.

a negro, and that the race feeling and race prejudice is so bitter in the state of Mississippi against negroes that he is in danger, if removed to that state, of assassination and of being killed, and that he cannot have a fair and impartial trial in any of the courts of that state, and that, to deliver him over to the authorities of that state is to deprive him, as a citizen of the United States and a citizen and resident of the state of Mississippi, of the equal protection of the laws." It is clear that the executive authority of a state in which an alleged fugitive may be found, and for whose arrest a demand is made in conformity with the Constitution and laws of the United States, need not be controlled in the discharge of his duty by considerations of race or color, nor by a mere suggestion—certainly not one unsupported by proof, as was the case here—that the alleged fugitive will not be fairly and justly dealt with in the state to which it is sought to remove him, nor be adequately protected, while in the custody of such state, against the action of lawless and bad men. The court that heard the application for discharge on writ of habeas corpus was entitled to assume, as no [70] doubt the governor of Missouri assumed, that the state demanding the arrest and delivery of the accused had no other object in view than to enforce its laws, and that it would, by its constituted tribunals, officers, and representatives, see to it not only that he was legally tried, without any reference to his race, but would be adequately protected while in the state's custody against the illegal action of those who might interfere to prevent the regular and orderly administration of justice.

We perceive no error of law in the record, and the judgment of the Circuit Court must be affirmed.

It is so ordered.

ELIZABETH M. MCGILVRA et al., Complainants, and Alfred J. Pritchard et al., Interveners, and Peter Bressler, Complainant, and Frank T. Hunter et al., Interveners, Appts.,

v.

E. W. ROSS, as State Land Commissioner of the State of Washington, and E. W. Ross, T. A. Roekwell, J. H. Easterday, J. E. Frost, and John R. Welty, as Board of State Land Commissioners, and James P. Agnew, as Auditor of the County of King, State of Washington.

(See S. C. Reporter's ed. 70-80.)

Federal courts — jurisdiction — Federal question — title to land below high-water mark.

1. The contention that rights below the

high-water mark of navigable nontidal waters can be asserted by the patentees from the United States as appurtenant to the uplands conveyed to them, as against the title of the state when subsequently admitted into the Union, is too clearly unfounded, in view of the prior decisions of the Federal Supreme Court, to raise a Federal question within the original jurisdiction of a Federal circuit court.

[For other cases, see Courts, 489-494; Waters, 38-79, in Digest Sup. Ct. 1908.]

Appeal — judgment — remanding for dismissal.

2. A decree of a Federal circuit court of appeals which, after correctly deciding that the court below was without jurisdiction, inadvertently affirmed the decree of that court, dismissing the bill on the merits, will be reversed by the Federal Supreme Court, and the case remanded to the circuit court, with directions to set aside the decree on the merits and sustain the demurrer for want of jurisdiction, and, on that ground, dismiss the suit.

[For other cases, see Appeal and Error, 5485-5490, in Digest Sup. Ct. 1908.]

[No. 328.]

Argued October 19, 20, 1909. Decided November 15, 1909.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western District of Washington, sustaining demurrers to and dismissing for want of equity, suits to enjoin officers of the state from interfering with or selling or disposing of lands below high-water mark in navigable nontidal waters. Reversed and remanded to the Circuit Court, with directions to dismiss for want of jurisdiction.

See same case below, 90 C. C. A. 398, 164 Fed. 604.

Statement by Mr. Justice McKenna:

These cases were consolidated in the circuit court. The appellants were complainants in the suits respectively, and asserted title by virtue of patents from the United States to lands bordering on and touching Lakes Washington and Union, in the state of Washington, to the lands below the high-water mark of said lakes respectively, against a title claimed by the state. The

appellee James P. Agnew is the auditor of the county of King, and the other appellees constitute the board of land commissioners of the state.

The fundamental question presented is whether rights below high-water mark passed to the patentees as appurtenant to the uplands conveyed to them, or whether they vested in the state upon its admission into the Union, and are subject to the control of the state.

The patent in the McGilvra Case was issued in 1866, under the act of Congress of April 24, 1820, entitled, "An Act Making Further Provision for the Sale of the Public Lands" [3 Stat. at L. 566, chap. 51]; that in the Bressler Case was issued under the provisions of the act of Congress of September 27, 1850, entitled, "An Act to Create the Office of Surveyor General of the Public Lands in Oregon, and to Provide for the Survey, and to Make Donations to Settlers of the Said Public Lands" [9 Stat. at L. 496, chap. 76]. It is alleged that the lakes are respectively nontidal bodies of water, situated wholly within the county of King, Lake Washington being about 20 miles in length, with an average breadth of 3 miles, and Lake Union being about 3 miles in length, with an average breadth of 1 mile; and that neither lake has an outlet, navigable for boats, scows, or lighters, and at all times has been confined to the conveyance of passengers or freight to and from different points upon said lake; and that neither lake is now or ever has been "suscep- [72] tible of navigation, so far as the carrying of passengers or freight is concerned, to points upon the lake from different counties of the state, to and from other states, or to and from foreign nations, and that the same can never be used unless it be by a very extensive system of canals or dredging of the outlet thereof.

It is alleged that the height of the waters of Lake Washington is dependent upon the amount of rainfall, and that the rise and fall of the water "covers and uncovers many hundreds of thousands of square feet of land" in the patented tracts, exceeding the value of \$40,000. As to Lake Union, it is alleged that, by a dam constructed about fifty years ago, its waters were raised and are maintained about 7 feet higher than their natural level. And further, that a

NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to *Bailey v. Mosher*, 11 C. C. A. 308, and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7.

On title to land under water—see note to *Goff v. Congle*, 42 L.R.A. 161.

On title to land between high and low water mark—see notes to *Waverly Water*

Front Improv. & Development Co. v. White, 45 L.R.A. 227, and *United States v. Pacheco*, 17 L. ed. U. S. 865.

On error to state courts on questions presenting merely abstract or moot questions—see note to *Campbell v. California*, 50 L. ed. U. S. 382.

On the relative rights of states and United States to shore lands—see note to *Doe ex dem. Hallett v. Beebe*, 14 L. ed. U. S. 35.

ditch has been excavated, crossing a narrow neck of land which separates Lake Union from Lake Washington, through which the waters of the latter flow into Lake Union, and keep its waters at practically the same level.

It is further alleged that, by virtue of the patents and the acts of Congress under which they are issued, there became vested in the patentees and their successors the ownership of those portions of the lakes immediately in front of the tracts patented "out into" the "deep waters" of the lakes, subject only to the supervision in their use of the same to the extent that they be so used by the proprietor thereof; that said proprietor should not and did not interfere with the rights of other riparian owners, and the rights of the public in navigating the waters of said lake. And that they became and are vested from the dates of the several patents with the exclusive right and privilege to make such fills in shallow water, and to erect such piers, docks, and warehouses as might be convenient and necessary to aid and facilitate the navigation upon the waters of the lakes, and that said rights were so vested, "limited only by the rights of supervision in the government; that said rights be exercised in such a manner that there should be no interference with the rights of other riparian owners, or with 73] *the rights of the public to freely navigate upon the navigable waters of said lake," and that these rights were conveyed by the patents many years before the admission of Washington into the Union.

It is alleged that the state was admitted into the Union, November 11, 1889, and that article 17, § 1, of the Constitution of the state, reads as follows:

"The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state . . . up to and including the line of ordinary high water within the banks of all navigable rivers and lakes; provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state."

That, by virtue of this provision, the state claims the ownership in fee of all the waters and lands under the waters of the lakes up to and including the line of ordinary high water, and, by reason of such claim of ownership, the legislature passed senate bill No. 101, which was approved by the governor February 4, 1907, and took effect immediately upon its passage. The act was entitled, "An Act to Provide for the Establishment of Harbor Lines, Survey, Platting, and Appraisal of Shore Lands of the First Class of Lakes Washington and Union, in King County, Washington, the Sale and Disposi-

tion of Said Shore Lands, the Creation of the Alaska-Yukon-Pacific Exposition Fund, and Declaring an Emergency."

It is also alleged that it is provided in said act that "the board of land commissioners of the state of Washington, acting as a board of harbor line commission or other proper official capacity, as now authorized by law, shall, as soon as possible after the passage of this act, and not later than July 1, 1907, establish harbor lines in Lakes Washington and Union, situated in King county, Washington, in front of the city of Seattle, . . . ; and to survey, plat, examine, and appraise such shore lands of the first class within or in front of the *limits of the said city of Seattle. [74 . . . After the establishment of said harbor lines and the survey, platting, examination, and appraisal, as aforesaid, a copy of the plat and record thereof, as required by existing law, shall be deposited with the county auditor of King county, Washington, and another copy shall be delivered to the commissioner of public lands of this state, and the same shall be filed and safely kept as required by law."

It is further alleged that the board has proceeded to survey the lands belonging to the appellants respectively, and has included therein those portions which lie between the line of ordinary high water and the line of low water out into the lakes to a point where the depth is 30 feet, and that the plat thereof covers the property of the appellants.

It is alleged that John J. McGilvra, the original patentee in the McGilvra Case, "did erect and construct out into the waters of Lake Washington a wharf in front of a portion" of the patented lands, which was erected and maintained at great expense, to facilitate the commerce of the lake, and which was for many years the only wharf within the limits of Seattle. It is alleged that the wharf is still owned by the appellants in the case, and still used for the purpose above mentioned, and is, with the privilege connected therewith and appurtenant thereto, of greater value than \$10,000.

It is also alleged in the Bressler Case that the owners of the lands alleged therein to have been patented constructed a dock or wharf into the waters of Lake Union, for a landing place for passengers and freight, and it was and is used for that purpose, and that the appellant Bressler has, since his ownership of the property, further improved the same by covering nearly all of it with buildings, which have long been occupied by his tenants for the purpose of trade and manufacture, and the value of the wharf and building exceed

\$12,000, and the value of the property \$75,000.

It is alleged, in both cases, that, by the constitutional provision above mentioned, the 75] state "seeks to confiscate without *compensation, and, if declared valid and of effect, will confiscate, without compensation, the rights of" appellants in and to all the rights hereinbefore set forth as vested for a period of twenty-four years before the admission of the state, and will divest appellants of their said property rights without compensation and without due process of law, all of which, it "is alleged, is contrary to the protection guaranteed to the citizens of the United States by the 14th Amendment of the Constitution of the United States."

And as to the acts and threatened acts of the appellees, above described, and other acts which they threaten in pursuance of the statute of February 4, 1907, it is alleged that they will cast a cloud upon the respective rights, titles, and properties of the appellants in the respective cases, to their damage respectively in the sums of \$5,000, \$25,000, and \$100,000, and that they will take and convert into money the properties of the respective appellants without compensation and without due process of law, and that appellants have no plain, speedy, or adequate remedy at law.

Injunctions were prayed, provisional and perpetual, also general relief.

Demurrers were filed to the bills on the ground that they exhibited no equities in the respective complaints, and on the ground that the court was "without jurisdiction of the parties or the subject-matter."

Alfred J. Pritchard et al. were allowed to intervene in the McGilvra Case and Frank T. Hunter et al. were allowed to intervene in the Bressler Case as parties complainant.

The circuit court did not pass on the question of jurisdiction, saying: "As the bills fully disclose the extent of the complainants' claims to relief, it results that the demurrers must be sustained and the suits dismissed for want of equity." 161 Fed. 398. A decree was entered accordingly. The circuit court of appeals, however, discussed the question of jurisdiction, and said:

"The circuit court was, therefore, without 76] jurisdiction in *these cases, and the bills of complaint were properly dismissed.

"The views here expressed would require this court to affirm the decrees of the circuit court dismissing the bills of complaint if the cases were considered on their merits.

"The decree of the circuit court is affirmed." 90 C. C. A. 398, 164 Fed. 604.

Mr. Charles K. Jenner argued the cause and filed a brief for appellants:

The bill of complaint herein states a

case fully within the jurisdiction of the circuit court of the United States wherein such bill was filed.

Doolan v. Carr, 125 U. S. 618, 620, 31 L. ed. 844, 845, 8 Sup. Ct. Rep. 1228; Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; Shively v. Bowlby, 152 U. S. 9, 38 L. ed. 335, 14 Sup. Ct. Rep. 548; Paeker v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210.

By the common law of England, Scotland, and Ireland, the owner of the banks of rivers above the ebb and flow of the tide prima facie owns the bed of all such fresh-water rivers, though actually navigable, to the thread of the stream, *usque ad filum aquæ*.

Hargrave's Law Tracts, 5; Bickett v. Morris, L. R. 1 H. L. Sc. App. Cas. 47; Murphy v. Ryan, Ir. Rep. 2 C. L. 143; Ewing v. Colquhoun, L. R. 2 App. Cas. 839.

The jurisprudence of Oregon, from which the territory of Washington was formed, is based on the common law.

Van Ness v. Pacard, 2 Pet. 137, 144, 7 L. ed. 374, 377; Norris v. Harris, 15 Cal. 252; Cressey v. Tatom, 9 Or. 541; Lamb v. Starr, Deady, 358, Fed. Cas. No. 8,021; Shively v. Bowlby, 152 U. S. 51, 38 L. ed. 350, 14 Sup. Ct. Rep. 548.

For the sake of argument, admitting that the state of Washington is the owner of the fee in the water and soil under the water in lakes Union and Washington, and that such lakes are navigable in the sense which gave rise to what is claimed as the American doctrine, thereby changing the common-law rule in regard to the ownership of such waters, complainants still contend that the attempted sale and disposition of the shore lands of such lakes are without the power of the state of Washington, and are an interference and denial of rights vested in complainants long prior to the admission of the state of Washington into the Union, and that the ownership of the state is not such ownership as is vested in upland property. It is not vested in the state for purposes of barter and sale, but as a public trust, to conserve the use of the waters in such a manner as to protect the rights of navigation, and to foster and encourage the same for the uses of the public, and also for the uses and benefit of those having vested interests therein, by reason of their riparian ownership.

Illinois C. R. Co. v. Illinois, 146 U. S. 387-476, 36 L. ed. 1018-1051, 13 Sup. Ct. Rep. 110; Yates v. Milwaukee, 10 Wall. 497, 504, 19 L. ed. 984, 986; Weber v. State Harbor, 18 Wall. 57, 21 L. ed. 798; Dutton v. Strong, 1 Black, 23, 17 L. ed. 29; St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 19 L. ed. 74; Walker v. Shepardson, 4 Wis. 486, 65 Am. Dec. 324; Delaplaine v. Chi-

cago & N. W. R. Co. 42 Wis. 214, 24 Am. Rep. 386; *St. Louis v. Rutz*, 138 U. S. 246, 34 L. ed. 949, 11 Sup. Ct. Rep. 337.

The riparian proprietor upon a navigable lake has, as such, the exclusive right of access to and from the lake in front of his land, and of building there piers and wharves in aid of navigation, not interfering with the public easement. These private rights grow out of his title to the land, and have a pecuniary value, and their destruction or abridgment is, in general, an injury entitling him to redress.

Delaplaine v. Chicago & N. W. R. Co. 42 Wis. 224, 24 Am. Rep. 386.

Mr. O. C. McGilvra also argued the cause for appellants.

Messrs. Walter P. Bell and John W. Roberts argued the cause and filed a brief for appellees:

The question involved is not an open one.

Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Prosser v. Northern P. R. Co.* 152 U. S. 59, 38 L. ed. 352, 14 Sup. Ct. Rep. 528; *Mann v. Tacoma Land Co.* 153 U. S. 273, 284, 38 L. ed. 714, 717, 14 Sup. Ct. Rep. 820; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; *United States v. Mission Rock Co.* 189 U. S. 391, 47 L. ed. 865, 23 Sup. Ct. Rep. 606; *Kean v. Calumet Canal & Improv. Co.* 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651; *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655; *Barney v. Keokuk*, 94 U. S. 324-338, 24 L. ed. 224-228; *St. Louis v. Myers*, 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 803, 838; *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L.R.A. 632, 26 Pac. 539; *Pierce v. Kennedy*, 2 Wash. 324, 26 Pac. 554, 28 Pac. 35; *Harbor Line Comrs. v. State*, 2 Wash. 530, 27 Pac. 550; *Baer v. Moran Bros. Co.* 2 Wash. 603, 27 Pac. 470; *State ex rel. Stimson Mill Co. v. Harbor Line Comrs.* 4 Wash. 6, 29 Pac. 938; *State ex rel. Columbia & P. S. R. Co. v. Harbor Line Comrs.* 4 Wash. 816, 30 Pac. 734; *McCue v. Bellingham Bay Water Co.* 5 Wash. 156, 31 Pac. 461; *Morse v. O'Connell*, 7 Wash. 117, 34 Pac. 426; *West Coast Improv. Co. v. Windsor*, 8 Wash. 490, 36 Pac. 441; *Allen v. Forrest*, 8 Wash. 700, 24 L.R.A. 606, 36 Pac. 971; *State ex rel. McKenzie v. Forrest*, 11 Wash. 227, 39 Pac. 684; *Lowndale v. Gray's Harbor Boom Co.* 21 Wash. 542, 58 Pac. 663; *Watkinson v. McCoy*, 23 Wash. 372, 63 Pac. 245; *New Whatcom v. Fairhaven Land Co.* 24 Wash. 493, 54 L.R.A. 190, 64 Pac. 735; *Watkins v. Dorris*, 24 54 L. ed.

Wash. 636, 54 L.R.A. 199, 64 Pac. 840; *Sullivan v. Callvert*, 27 Wash. 600, 68 Pac. 363; *Washougal & L. Transp. Co. v. Dalles, P. & A. Nav. Co.* 27 Wash. 490, 68 Pac. 74; *Madson v. Spokane Valley Land & Water Co.* 40 Wash. 415, 6 L.R.A. (N.S.) 257, 82 Pac. 718; *Kalcz v. Spokane Valley Land & Water Co.* 42 Wash. 43, 84 Pac. 395; *Burrows v. Gray's Harbor Boom Co.* 44 Wash. 630, 87 Pac. 937; *Van Sieten v. Muir*, 46 Wash. 38, 89 Pac. 188; *Bryant Lumber & Shingle Mill Co. v. Pacific Iron & Steel Works*, 48 Wash. 574, 94 Pac. 110; *Muir v. Johnson*, 49 Wash. 66, 94 Pac. 899; *Brace & H. Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The appellants are citizens of the state of Washington, and rely, therefore, upon the existence of Federal questions to sustain the jurisdiction of the circuit court. These questions are asserted to be (and we give the language of counsel): "(1) the validity and effect of the several patents of the United States in respect to the claim of ownership thereunder, as set forth in the bill of complaint; (2) the invocation of the protection of the 14th Amendment of the Federal Constitution by these plaintiffs against the threatened taking of their property" by "the several acts of the legislature of the state of Washington and the procedure directed thereunder."

It is manifest that the first is the primary question. If the appellants did not derive the rights contended for by the patents, they have no rights to be impaired, even assuming, as we have assumed in this discussion, that the action of the state has proceeded far enough to be a trespass upon or an impairment of them. But whether such rights passed involves the construction of the acts of Congress under which the patents issued, and, necessarily, of the effect of the patents, and presents a Federal question, if prior decisions have not defined *such [77] rights and removed them from controversy. This is contended by appellees, and *Shively v. Bowlby*, 152 U. S. 1, 28 L. ed. 331, 14 Sup. Ct. Rep. 548, is cited. And, as we have seen, the circuit court of appeals took this view. Appellants attack it, and contend that the facts of *Shively v. Bowlby* are so far different from those in the case at bar as to make that case inconclusive of the questions presented in the latter. A determination of the scope of *Shively v. Bowlby* becomes necessary. The controversy in that case was between a title by United States patent under the Oregon donation land law, so called, being the act of Congress, Sep-

tember 27, 1850 [9 Stat. at L. 496, chap. 76] (and the same law under which the title in the Bressler Case is derived), to lands bounded by the Columbia river, and a title derived under the act of the state of Oregon, entitled, "An Act to Provide for the Sale of Tide and Overflowed Lands on the Seashore and Coast" to lands below high-water mark on that river. The issue, therefore, was accurately presented between a title under a patent of the United States and one conveyed by a state in the exercise of its dominion over lands below high-water mark. The issue in the case at bar is exactly the same. But a distinction is pointed out, and on that distinction appellants' contentions and arguments are based. The Shively Case was concerned with shore lands within the ebb and flow of the tide. In the case at bar the lands border on navigable waters, but not on tidal waters. The Shively Case, it is therefore contended, as we have said, is not applicable, for, it is said, that whenever the "court, in deciding said cause, used the term 'navigable waters' in discussing the case then before it, said term meant tidal waters, for the question of rights upon tidal waters was the only question therein presented."

The argument to sustain the contention is not confined to an analysis of the case, but goes beyond, and by the citation of many cases seeks to determine the riparian rights of appellants by the common-law test of navigability; to wit, the ebb and flow of the tide. The contention is that, when the patents were issued to the respective appellants, "the common law of England *in relation to riparian ownership was in full force in the territory of Washington, and, in the absence of statutes passed by the United States, changing, modifying, or varying the common law in regard to grants of land," such grants carried, unless there was an express reservation, as "appurtenances thereunto belonging," such riparian ownership, and from this it is contended that appellants "received with their several patents a grant in fee to the waters" of Lakes Union and Washington, respectively, "in front of the several tracts of land to the middle of said lakes." We will not review the reasoning by which this contention is attempted to be supported. It is enough to say that the test of navigability of waters insisted on has had no place in American jurisprudence since the decision in the case *The Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L. ed. 1058, and is therefore no test of riparian ownership. This is the effect of *Shively v. Bowlby*. The whole doctrine is there displayed, and the court declared that, on account of the diversity of view entertained of "the scope and effect of the pre-

vious decisions of this court upon the subject of public and private rights in lands below high-water mark of navigable waters," it appeared "to be a fit occasion for a full review of those decisions and a consideration of other authorities upon the subject." And the term "navigable waters," as there used, meant waters which were navigable in fact. The definition was not inadvertent or unnecessary. It was that to which the reasoning conducted and which became the test of the dominion of the national and state governments over shore lands and the rights which they had or could convey. Hence this conclusion by the court: "The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution." It was observed that the United States, while it held the country as a territory, having all the powers of national and of municipal government, might have granted for appropriate purposes rights and titles below high-water mark. See *United States v. [79 Winans]*, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662; *Prosser v. Northern P. R. Co.* 152 U. S. 59, 38 L. ed. 352, 14 Sup. Ct. Rep. 528. But it was said that they had never done so by general laws, but had considered it "as most in accordance with the interest of the people and with the object for which the territories were acquired of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states respectively, when organized and admitted into the Union." This policy, it was remarked, as "to navigable waters and the soils under them, whether within or above the ebb and flow of the tide," has been "constantly acted upon." And hence it was further said: "Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future state when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States." The conclusion necessarily follows, as expressed by the court, that the state may dispose of its lands under navigable waters "free from any easement of the upland proprietor."

Joy v. St. Louis, 201 U. S. 332, 50 L. ed. 776, 26 Sup. Ct. Rep. 478, is to the same effect. See also *Scranton v. Wheeler*, 179 U. S. 141, 190, 45 L. ed. 126, 147, 21 Sup. Ct.

Rep. 48; *United States v. Mission Rock Co.* 189 U. S. 391, 47 L. ed. 865, 20 Sup. Ct. Rep. 606; *Kansas v. Colorado*, 206 U. S. 46-93, 51 L. ed. 956-973, 27 Sup. Ct. Rep. 655. In the latter case it was said, as a deduction from many previous cases, including *Shively v. Bowlby*, "that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters." *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224, was quoted from as follows: "And since this court, in the case of *The Genesee Chief v. Fitzhugh*, supra, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems 80] *to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

It follows from these views that the circuit court of appeals rightly decided that the questions presented by the bill are no longer open to discussion, and that the circuit court was without jurisdiction. But the circuit court of appeals, overlooking the fact that the decree was not of dismissal simply, but on the merits, affirmed it. To correct this inadvertence, the decree of the Circuit Court of Appeals must be reversed and the cause remanded to the Circuit Court, with directions to set aside the decree on the merits, and sustain the demurrer for want of jurisdiction, and, on that ground, dismiss the suits. This will enable appellants to litigate in the state courts whatever riparian rights they may have under the laws of the state and the constitutional provisions hereinbefore set out. "

So ordered.

Mr. Justice Holmes concurs in the result.

CLARA E. SYLVESTER and May L. Sylvester, Plffs. in Err.,
v.

STATE OF WASHINGTON.

(See 'S. C. Reporter's ed. 80-87.)

Error to state court — Federal question — land titles.

1. A decision of the Washington supreme court adverse to a claim of title founded upon the invalidity, under the Oregon donation act of September 27, 1850 (9 Stat. at L. 496, chap. 76), of their ancestors' deed to 54 L. ed.

the territory of Washington, and upon the incapacity of the territory to accept the deed under the act of March 2, 1853 (10 Stat. at L. 172, chap. 90), by which such territory was organized, is reviewable on a writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 1835-1858, in Digest Sup. Ct. 1908.]

Territories — powers — accepting deed for seat of government.

2. The power of the territory of Washington to accept a deed of land as a site for the seat of government, and the erection of a capitol building, even if not incident to the organization of the territorial government, is implied from the provisions of the organic act of March 2, 1853, § 13, granting a sum of money "for the erection of suitable buildings at the seat of government."

[Powers of territory, see Territories, II., in Digest Sup. Ct. 1908.]

Public lands — donation claims — sale before patent.

3. A claimant under the Oregon donation act of September 27, 1850, who had not made final proof under that act, but had occupied the land for more than four years, could make a valid deed of his rights after the amendatory act of July 17, 1854 (10 Stat. at L. 305, chap. 84), § 2 by which the proviso in § 4 of the earlier act, making void contracts for the sale of land before patent, was repealed, "provided that no sale shall be deemed valid unless the vendor shall have resided four years upon the land."

[For other cases, see Public Lands, 549-552, in Digest Sup. Ct. 1908.]

Error to state court — questions reviewable — non-Federal questions — land titles.

4. The effect of a valid conveyance to the territory of Washington by a claimant, under the Oregon donation act of September 27, 1850, after occupation for more than four years, but before he had made final proof under that act, upon the title subsequently given him by a patent from the United States, is a question of local law, not open for review upon a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 2089-2095, in Digest Sup. Ct. 1908.]

[No. 40.]

NOTE.—On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On error to state court in cases involving land titles—see note to *O'Connor v. Texas*, 50 L. ed. U. S. 1120.

Argued November 4, 5, 1909. Decided November 15, 1909.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of Thurston County, in that state, in favor of the defendant in an action against the state to recover a parcel of land conveyed to the territory of Washington as a site for the seat of government. Affirmed.

See same case below, 46 Wash. 585, 91 Pac. 15.

The facts are stated in the opinion.

Mr. George Marvin Savage argued the cause, and, with Miss May L. Sylvester, *in propria persona*, filed a brief for plaintiffs in error:

Under the Oregon donation law, neither legal nor equitable title vests in the settler before his full compliance with all the requirements of such act. Until he has fully conformed to the terms of the act, he has nothing but a mere possessory right to the land.

Hall v. Russell, 101 U. S. 509, 25 L. ed. 831; Vance v. Burbank, 101 U. S. 514, 25 L. ed. 929; Maynard v. Hill, 125 U. S. 215, 31 L. ed. 660, 8 Sup. Ct. Rep. 723; Oregon & C. R. Co. v. United States, 190 U. S. 195, 47 L. ed. 1015, 23 Sup. Ct. Rep. 673; United States v. Oregon & C. R. Co. 133 Fed. 954; Cutting v. Cutting, 6 Fed. 262; Henry v. Lilliwaup Falls Land Co. 83 Fed. 748; Hershberger v. Blewett, 55 Fed. 177; Traver v. Tribou, 8 Sawy. 511, 15 Fed. 31; Quinn v. Ladd, 37 Or. 261, 59 Pac. 459; Bullene v. Garrison, 1 Wash. Terr. 590; Maynard v. Hill, 2 Wash. Terr. 327; McSorley v. Hill, 2 Wash. 638, 27 Pac. 554; Re Andrew J. Allen, 7 Land Dec. 547; Veatch v. Park, 16 Land Dec. 490; Warren v. Northern P. R. Co. 22 Land Dec. 569; Stone v. Connell, 23 Land Dec. 166; McCune v. Essig, 118 Fed. 280, 199 U. S. 388, 50 L. ed. 240, 26 Sup. Ct. Rep. 78; United States v. Turner, 54 Fed. 228; Maynard v. Valentine, 2 Wash. Terr. 18, 3 Pac. 195.

Decisions of state courts are not binding in cases involving the validity of conveyances of the public lands of the United States, as the questions when title passed, and whether it passed, and to whom, depend on the laws of the United States.

McCune v. Essig, 199 U. S. 390, 50 L. ed. 241, 26 Sup. Ct. Rep. 78; Anderson v. Carkins, 135 U. S. 486, 34 L. ed. 274, 10 Sup. Ct. Rep. 905; Wilcox v. Jackson, 13 Pet. 517, 10 L. ed. 273; Proebstel v. Hogue, 8 Sawy. 592, 15 Fed. 583; Cunningham v. Krutz, 41 Wash. 190, 7 L.R.A. (N.S.) 967, 83 Pac. 109.

It is only necessary that residence and cultivation should be made upon some part

of the claim on which the settler proves up.

United States v. Tichenor, 8 Sawy. 142, 12 Fed. 426.

The territory, with full knowledge, permitted him to prove up and establish his legal title to his full claim, and must be held to have waived any right beyond a mere possessory right, subordinate to his high title.

Hall v. Russell, 101 U. S. 512, 25 L. ed. 833.

The territory of Washington, having no attributes of sovereignty, had no power to acquire land. Its organic act gave no power to acquire title to land. It was not authorized or directed by act of Congress to purchase or take title. The land was public land of the United States. A territory is a mere dependency of the United States. It is a creation by the government for temporary purposes only, having such limited powers as are delegated and granted under the terms of its organic act. The artificial body politic thus emanating from Federal power is completely subordinate to the general government, and subject to legislative authority of Congress as a necessary incident of immaturity, and possesses none of the attributes of sovereignty. The relation between the government and the territory may be said to be *sui generis*. The general government, *parens patriæ*, retains entire dominion and sovereignty over the territory, determines what its powers shall be, who shall execute them, and approves or disapproves of territorial legislative enactments.

American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 543, 7 L. ed. 255; Snow v. United States, 18 Wall. 321, 21 L. ed. 785; First Nat Bank v. Yankton County, 101 U. S. 133, 25 L. ed. 1047; Murphy v. Ramsey, 114 U. S. 44, 29 L. ed. 57, 5 Sup. Ct. Rep. 747; Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 47, 34 L. ed. 492, 10 Sup. Ct. Rep. 792; Endleman v. United States, 30 C. C. A. 186, 57 U. S. App. 1, 86 Fed. 459; Reynolds v. People, 1 Colo. 179; People v. Daniels, 6 Utah, 288, 5 L.R.A. 444, 22 Pac. 159; 16 Ops. Atty. Gen. 115; Territory v. Lec, 2 Mont. 124.

The specific language that the money is for the erection of the monuments or tablets applies it to that use, and rebuts the implication that it may be applied to any other purpose.

18 Ops. Atty. Gen. 147; 19 Ops. Atty. Gen. 34; 19 Ops. Atty. Gen. 79.

Not merely a territory, but even the United States, cannot purchase land without authorization by act of Congress.

United States v. Tichenor, 8 Sawy. 142, 12 Fed. 421.

In any event, the first deed, running to the territory alone, conveyed only a life estate. It was not a deed to the sovereign. The common law was in force in Washington territory at the date of the first deed.

Ordinance of 1787, art. 4; 6 Am. & Eng. Enc. Law, 2d ed. p. 280; *Wagner v. Law*, 3 Wash. 500, 15 L.R.A. 784, 28 Am. St. Rep. 56, 28 Pac. 1109, 29 Pac. 927; *Richards v. Redelsheimer*, 36 Wash. 328, 78 Pac. 934.

Under the common law, the conveyance must be to the grantee and his heirs in order to convey anything more than a life estate.

Williams, Real Prop. p. 123; *Dembitz*, Land Titles, 323; *Anderson v. Logan*, 105 N. C. 266, 11 S. E. 361; *Nicholson v. Caress*, 45 Ind. 483, 59 Ind. 39; *Rector v. Waugh*, 17 Mo. 13, 57 Am. Dec. 251.

The rule is the same where a corporation is a grantee.

Winsor v. Webb, Godb. 211; *Atty. Gen. v. Gover*, 9 Mod. 224; *Burgess v. Wheate*, 1 W. Bl. 123, 10 Eng. Rul. Cas. 614; *Colchester v. Brooke*, 7 Q. B. 339; *Folger v. Chase*, 18 Pick. 63; *Life Asso. of America v. Fassett*, 102 Ill. 315; *Moultrie v. Smiley*, 16 Ga. 298.

The affidavits of nonalienation required of the settlers under the pre-emption, homestead, and donation acts are substantially the same. They all prohibit the settler from acquiring title for another. Without statutory prohibition, such is the public policy of the United States, governing its public lands.

Smythe v. Henry, 41 Fed. 709; *Warren v. Van Brunt*, 19 Wall. 654, 22 L. ed. 222; *McCrillis v. Copp*, 31 Fla. 108, 12 So. 646; *Robinson v. Jones*, 31 Neb. 29, 47 N. W. 482; *Harden v. Cullins*, 8 Nev. 53; *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 99; *Horseman v. Horseman*, 43 Or. 83, 72 Pac. 699; *Moore v. Moore*, 130 Cal. 110, 80 Am. St. Rep. 78, 62 Pac. 294; *Fleischer v. Fleischer*, 14 N. D. 221, 91 N. W. 51; *Hafemann v. Gross*, 199 U. S. 345, 50 L. ed. 223, 26 Sup. Ct. Rep. 80; *Anderson v. Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; *Coe v. Low*, 36 Wash. 17, 77 Pac. 1077.

The plaintiffs, through Edmund Sylvester, hold the legal title to the land in controversy, because the legal title does not pass until the patent issues.

United States v. Detroit Timber & Lumber Co. 200 U. S. 338, 50 L. ed. 506, 26 Sup. Ct. Rep. 282; *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 593, 42 L. ed. 592, 18 Sup. Ct. Rep. 208; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 645, 26 L. ed. 875, 878; *Gibson v. Chouteau*, 13 Wall. 102, 20 L. ed. 537; *Shiver v. United States*, 159 U. S. 495, 40 L. ed. 232, 16 54 L. ed.

Sup. Ct. Rep. 54; *Hershberger v. Blewett*, 55 Fed. 170; *Bolton v. LaCamas Water Power Co.* 10 Wash. 249, 38 Pac. 1043.

In actions of ejectment the legal title must prevail. The patent of the United States passes that right. Whoever holds it must recover against those who have only unrealized hopes to obtain it, or claims which it is the exclusive province of equity to enforce.

Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 452, 27 L. ed. 228, 1 Sup. Ct. Rep. 389; *Johnson v. Christian*, 128 U. S. 382, 32 L. ed. 414, 9 Sup. Ct. Rep. 87; *Bagnell v. Broderick*, 13 Pet. 450, 10 L. ed. 242; *Carter v. Ruddy*, 166 U. S. 495, 41 L. ed. 1091, 17 Sup. Ct. Rep. 640; *Redfield v. Parks*, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83; *Doe ex dem. Winchester v. Aiken*, 31 Fed. 395; *Harden v. Cullins*, 8 Nev. 56; *Slaght v. Northern P. R. Co.* 39 Wash. 583, 81 Pac. 1062.

The state did not plead equitable estoppel against plaintiffs, and cannot be given relief in equity.

Quinby v. Conlan, 104 U. S. 421, 26 L. ed. 800; *Interstate Sav. & L. Asso. v. Knapp*, 20 Wash. 225, 55 Pac. 48, 931; *Gibson v. Chouteau*, 13 Wall. 103, 20 L. ed. 537; *Moreland v. Marion County*, Fed. Cas. No. 9,794.

The state is not a bona fide purchaser. At best it is but a donee under a gift. The essentials of valuable consideration and absence of notice of imperfect title are lacking.

California Redwood Co. v. Litle, 79 Fed. 856; *United States v. California & O. Land Co.* 148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. Rep. 458; *Shoufe v. Griffiths*, 4 Wash. 165, 31 Am. St. Rep. 910, 30 Pac. 93.

Deeds which operate under the statute of uses, such as bargain-and-sale deeds, require a valuable consideration to support them.

Jackson ex dem. Houseman v. Sebring, 16 Johns. 515, 8 Am. Dec. 357; *Wood v. Beach*, 7 Vt. 522; *Chiles v. Coleman*, 2 A. K. Marsh. 296; 1 Am. & Eng. Enc. Law, p. 683.

The breach of a condition subsequent forfeits the estate.

6 Am. & Eng. Enc. Law, 2d ed. p. 503.

The land reverts by operation of law, upon a breach, whether the deed recites that the title shall revert or not. Nor is it necessary that there shall be a clause providing for a right of re-entry.

6 Am. & Eng. Enc. Law, p. 501; *Horner v. Chicago, M. & St. P. R. Co.* 38 Wis. 173; *Glocke v. Glocke*, 113 Wis. 303, 57 L.R.A. 458, 89 N. W. 118.

A grantee who requests and accepts a deed with a condition subsequent is estopped to deny the existence of that condition, or

the validity of the title thereby conveyed, when sued for breach.

Cowell v. Colorado Springs Co. 100 U. S. 61, 25 L. ed. 550; *Fetter, Eq. Jur.* p. 45; *Eaton, Eq. Jur.* pp. 165-169; *Keate v. Phillips, L. R.* 18 Ch. Div. 550.

The questions when title passed, whether it passed, and to whom it passed, depend upon the laws of the United States.

McCune v. Essig, 199 U. S. 390, 50 L. ed. 241, 26 Sup. Ct. Rep. 78; *Anderson v. Carkins*, 135 U. S. 486, 34 L. ed. 274, 10 Sup. Ct. Rep. 905; *Wilcox v. Jackson*, 13 Pet. 498, 10 L. ed. 264.

Hence the jurisdiction of this court cannot be doubted.

Anderson v. Carkins, *supra*; *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; *Cincinnati, P. B. S. & P. Packet Co. v. Bay*, 200 U. S. 183, 50 L. ed. 432, 26 Sup. Ct. Rep. 208; *Rector v. City Deposit Bank Co.* 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289; *Rector v. Commercial Nat. Bank*, 200 U. S. 420, 50 L. ed. 533, 26 Sup. Ct. Rep. 294; *Nutt v. Knut*, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216.

Mr. William P. Bell argued the cause, and, with Messrs. W. V. Tanner, W. F. Magill, and George A. Lee, filed a brief for defendant in error:

The writ of error should be dismissed.

Romie v. Casanova, 91 U. S. 379, 23 L. ed. 374; *California ex rel. Hastings v. Jackson*, 112 U. S. 233, 28 L. ed. 712, 5 Sup. Ct. Rep. 113; *McStay v. Friedman*, 92 U. S. 723, 23 L. ed. 767; *Maney v. Porter*, 4 How. 55, 11 L. ed. 873; *Wynn v. Morris*, 20 How. 3, 15 L. ed. 800; *Millingar v. Hartuppee*, 6 Wall. 259, 18 L. ed. 829; *Ryan v. Thomas*, 4 Wall. 603, 18 L. ed. 460; *McManus v. O'Sullivan*, 91 U. S. 578, 23 L. ed. 390; *Moore v. Mississippi*, 21 Wall. 636, 22 L. ed. 653; *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429; *Williams v. Norris*, 12 Wheat. 117, 6 L. ed. 571; *Hammond v. Johnston*, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Knox v. Exchange Bank*, 12 Wall. 379, 20 L. ed. 414; *Mississippi & M. R. Co. v. Rock*, 4 Wall. 177, 18 L. ed. 381; *Onondaga Nation v. Thacher*, 189 U. S. 306, 47 L. ed. 826, 23 Sup. Ct. Rep. 636.

Only the state can proceed to declare the deed or conveyance invalid.

Abrams v. State, 45 Wash. 327, 9 L.R.A.

(N.S.) 186, 122 Am. St. Rep. 914, 88 Pac. 327, 13 A. & E. Ann. Cas. 527; *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 644, 58 N. W. 522; *Barrow v. Nashville & C. Turnp. Co.* 9 Humph. 304; *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192, 8 N. W. 389; *Russell v. Texas & P. R. Co.* 68 Tex. 646, 5 S. W. 686; *Tarpey v. Deseret Salt Co.* 5 Utah, 494, 17 Pac. 631; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188.

A bargain-and-sale deed conveys an after-acquired title, and the grantor in such a deed is estopped from claiming to the contrary.

Apgar v. Christopher, 33 Fed. 201; *O'Brien v. Smith*, 16 La. 94; 1 Devlin, Deeds, § 23; *Nixon v. Careo*, 28 Miss. 425; *Bush v. Cooper*, 26 Miss. 612, 59 Am. Rep. 270; *Willson v. Betts*, 4 Denio, 201; *Griffith v. Huston*, 7 J. J. Marsh. 385; *French v. Spencer*, 21 How. 228, 16 L. ed. 97; *Hannon v. Christopher*, 34 N. J. Eq. 459; *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. ed. 703; *Pendill v. Marquette County Agri. Soc.* 95 Mich. 491, 55 N. W. 384; *Lindsay v. Freeman*, 83 Tex. 264, 18 S. W. 727; *Root v. Crock*, 7 Pa. 378; *Irvine v. Irvine*, 9 Wall. 617, 19 L. ed. 800; *Brown v. McCormick*, 6 Watts, 60, 31 Am. Dec. 450; *Clark v. Martin*, 49 Pa. 299; *Smith v. Williams*, 44 Mich. 240, 6 N. W. 662.

Mr. Justice Holmes delivered the opinion of the court:

This is an action brought by the heirs of one Edmund Sylvester to recover a parcel of land patented to him by the United States, under the Oregon donation act of September 27, 1850, chap. 76, 9 Stat. at L. 496, and the amendments to the same. The state took up the defense and alleged that Sylvester *settled on the land on February 1, 1850, resided there continuously for more than four years, and then with his wife, the plaintiff Clara Sylvester, by deed of bargain and sale without covenants, conveyed the land to the territory of Washington on January 18, 1855. This conveyance was made in accordance with a territorial act of January 9, 1855, to provide for the seat of government. The state alleged that it and the territory, its predecessor, have been in open and adverse possession ever since, and relied upon the statute of limitations as well as upon the deed. To this defense there is a very verbose reply to the following effect:

The grantor offered the land to the territory as a gift so long as it should be used as a site for the seat of government and the territorial capitol building erected and maintained thereon. The offer was accepted and an act was passed establishing

the seat of government there, provided the owners or claimants gave a release of the land. January 9, 1855. Thereupon Sylvester made the above-mentioned deed, which the plaintiffs prefer to call a release, or a quitclaim, as it was called in another territorial act of a few days later, January 28, 1855, accepting the deed. At the time of Sylvester's conveyance he was a claimant, but had not complied with the requirements of the donation act in other respects than the occupation for more than four years. On this ground it is alleged that his deed was void. On July 1, 1858, he made final proof; there was no adverse claim, and on May 3, 1860, a patent was issued to him. He died in 1887, and after the state of Washington had been admitted to the Union, at its request, the plaintiffs executed another deed of the premises; but this deed purported to be made "upon the express condition that the tract shall be and remain the site of the capitol of Washington, and that, in the event of the location of the capitol elsewhere than upon his tract, these presents shall be null and void." As a further ground of recovery, it is alleged that the state has ceased to use the tract for the seat of government. Finally, it is alleged that, under the act of Congress of March 2, 1853, chap. 90, 10 Stat. at L. 172, 85] *organizing Washington territory, the territory was not authorized or permitted to acquire title to the land in suit. It is added that the statute of limitations did not run, because the plaintiffs could not sue the territory or state until authorized to do so by the act of 1895, chap. 95, p. 188, for the first time.

There was a trial and judgment for the state, which judgment was affirmed by the state supreme court. 46 Wash. 585, 91 Pac. 15. The facts found were substantially those set forth in the pleadings, except that it was held to be proved that Sylvester filed his notification of settlement with the surveyor general of Oregon in February, 1854, before the date of his deed to the territory, although, as has been shown, his final proof and his receipt of a patent were after that date. The plaintiffs specially set up the invalidity of his deed under the Oregon donation act, and the incapacity of the territory to accept it under the act by which it was organized, and claimed title on these grounds. We may assume that the present writ of error is within the jurisdiction of this court. *Anderson v. Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; *Nutt v. Knut*, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216. But, on the merits, we are of opinion that the plaintiffs have no case.

We see no ground whatever for the doubt

suggested as to the power of the territory to accept the deed. If that power was not incident to the organization, it was implied by § 13 of the organic act, as Congress granted \$5,000 for "the erection of suitable buildings at the seat of government." For that purpose it was necessary that the territory should control the land, and especially, in a region where land was so cheap as it was in those days, the implied authority cannot be confined to the taking of a lease.

On the other point, it was said that the settler acquired no rights until he not only had cultivated the land for four years, but had otherwise conformed to the provisions of the Oregon donation act. § 4. Whereas, at least, he had not made final proof. *Oregon & C. R. Co. v. United States*, 190 U. S. 186, 195, 47 L. ed. 1012, 1015, 23 Sup. Ct. Rep. 673. But the question in this case is not whether Sylvester had acquired rights that the government could not *impair, [86 or in fact preserve as against another claimant, as in *East Central Eureka Min. Co. v. Central Eureka Min. Co.* 204 U. S. 266, 270, 271, 51 L. ed. 476, 481, 27 Sup. Ct. Rep. 258, but it is between his representatives and his grantee. That Sylvester had some rights cannot be disputed, and is recognized by § 8 of the act ("all the rights of the deceased"). He was in possession and had taken lawful steps toward getting the title. Those rights he could convey unless prohibited by law. But, by the amending act of July 17, 1854, chap. 84, § 2, 10 Stat. at L. 305, the proviso in § 4 of the donation act, making contracts for the sale of the lands before patent void, was repealed, "Provided, that no sale shall be deemed valid unless the vendor shall have resided four years upon the land." As this proviso attached no condition except residence for four years, it would be more than a harsh construction to hold that the validity of the deed still depended upon the fulfilment of the other requirements for a perfect right. We are of opinion that the deed was valid; and thus the question is narrowed to the effect of the conveyance upon the title subsequently given to Sylvester by the patent of the United States. See *Brazee v. Schofield*, 124 U. S. 495, 31 L. ed. 484, 8 Sup. Ct. Rep. 604.

But the questions that come before this court are confined to the rights of the parties under the statutes of the United States; and when it is decided that Sylvester's deed was valid under these statutes, its effect upon his later acts and acquisitions would seem to be a matter of local law. If the state court assumed, as it seems to have assumed, that Sylvester's subsequent making of final proof was to be taken to have been done on behalf of his grantee, and thus to have perfected its equitable right to the

land, it is enough to say that we see no ground for disturbing the assumption. See *Nixon v. Careo*, 28 Miss. 414. If the state supreme court concurred with the trial court in holding an equitable title a sufficient answer to the plaintiff's claim, that is a matter with which we have nothing to do. Whether the decision went on this ground or assumed that the legal title also inured to the benefit of the state does not appear. If 87] the latter ground were adopted, we *presume that it could not be because of the form of the deed, in the absence of words expressing or implying warranty, but would be peculiar to this class of cases. We suppose that, in the absence of a statute specially dealing with the matter, either the title would be taken to relate back, or it would be held that a permitted conveyance, before the government has given a legal title to anyone, made by a person in process of acquiring a title in the statutory method, would be taken to have contemplated that the grantee should have the benefit of what was done afterwards to perfect it. Those propositions we are not called upon to discuss. See *Landes v. Brant*, 10 How. 348, 13 L. ed. 449; *United States v. Clark*, 200 U. S. 601, 607, 50 L. ed. 613, 616, 26 Sup. Ct. Rep. 340; Rev. Stat. § 2448, U. S. Comp. Stat. 1901, p. 1512.

Other matters were argued, as, for instance, whether parol evidence should have been received to show that the first deed was intended to be conditional, although absolute in form; the effect of the second deed and the condition that it expressed, the statute of limitations, and so forth. But the only questions open, on the most liberal interpretation, are those that we have answered, and it follows without more that the judgment must be affirmed.

Affirmed.

EL PASO & NORTHEASTERN RAILWAY
COMPANY, Plff. in Err.,
v.

ENEDINA GUTIERREZ, Administratrix of
the Estate of Antonio Gutierrez, De-
ceased.

(See S. C. Reporter's ed. 87-98.)

Error to state court—decision of Federal question—full faith and credit.

1. A judgment of the Texas supreme court, which, reversing the judgment of the court of civil appeals of that state, affirmed the judgment of the trial court entered on a verdict in favor of the plaintiff in an action against a railway company for the negligent killing of an employee in the territory of New Mexico, is reviewable in the Federal Supreme Court as necessarily

deciding against a Federal right specially set up, within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, where the trial court sustained a demurrer to a plea setting up a defense under a statute of the territory, which, if applicable, was a complete bar to the action, because of noncompliance with its requirements, although the decision of the state supreme court proceeded upon the theory that the case was controlled by the Federal employers' liability act, which it held to be valid.

[For other cases, see Appeal and Error, 1319-1528, in Digest Sup. Ct. 1908.]

Error to state court—Federal question—full faith and credit.

2. A claim by a railway company in a state court of immunity from liability for the negligent killing of an employee in the territory of New Mexico because of noncompliance with the requirements of a statute of that territory governing actions for personal injuries received therein presents a Federal question within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, which, when adversely adjudicated, confers jurisdiction on the Federal Supreme Court of a writ of error to the state court.

[For other cases, see Appeal and Error, 1968-2003, in Digest Sup. Ct. 1908.]

NOTE.—On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On review of decisions of state courts presenting the question of full faith and credit—see note to *Allen v. Alleghany Co.* 49 L. ed. U. S. 551.

On the power of Congress to regulate commerce—see notes to *State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co.* 6 L.R.A. 579; *Bullard v. Northern P. R. Co.* 11 L.R.A. 246; *Re Wilson*, 12 L.R.A. 624; *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Brown v. Maryland*, 6 L. ed. U. S. 678; *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; and *Cleveland, C. C. & St. L. R. Co. v. Baekus*, 38 L. ed. U. S. 1041.

On the power of Congress over the territories—see note to *First Nat Bank v. Yankton*, 25 L. ed. U. S. 1046.

On the validity of statutes abrogating fellow-servant rule—see note to *Bradford Constr. Co. v. Heflin*, 12 L.R.A. (N.S.) 1040.

On statutes part valid and part invalid—see notes to *Titusville Iron Works v. Keystone Oil Co.* 1 L.R.A. 363; and *Fayette County v. People's & D. Bank*, 10 L.R.A. 196.

Conflict of laws — torts — full faith and credit — territorial statute.

3. The full faith and credit demanded by U. S. Rev. Stat. § 906, U. S. Comp. Stat. 1901, p. 677, is not given to N. M. act of March 11, 1903 (Laws 1903, p. 51, chap. 33), governing actions for personal injuries received in that territory, where a recovery is permitted in a state court on such a cause of action, with no showing of a compliance with the preliminaries of notice and demand prescribed by the territorial statute.

[Conflict of laws as to torts, see Conflict of Laws, I. c, in Digest Sup. Ct. 1908.]

Commerce — exclusiveness of Federal power — superseding territorial statute.

4. The Federal employers' liability act of June 11, 1906 (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891), by undertaking to regulate commerce in the District of Columbia and the territories of the United States necessarily superseded any otherwise applicable provisions of the New Mexico act of March 11, 1903, governing suits for death and personal injuries.

[For other cases, see Commerce, I. c, in Digest Sup. Ct. 1908.]

Territories — power of Congress — regulating employers' liability.

5. Congress had the power to enact so much of the Federal employers' liability act of June 11, 1906, as provides that every common carrier engaged in trade or commerce in any territory of the United States shall be liable for the death or injury of any of its employees which may result from the negligence of any of its officers, agents, or employees.

[For other cases, see Territories, II., in Digest Sup. Ct. 1908.]

Statutes — invalid in part — Federal employers' liability act.

6. The invalidity, so far as interstate commerce is concerned, of the provisions of the Federal employers' liability act of June 11, 1906, does not invalidate such of its provisions as attempt to regulate commerce within the District of Columbia and the territories.

[For other cases, see Statutes, 61-88, in Digest Sup. Ct. 1908.]

[No. 505.]

Submitted October 11, 1909. Decided November 15, 1909.

IN ERROR to the Supreme Court of the State of Texas to review a judgment which, reversing a judgment of the Court of Civil Appeals of that state, affirmed a judgment of the District Court of El Paso County in favor of plaintiff in an action against a railway company for the negligent killing of an employee in the territory of New Mexico. Affirmed.

See same case below, 102 Tex. 378, 117 S. W. 426.

The facts are stated in the opinion.

Mr. W. C. Keegin submitted the cause
54 L. ed.

for plaintiff in error. Messrs W. A. Hawkins and John Franklin were on the brief:

Plaintiff in error plainly claimed a right, privilege, and immunity under the Constitution and statutes of the United States, and the decision of the courts of Texas is against such claim.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 293, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153.

In this case, from the beginning, the plaintiff in error has insisted that the employers' liability act was void, and that the liability or nonliability of the plaintiff in error arose under and must be determined by the laws of the territory of New Mexico, where the accident occurred. This position of the plaintiff in error was made perfectly plain by its pleadings originally filed in this case, and it was sustained by the appellate court to which the case was appealed, and never denied until after the judgment of the supreme court of Texas, and after such denial plaintiff in error's contention was again asserted in its petition for a writ of error to this court, and the assignments of error which accompanied the same. It would therefore seem clear that this court has jurisdiction.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Statutes that are unconstitutional in part will be upheld only so far as they are not in conflict with the Constitution, when the valid and invalid parts are severable, so that each may be read alone.

Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; Sprague v. Thompson, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988.

Mr. F. G. Morris submitted the cause for defendant in error:

The Federal question relied upon for jurisdiction was not passed upon by the supreme court of Texas, and was not material to a decision of the case.

Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Beaupre v. Noyes, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350.

No Federal question arises on denial of full faith and credit to a statute of a territory which was not authenticated as required by the act of Congress.

Caperton v. Ballard, 14 Wall. 238, 20 L. ed. 885.

No Federal right was specially set up and claimed.

Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Hoyt v. Shelden (Hoyt v. Thompson) 1 Black, 518, 17 L. ed. 65; Michigan Sugar Co. v. Michigan (Michigan Sugar Co. v. Dix) 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581.

It does not appear that the New Mexico courts give other effect to the territorial statute over the act of Congress in question than is given by the courts of Texas in this case.

Lloyd v. Matthews, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70.

The decision that the act of Congress, and not the territorial statute, was the law of New Mexico which was applicable to the case, does not deny full faith and credit to the territorial statute.

Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397; United States v. Lynch, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114; Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503; Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; Smithsonian Institution v. St. John, 214 U. S. 19, 53 L. ed. 892, 29 Sup. Ct. Rep. 601.

The clauses of the judiciary act providing for writs of error to state courts when the plaintiff in error claims a right under the Constitution of the United States confer no additional jurisdiction to support a writ of error to impeach the validity of an act of Congress in cases wherein the validity of an act of Congress is drawn in question, to that conferred by the clause expressly applicable to that subject, and which limits the writ of error to cases wherein the decision of the state court is against its validity.

Missouri ex rel. Carey v. Andriano, 138 U. S. 497, 34 L. ed. 1013, 11 Sup. Ct. Rep. 385; Roosevelt v. Meyer, 1 Wall. 512, 17 L. ed. 500.

No Federal right exists under a territorial statute in a state court which will support a writ of error from this court other than that provided for by the United States statute requiring it to be given full faith and credit.

Atchison, T. & S. F. R. Co. v. Sowers, *supra*.

The act of Congress, in its provisions relating to the District of Columbia and the territories, is such a law as Congress had the power to enact, and such provisions are clearly severable from the provisions relating to interstate and foreign commerce, and there is no sufficient reason for believing that Congress would not have passed

alone the provisions relating to the District of Columbia and the territories if it had known that the other provisions were so invalid as to justify a decision that these provisions fall with the unconstitutional provisions.

Hyde v. Southern R. Co. 31 App. D. C. 466.

The severableness of the provisions of a statute that may preserve the validity of one notwithstanding the repugnance of the other to the Constitution is not dependent upon the fact that they may be found in separate sections, though this would ordinarily render the task of separation easier. It is sufficient if the separation can be accomplished by exercising a clause of the same section, and leaving the remainder complete and unchanged in meaning without reading into it another word.

Penniman's Case, 103 U. S. 714, 717, 26 L. ed. 602, 604; Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 617, 47 L. ed. 328, 333, 23 Sup. Ct. Rep. 206; Florida C. R. Co. v. Schutte, 103 U. S. 118, 142, 26 L. ed. 327, 335.

Mr. Justice Day delivered the opinion of the court:

In this case an action was commenced by Enequina Gutierrez, as administratrix of the estate of Antonio Gutierrez, in the district court of El Paso county, Texas, against the El Paso & Northeastern Railway Company, to recover damages because of the death of the plaintiff's intestate by wrongful act while engaged in the service of the railway company, a common carrier, in the territory of New Mexico, on June 22, 1906. By way of special plea and answer the railway company set up a statute of the territory of New Mexico, wherein it is provided that no actions for injuries inflicting death, caused by any person or corporation in the territory, shall be maintained unless the person claiming damages shall, within ninety days after the infliction of the injury complained of, and thirty days before commencing suit, serve upon the defendant an affidavit covering certain particulars as to the injuries complained of, and containing the names and addresses of all witnesses of the happening of the alleged acts of negligence. Suit must be brought within one year, and in the district court of the territory in and for the county in which the injuries were received, or where the injured person resides; or, in a claim against a corporation, in the county of the territory where the corporation has its principal place of business. This act is set out in full in the marginal note to the case of Atchison, T. & S. F. R. Co. v. Sowers. 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397.

The special answer sets forth that the accident happened in the territory of New Mexico, while the statute was in full force, and that its terms and provisions were not complied with.

91] *To the special answer the plaintiff below interposed a demurrer, and further, by way of supplemental petition, set forth that the injuries complained of happened after the passage of the so-called employers' liability act, June 11, 1906. 34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891. This act, the plaintiff alleged, controlled the liability of the defendant in the case. The district court sustained the demurrer of the plaintiff to that part of the defendant's answer which set up the territorial act of New Mexico, to which ruling the railway company duly excepted. The case then went to trial to a jury upon issues made concerning the liability of the railway company under the Federal employers' liability act of June 11, 1906. 34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891. The result was a verdict and judgment in favor of the plaintiff against the railway company. The case was then taken to the court of civil appeals of Texas, and that court held that it would not be governed by the territorial statutes, and that the employers' liability act of June 11, 1906, was unconstitutional, upon the authority of Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, and certain cases in the Texas court of appeals. Upon rehearing, a majority of the court held that the provisions of the New Mexico act as to the presentation of notice of claim for damages was a condition precedent to a cause of action, and that the trial court therefore erred in sustaining plaintiff's exception to that part of the defendant's answer which pleaded the territorial act and plaintiff's failure to present her claim in accordance with it. 111 S. W. 159. Thereupon the plaintiff took the case to the supreme court of Texas by writ of error, and that court held that the case was controlled by the act of Congress known as the employers' liability act (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891), and that the same was constitutional, and therefore held that the judgment of the court of civil appeals should be reversed, and the original judgment of the district court affirmed. 117 S. W. 426. From the judgment of the supreme court of the state a writ of error was prosecuted to this court.

Among other errors assigned is the failure of the supreme court of Texas to give effect to the defense setting up the statute of New Mexico as a full defense to the

action. While the supreme court of Texas in its opinion conceded that, if the territorial act of New Mexico alone controlled the action, the plaintiff must fail for non-compliance with its requirements, it reversed the judgment of the court of civil appeals, and affirmed the judgment of the district court, because, in its opinion, the liability was controlled by the employers' liability act. The effect of this judgment of the supreme court of Texas was to deny the defense set up under the territorial act as a complete bar to the action. The district court sustained the demurrer to the plea setting up this act, and thereby denied the rights specially set up under that statute, the supreme court of Texas overruled the court of civil appeals and affirmed the judgment of the district court. It thereby necessarily adjudicated the defense claimed under the territorial act against the railway company. If this defense sets up a Federal right within the meaning of § 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575), then we have jurisdiction of the case. *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 44, 52 L. ed. 379, 381, 28 Sup. Ct. Rep. 182.

That the claim of immunity under the territorial act, because of the failure of the plaintiff to comply with its provisions as to the affidavit within ninety days, etc., presented a Federal question within the meaning of § 709 of the Revised Statutes, was decided in *Atchison, T. & S. F. R. Co. v. Sowers*, supra, in which case it was held that, where suit was brought in a state court, a claim of defense under the provisions of the New Mexico statute was a claim of Federal right, which, when adversely adjudicated, gave jurisdiction to this court to review the judgment.

Coming to consider the merits: This court, in *Atchison, T. & S. F. R. Co. v. Sowers*, supra, held that, in order to give due faith and credit to the territorial statute, under § 906 of the Revised Statutes of the United States (U. S. Comp. Stat. [93 1901, p. 677]), the plaintiff suing in a state must show compliance with the preliminaries of notice and demand as required by the territorial law. As the answer in the present case set up noncompliance with these requisites, and the state court sustained a demurrer thereto, the judgment must be reversed, unless the state court was right in denying the benefit of the territorial act thus set up, because the Federal employers' liability act superseded the New Mexico law, and is constitutional so far as the territories are concerned.

In view of the plenary power of Congress under the Constitution over the territories of the United States, subject only to cer-

tain limitations and prohibitions not necessary to notice now, there can be no doubt that an act of Congress undertaking to regulate commerce in the District of Columbia and the territories of the United States would necessarily supersede the territorial law regulating the same subject.

Is the Federal employers' liability act of June 11, 1906, unconstitutional so far as it relates to common carriers engaged in trade or commerce in the territories of the United States? It has been suggested that this question is foreclosed by a decision of this court in the Employers' Liability Cases, *supra*. In that case this court held that, conceding the power of Congress to regulate the relations of employer and employee engaged in interstate commerce, the act of June 11, 1906 (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891), was unconstitutional in this: that, in its provisions regulating interstate commerce, Congress exceeded its constitutional authority in undertaking to make employers responsible not only to employees when engaged in interstate commerce, but to any of its employees, whether engaged in interstate commerce or in commerce wholly within a state. That the unconstitutionality of the act, so far as it relates to the District of Columbia and the territories, was not determined, is evident from a consideration of the opinion of the court in the case. In answering the suggestion that the words "any employee" in the statute should be so read as to mean only employees engaged [94] *in interstate commerce, Mr. Justice White, delivering the opinion of the court, said:

"But this would require us to write into the statute words of limitation and restriction not found in it. But, if we could bring ourselves to modify the statute by writing in the words suggested, the result would be to restrict the operation of the act as to the District of Columbia and the territories. We say this because, immediately preceding the provision of the act concerning carriers engaged in commerce between the states and territories is a clause making it applicable to 'every common carrier engaged in trade or commerce in the District of Columbia or in any territory of the United States.' It follows, therefore, that common carriers in such territories, even although not engaged in interstate commerce, are, by the act, made liable to 'any' of their employees, as therein defined. The legislative power of Congress over the District of Columbia and the territories being plenary, and not depending upon the interstate commerce clause, it results that the provision as to the District of Columbia and the territories, if standing alone, could not be ques-

tioned. Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested, that is, by causing the act to read 'any employee when engaged in interstate commerce,' we would restrict the act as to the District of Columbia and the territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save, and to save in order to destroy." 207 U. S. 500.

A perusal of this portion of the opinion makes it evident that it was not intended to hold the act unconstitutional in so far as it related to the District of Columbia and the territories, for it is there suggested that to interpolate in the act the qualifying words contended for would destroy the act in respect to the District of Columbia and the territories by *limiting its opera- [95] tion in a field where Congress has plenary power, and did not depend for its authority upon the interstate commerce clause of the Constitution. The act in question is set forth in full in a note to Employers' Liability Cases (*Howard v. Illinois C. R. Co.*) 207 U. S. 490, 52 L. ed. 305, 28 Sup. Ct. Rep. 141. We are concerned in the present case with its first section only. This section reads:

"That every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road-bed, ways, or works."

A perusal of the section makes it evident that Congress is here dealing, first, with trade or commerce in the District of Columbia and the territories; and, second, with interstate commerce, commerce with foreign nations, and between the territories and the states. As we have already indicated, its power to deal with trade or commerce in the District of Columbia and the territories does not depend upon the authority of the

interstate commerce clause of the Constitution. Upon the other hand, the regulation sought to be enacted as to commerce between the states and with foreign nations depends upon the authority of Congress granted to it by the Constitution to regulate commerce among the states and with foreign nations. As to the latter class, Congress was dealing with a liability ordinarily governed by state statutes, or controlled by the common law as administered [96] in the *several states. The Federal power of regulation within the states is limited to the right of Congress to control transactions of interstate commerce; it has no authority to regulate commerce wholly of a domestic character. It was because Congress had exceeded its authority in attempting to regulate the second class of commerce named in the statute that this court was constrained to hold the act unconstitutional. The act undertook to fix the liability as to "any employee," whether engaged in interstate commerce or not; and, in the terms of the act, had so interwoven and blended the regulation of liability with the authority of Congress with that which was not that the whole act was held invalid in this respect.

It is hardly necessary to repeat what this court has often affirmed, that an act of Congress is not to be declared invalid except for reasons so clear and satisfactory as to leave no doubt of its unconstitutionality. Furthermore, it is the duty of the court, where it can do so without doing violence to the terms of an act, to construe it so as to maintain its constitutionality; and, whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid. It was held in the Employers' Liability Cases that, in order to sustain the act, it would be necessary to write into its provisions words which it did not contain.

Coming to consider the statute in the light of the accepted rules of construction, we are of opinion that the provisions with reference to interstate commerce, which were declared unconstitutional for the reasons stated, are entirely separable from, and in nowise dependent upon, the provisions of the act regulating commerce within the District of Columbia and the territories. Certainly these provisions could stand in separate acts, and the right to regulate one class of liability in nowise depends upon the other. Congress might have regulated

the subject by laws applying alone to the territories, *and left to the various [97] states the regulation of the subject-matter within their borders, as had been the practice for many years.

It remains to inquire whether it is plain that Congress would have enacted the legislation had the act been limited to the regulation of the liability to employees engaged in commerce within the District of Columbia and the territories. If we are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall. *Illinois C. R. Co. v. McKendree*, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; *Employers' Liability Cases*, supra.

When we consider the purpose of Congress to regulate the liability of employer to employee, and its evident intention to change certain rules of the common law which theretofore prevailed as to the responsibility for negligence in the conduct of the business of transportation, we think that it is apparent that, had Congress not undertaken to deal with this relation in the states where it had been regulated by local law, it would have dealt with the subject and enacted the curative provisions of the law applicable to the District of Columbia and the territories, over which its plenary power gave it the undoubted right to pass a controlling law, and to make uniform regulations governing the subject.

Bearing in mind the reluctance with which this court interferes with the action of a co-ordinate branch of the government, and its duty, no less than its disposition, to sustain the enactments of the national legislature, except in clear cases of invalidity, we reach the conclusion that, in the aspect of the act now under consideration, the Congress proceeded within its constitutional power, and with the intention to regulate the matter in the District and territories, irrespective of the interstate commerce feature of the act.

While not binding as authority in this court, we may note that the act, so far as it relates to the District of Columbia, *was sustained in a well-considered [98] opinion by the court of appeals of the District of Columbia. *Hyde v. Southern R. Co.* 31 App. D. C. 466.

The judgment of the Supreme Court of Texas is affirmed.

INTERSTATE COMMERCE COMMISSION,
Appt.,
v.

ALPHEUS B. STICKNEY and Charles H. F. Smith, Receivers of the Chicago Great Western Railway Company et al.

(See S. C. Reporter's ed. 98-110.)

Carriers — terminal charges — reasonableness.

1. A terminal charge for delivering car loads of live stock to the Union Stock Yards in Chicago, a point beyond the carrier's line, if in itself just and reasonable, and separately stated in the tariff schedules, as required by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892), § 2, cannot be condemned or the carrier required to reduce it, on the ground that it, taken with prior charges of transportation over the lines of the carrier, or of connecting carriers, makes the total charge to the shipper unreasonable.

[For other cases, see Carriers, III. f, in Digest Sup. Ct. 1908.]

Carriers — publishing tariffs — separating terminal charges.

2. Carriers separately state the terminal charges for delivering live stock beyond their own lines to the Union Stock Yards in Chicago, as required by the act of June 29, 1906, § 2, where their tariff schedules inform shippers that the live stock rates to Chicago apply only to deliveries at the carriers' own yards and that, for transportation to the Union Stock Yards, a stated additional charge will be made, the amount of such charge being entered, not upon the general freight charges of the companies, but as a separate item.

[For other cases, see Carriers, III. g, in Digest Sup. Ct. 1908.]

[No. 251.]

Argued October 12, 1909. Decided November 29, 1909.

APPEAL from the Circuit Court of the United States for the District of Minnesota to review a decree enjoining the enforcement of an order of the Interstate Commerce Commission, requiring certain railroads to reduce to \$1 per car their terminal charges for transporting live stock beyond their lines to the Union Stock Yards in Chicago. Affirmed.

See same case below, 164 Fed. 638.

Statement by Mr. Justice Brewer:

99] *On December 10, 1907, the Interstate Commerce Commission entered an order requiring certain railroads running into Chicago to cease and desist from making a terminal charge of \$2 per car for the transportation of live stock beyond the tracks of said railroads in Chicago, and for delivery thereof at the

Union Stock Yards, and requiring them to establish and put in force for said services a charge of \$1 per car. Compliance with the order was postponed by the Commission until May 15, 1908. On May 7, 1908, the appellees filed this bill in the circuit court of the United States for the district of Minnesota, to restrain the enforcement of said order, averring that the actual cost to them for such terminal services exceeded in each instance the sum of \$2 per car, and that the companies were making delivery at a charge less than such actual cost; that therefore the reduction of the charge by the commission to \$1 per car was unreasonable, oppressive, and unlawful. A hearing was had before three judges of the eighth circuit, and a restraining order entered as prayed for by the railroad companies, from which order an appeal was taken to this court.

Assistant to the Attorney General Ellis and Mr. S. H. Cowan argued the cause and filed a brief for appellant:

The Commission did not commit an error of law in considering the terminal charge and the through rate together.

Interstate Commerce Commission v. Chicago, B. & Q. R. Co. 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. Rep. 824.

The railroads have created the Union Stock Yards. They have made it their depot. They have made it the only available place for delivering live stock in Chicago. They have made it the greatest live stock market in America. They have used it as such for thirty years. They cannot now, by pretending to create a terminal service, and by pretending to construct other live stock depots, charge an extra fee or an additional rate for delivering at the Union Stock Yards.

Covington Stock Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 469.

The cost of a particular service is not a proper test of the reasonableness of the charge for it when the service performed is part of a larger transaction.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 267, 46 L. ed. 1151, 1157, 22 Sup. Ct. Rep. 900; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 596, 41 L. ed. 566, 17 Sup. Ct. Rep. 198; Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. Rep. 163; Railroad Commission v. Weld, 96 Tex. 408, 73 S. W. 529.

The claim of the railroads, that the Commission's order requires them to perform the alleged terminal service for less than cost, and that the cost of such service is more than \$2, requires them to contend for too much. The railroads themselves make the \$2 charge, and if this is below the cost, it only evidences the fact that the railroads look to the through rate for compensation for the terminal service. They cannot be presumed to perform any service gratuitously.

Interstate Commerce Commission v. Chicago, B. & Q. R. Co. supra; *Pierce v. Milwaukee & St. P. R. Co.* 23 Wis. 387.

Every intendment of law and fact should avail to support the Commission's order.

Bates & G. Co. v. Payne, 194 U. S. 106, 48 L. ed. 894, 24 Sup. Ct. Rep. 595; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. ed. 800.

Mr. William D. McHugh argued the cause and filed a brief for appellees:

Railroad companies have a legal right to divide their rates, and thus make a definite charge for transportation from the points of shipment to Chicago, and a separate terminal charge for delivery to the stock yards, a point beyond the lines of the respective carriers.

Interstate Commerce Commission v. Chicago, B. & Q. R. Co. 186 U. S. 320, 335, 46 L. ed. 1182, 1190; 22 Sup. Ct. Rep. 824.

The separate terminal charge of \$2 per car, made by the railroad companies for the delivery by them of live stock to the stock yards, a point beyond the lines of their respective railroads, is not excessive, since it is less than the actual cost to the railroads for the performance of such service.

Interstate Commerce Commission v. Chicago, B. & Q. R. Co. 186 U. S. 326, 46 L. ed. 1187, 22 Sup. Ct. Rep. 824.

A railroad company is entitled to reasonable compensation for a separate service for which a separate charge is lawfully made.

Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 297, 53 L. ed. 1004, 29 Sup. Ct. Rep. 678.

Mr. Walker D. Hines also argued the cause and filed a brief for appellees.

Mr. Justice Brewer delivered the opinion of the court:

The controversy as to this terminal charge has been of long duration. A history of it antecedent to the present litigation is to be found in *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.* 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. Rep. 824.

It is well to understand the precise question which is presented in this case. That question is the validity of the terminal charge of \$2 per car. The report of the

Commission opens with this statement: "The subject of this complaint is the so-called terminal charge of \$2 per car imposed by the defendants for the delivery of car loads of live stock at the Union Stock Yards in Chicago," and its order was in terms that the railroad companies be—"required to cease and desist on or before the 1st day of February, 1908, from exacting for the delivery of live stock at the Union Stock Yards, in Chicago, Illinois, with respect to shipments of live stock transported by them from points outside of that state, their present terminal charge of \$2 per car."

"It is further ordered that said defendants be, and they are hereby, notified and required to establish and put in force on or before the 1st day of February, 1908, and apply thereafter during a period of not less than two years, for the delivery of live stock at the Union Stock Yards, in said Chicago, with respect to shipments of live stock transported by them from points outside the state of Illinois, a terminal charge which shall not exceed \$1 per car, if any terminal charge is maintained by them."

The 2d section of the act known as the "Hepburn act" (an act to amend the interstate commerce act, passed on June 29, 1906, 34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892) requires carriers to file with the Commission, and print and keep open to inspection, *schedules [105 showing, among other things, "separately all terminal charges . . . and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates." By § 4, the Commission is authorized and required, upon a complaint, to inquire and determine what would be a just and reasonable rate or rates, charge or charges. This, of course, includes all charges, and the carrier is entitled to have a finding that any particular charge is unreasonable and unjust before it is required to change such charge. For services that it may render or procure to be rendered off its own line, or outside the mere matter of transportation over its line, it may charge and receive compensation. *Southern R. Co. v. St. Louis Hay & Grain Co.* 214 U. S. 297, 53 L. ed. 1004, 29 Sup. Ct. Rep. 678. If the terminal charge be, in and of itself, just and reasonable, it cannot be condemned or the carrier required to change it on the ground that it, taken with prior charges of transportation over the lines of the carrier or of connecting carriers, makes the total charge to the shipper unreasonable. That which must be corrected and condemned is not the just and reasonable terminal charge, but those prior charges which must of themselves be unreasonable in order to make the aggregate of

the charge from the point of shipment to that of delivery unreasonable and unjust. In order to avail itself of the benefit of this rule, the carrier must separately state its terminal or other special charge complained of; for, if many matters are lumped in a single charge, it is impossible for either shipper or Commission to determine how much of the lump charge is for the terminal or special services. The carrier is under no obligations to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and Commission that it is insisting upon it. In the case in 186 U. S. *supra*, we sustained the decree of the lower court, restraining the reduction of the terminal charge from \$2 to \$1 as to all stock shipped to Chicago, although the Commission had stated that there had been a reduction of the through rate *from certain points by from \$10 to \$15, in reference to which reduction and its effect upon the order of the Commission we said, speaking by Mr. Justice White, after quoting from the report of the Commission (pp. 338, 339):

"In other words, it was held that the rate, which was unjust and unreasonable solely because of the \$1 excess, continued to be unjust and unreasonable after this rate had been reduced by from ten to fifteen dollars. This was based not upon a finding of fact,—as, of course, it could not have been so based,—but rested alone on the ruling by the Commission that it could not consider the reduction in the through rate, but must confine its attention to the \$2 terminal rate, since that alone was the subject-matter of the complaint. But, as we have previously shown, the Commission, in considering the terminal rate, had expressly found that it was less than the cost of service, and was therefore intrinsically just and reasonable, and could only be treated as unjust and unreasonable by considering 'the circumstances of the case;' that is, the through rate and the fact that a terminal charge was included in it, which, when added to the \$2 charge, caused the terminal charge as a whole to be unreasonable. Having, therefore, decided that the \$2 terminal charge could only be held to be unjust and unreasonable by combining it with the charge embraced in the through rate, necessarily the through rate was entitled to be taken into consideration if the previous conclusions of the Commission were well founded. It cannot be in reason said that the inherent reasonableness of the terminal rate, separately considered, is irrelevant because its reasonableness is to be determined by considering the through rate and the terminal

charge contained in it, and yet, when the reasonableness of the rate is demonstrated, by considering the through rate as reduced, it be then held that the through rate should not be considered. In other words, two absolutely conflicting propositions cannot at the same time be adopted. As the finding was that both the terminal charge of \$2 and the through rate as reduced, when separately considered, were *just and reasonable, and as the further finding was that, as a consequence of the reduction of from ten to fifteen dollars per car, the rates, considered together, were just and reasonable, it follows that there can be no possible view of the case by which the conclusion that the rates were unjust and unreasonable can be sustained."

The tariff schedules of the appellees make clear the separate terminal charge for delivery from their own lines to the Union Stock Yards. We quote the schedule of the Chicago & Northwestern Railroad Company:

"The live stock station and stock yards of this company in Chicago are located at Mayfair, and the rates named herein apply only to live stock intended for delivery at or received and transported from the stock yards of the company at Mayfair, in Chicago.

"Upon all live stock consigned to or from the Union Stock Yards in Chicago or industries located on the Union Stock Yards Railway, or the Indiana State Line Railway, and transported and delivered to or received and transported from said Union Stock Yards or said industries located on said Union Stock Yards Railway, or the Indiana State Line Railway, aforesaid, a charge of two dollars (\$2) per car will be made for the special and separate service of transporting such cars to said Union Stock Yards or to said industries on said Union Stock Yards Railway, or the Indiana State Line Railway, from this company's own rails, or of transporting such cars from said Union Stock Yards, or said industries on said Union Stock Yards Railway, or the Indiana State Line Railway, to this company's own rails."

The others are equally specific. In some of them, as in the Atchison, Topeka, & Santa Fe Railway Company, it is provided:

"The attention of the shipper must be and is called to the fact that the transportation charge on live stock delivered at our own yards at Corwith in Chicago will be two dollars (\$2) per car less than when delivered at the Union Stock Yards *at Chicago, [108 or at industries located on the Union Stock Yards Railway or the Indiana State Line Railway, and the agent should ascertain definitely at which point the shipper desires delivery to be made. The live-stock contract must then be filled out so as to show the

correct destination and rate as provided by the tariff and amendments."

Further, it is shown by the affidavits that the amount of such terminal charge is not entered upon the general freight charges of the companies, but is kept as a separate item. The Union Stock Yards Company is an independent corporation, and the fact, if it be a fact, that most or even all of its stock is owned by the several railroad companies entering into Chicago, does not make its lines or property part of the lines or property of the separate railroad companies.

With reference to the reasonableness of the terminal charge, it was stipulated on the hearing before the Interstate Commerce Commission that all the testimony taken in the former proceedings might be considered. It also appears that additional testimony was there offered. None of this testimony has been printed in the record presented to us. We have, however, our former decision as well as the report of the Commission on the recent hearing, and also the affidavits filed on this application, and can consider them. It appears from the former case that, after some discussion, when testimony was being offered on the question of reasonableness, the Commission suggested that it was probably unnecessary to offer further evidence, and said (p. 327):

"To remove all doubt upon that subject, however, if it is not clearly found, we now find that, looking entirely to the cost of service, and including as a part of that cost the trackage charge paid the Union Stock Yards & Transit Company and the unloading charge paid that same company, the amount of this terminal, if, under the circumstances of this case, it is proper to impose, the charge is reasonable. If any modification of the present findings is necessary, they are hereby modified to that extent."

109] "And in the excerpt put into the margin in the opinion of this court is a statement of the actual and estimated expense to the different railroads for making such delivery, which makes it quite clear that the charge was a reasonable one. This finding as to the reasonableness of the charge was repeated again by the Commission.

In its report in the present case it said:

"The original case did not show the cost of making delivery of other kinds of car-load freight at this market, but the present record shows that the average cost to one defendant, the Atchison, Topeka, & Santa Fe Railway Company, of delivering all kinds of car load freight, including live stock, is \$5.40 per car, while the cost of delivering live stock is not far from \$2 per car. The testimony further indicates that the average cost of delivering all kinds of car-load freight does not differ much in the case of

the Santa Fe from that in the case of the other defendants, although it does appear that several of the defendants are at greater expense than \$2 per car in making delivery of live stock at the stock yards. We think it fairly appears upon this record that the total cost to these defendants of delivering live stock at the Union Stock Yards, including the trackage charge, is not much, if any, above one half the average cost of handling all car-load freight in the city of Chicago."

Under those circumstances it seems impossible to avoid the conclusion that, considered of and by itself, the terminal charge of \$2 a car was reasonable. If any shipper is wronged by the aggregate charge from the place of shipment to the Union Stock Yards, it would seem necessarily to follow that the wrong was done in the prior charges for transportation, and, as we have already stated, should be corrected by proper proceedings against the companies guilty of that wrong, otherwise injustice will be done. If this charge, reasonable in itself, be reduced, the Union Stock Yards Company will suffer loss while the real wrongdoers will escape. It may be that it is more convenient for the Commission to strike at the terminal charge, but the convenience of Commission or court is not the measure of justice.

We are unable to find any error in the conclusions of the trial judges, and their order is therefore affirmed.

HANOVER NATIONAL BANK OF THE
CITY OF NEW YORK, Plff. in Err.,
v.

WILLIAM F. SUDDATH, as Receiver of
the American National Bank of Abilene.

(See S. C. Reporter's ed. 110-122.)

Banks — lien — on security deposited for specific purpose.

1. A bank which refuses to discount notes sent to it by a correspondent bank for discount and credit has no right, by virtue of its general bankers' lien, to apply such notes as collateral to the payment of a loan voluntarily made to cover an overdraft of such correspondent bank.

[For other cases, see Banks, I. h, in Digest Sup. Ct. 1908.]

Banks — lien — under special agreement.

2. Notes sent to a bank by its correspondent for discount and credit, which such bank refuses to rediscount, cannot be held by it as collateral to the payment of a loan vol-

NOTE.—On banker's liens—see notes to Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 26 L. ed. U. S. 693, and Armstrong v. Chemical Nat. Bank, 6 L.R.A. 227.

untarily made to cover an overdraft, by virtue of an agreement embodied in a printed form prepared by such bank, and in general use by it, which gives the said bank power to appropriate any securities "deposited with said bank, or which may hereafter be deposited with said bank, or which may be in any wise in said bank or under its control, as collateral security for loans or advances already made or hereafter to be made to or for account of" its said correspondent by said bank, "or otherwise."

[For other cases, see Banks, I. h, in Digest Sup. Ct. 1908.]

Banks — lien — by authority or consent.

3. The inaction of a bank upon receiving notification that certain notes sent by it to another bank for discount and credit would not be discounted, but would be held as collateral, and that credit should either be transferred from other banks or currency shipped, is not equivalent to a request on its part to pay overdrafts previously drawn when presented, and to hold as collateral the notes which had been sent for discount. [For other cases, see Banks, I. h, in Digest Sup. Ct. 1908.]

[No. 12.]

Argued April 20, 1909. Decided November 29, 1909.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which, on a second writ of error, affirmed a judgment of the Circuit Court for the Northern District of New York in favor of the receiver of an insolvent national bank in an action to recover from another bank certain promissory notes, or their value, retained by the latter bank as collateral to the indebtedness of the former. Affirmed.

See same case below, 82 C. C. A. 676, 153 Fed. 1021; on first writ of error, 79 C. C. A. 23, 149 Fed. 127.

The facts are stated in the opinion.

Mr. Percy S. Dudley argued the cause and filed a brief for plaintiff in error:

The plaintiff in error had the right to retain the notes under the express terms of the collateral agreement.

Hutchinson v. Manhattan Co. 150 N. Y. 250, 44 N. E. 775.

The contract should be construed to give effect to each word and clause, and to effectuate the intention of the parties.

Gillet v. Bank of America, 160 N. Y. 549, 55 N. E. 292; Sattler v. Hallock, 160 N. Y. 291, 46 L.R.A. 679, 73 Am. St. Rep. 686, 54 N. E. 667; Church v. Hubbard, 2 Cranch, 233, 2 L. ed. 264; United States v. Choctaw Nation, 179 U. S. 494, 531, 45 L. ed. 291, 305, 21 Sup. Ct. Rep. 149.

Where the intent requires it, a compre-

hensive interpretation will be given to "otherwise," and the rule of *ejusdem generis* will be held to be inapplicable.

21 Am. & Eng. Enc. Law, 2d ed. p. 1016.

The defendant had the right to retain the notes by virtue of its banker's lien.

1 Dan. Neg. Inst. 5th ed. p. 342, § 334b; 1 Morse, Banks & Banking, 4th ed. § 324; Joyce v. Auten, 179 U. S. 591, 597, 45 L. ed. 332, 335, 21 Sup. Ct. Rep. 227; Continental Nat. Bank v. Weems, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802.

The receiver of the Abilene bank has no greater right to recover these notes than the bank itself would have had if it had sued, and he took the assets subject to the obligation existing at the time of his appointment.

Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; Rankin v. City Nat. Bank, 208 U. S. 541, 52 L. ed. 610, 28 Sup. Ct. Rep. 346.

If the Abilene bank had mailed cash or other credits on January 14th, it cannot be doubted that the Hanover bank could have lawfully appropriated them for its repayment, although not received until after the failure.

McDonald v. Chemical Nat. Bank, 174 U. S. 610, 620, 43 L. ed. 1106, 1110, 19 Sup. Ct. Rep. 787; Ruggles v. American Cent. Ins. Co. 114 N. Y. 415, 11 Am. St. Rep. 674, 21 N. E. 1000.

If the contents of the letter from the Abilene bank had been telegraphed to the Hanover bank, there could be no question of its authority to hold the notes as collateral for its advances; and it is submitted that the action of the Hanover bank in anticipation of authority was confirmed by the letter then in the mails and subsequently received.

McDonald v. Chemical Nat. Bank, *supra*.

Mr. Edward B. Whitney argued the cause, and, with Mr. Francis F. Oldham, filed a brief for defendant in error:

The Hanover bank had no general banker's lien on the four notes.

Brandao v. Barnett, 12 Clark & F. 787, 3 Eng. Rul. Cas. 592; Story, Agency, § 381; 1 Morse, Banks & Banking, 4th ed. pp. 597-599; Bank of the Metropolis v. New England Bank, 1 How. 234-239, 11 L. ed. 115, 116; Leese v. Martin, L. R. 17 Eq. 235; Reynes v. Dumont, 130 U. S. 354, 390-394, 32 L. ed. 934, 944, 945, 9 Sup. Ct. Rep. 486; 1 Jones, Liens, 2d ed. § 244; Lucas v. Dorrien, 7 Taunt. 278; Petrie v. Myers, 54 How. Pr. 513; Bank of Montreal v. White, 154 U. S. 660, 26 L. ed. 307, 14 Sup. Ct. Rep. 1191; Libby v. Hopkins, 104 U. S. 309, 26 L. ed. 772.

The instrument is to be construed strictly against the bank.

Gillet v. Bank of America, 160 N. Y. 549, 55 N. E. 292.

Among the circumstances which revoke an offer before acceptance is bankruptcy of one of the parties, which transfers all his property to trustees.

9 Cyc. Law & Proc. p. 293; *Mcynell v. Surtees*, 25 L. J. Ch. N. S. 262.

Mr. Justice White delivered the opinion of the court:

The predecessor of the present receiver of the American National Bank of Abilene, Texas, sued, in April, 1905, to recover from the Hanover National Bank of New York four promissory notes or their value.

We shall refer to the corporations as the Abilene bank and the Hanover bank.

At the trial, under instruction, there was verdict for the Hanover bank, and the judgment thereon was reversed. 79 C. C. A. 23, 149 Fed. 127. In conformity to the opinion of the circuit court of appeals, on the new trial a verdict was directed in favor of the receiver, and to reverse the affirmance of that judgment (82 C. C. A. 676, 153 Fed. 1021) this writ of error is prosecuted.

The facts are these: Prior to November, 1903, the Abilene bank was a correspondent of the Hanover bank, and had an account with the latter. The credit of this account was principally made up by the proceeds [113] arising from the rediscounting *by the Hanover bank of commercial paper for account of the Abilene bank. On November 27, 1903, the Abilene bank signed an agreement concerning the right of the Hanover bank, under conditions stated, to attribute to the payment of debts due it by the Abilene bank securities in its hands belonging to the Abilene bank. In January, 1905, the Hanover bank was contingently responsible for commercial paper, aggregating probably sixteen or seventeen thousand dollars, which it had rediscounted for the Abilene bank, and upon which the latter bank was ultimately liable.

On January 9, 1905, the Abilene bank transmitted by mail to the Hanover bank a note of the Hayden Grocery Company for \$2,000, drawn to the order of the Abilene bank, and by it indorsed, the letter stating that the note was sent for discount and credit. On the next day—the 10th—the Abilene bank also transmitted by mail a note drawn by R. H. Logan and W. R. Logan, to its order, and by it indorsed likewise, with a statement that it was sent for discount and credit. On the 12th of the same month the Abilene bank again transmitted to the Hanover bank for discount and credit two other notes, one drawn by L. W. Hollis for \$3,500, and indorsed as were

the previous notes, and a note of C. B. and W. F. Scarborough, for \$1,500, likewise so indorsed, the letter of transmittal yet again stating that they were sent for discount and credit.

The Hayden Grocery Company and the Logan notes, forwarded on the 9th and 10th of January, reached the Hanover bank on the 14th; and on that day it telegraphed to the Abilene bank, declining to discount the notes, and by a second telegram said: "Referring to previous despatch transfer or ship currency;" which, according to the counsel for the Hanover bank, meant to call upon the Abilene bank either to transfer a credit from some other bank or ship currency direct. It is not shown that any reply, either by telegram or letter, was made to the messages thus sent on the 14th. The notes forwarded on the 12th reached the Hanover bank on the 16th, and the latter at once telegraphed, "Not satisfactory," and [114 confirmed the telegram by a letter, saying: "We are not discounting inclosures for you, but hold same as collateral to your indebtedness to us." The Abilene bank did not reply by telegram, but on the same day, wrote to the Hanover bank as follows:

"We have just received your wire. The rediscounts we sent you were mostly renewals and in every instance 'good as gold.'"

"Since the drop in cotton, collections are at a standstill, and our clients expect us to stay with them, and we are obliged to ask the same indulgence from our correspondents."

"Should you prefer, we will send our B/P with collaterals attached."

"We trust you will accord us the leniency asked for."

On the morning of January 17, 1905, there stood on the books of the Hanover bank to the credit of the Abilene bank the sum of \$616.15. On that day a check on the Hanover bank, dated January 11, 1905, drawn by the Abilene bank for the sum of \$3,825.45, payable to the New York Life Insurance Company, as also some small checks, passed through the clearing house. Upon attention being directed to the overdraft which thereby resulted, a telegram was sent to the Abilene bank, referring to the previous letters and telegrams, and asking that bank what it had done. No reply having been received before the close of business on that day, the vice president of the Hanover bank, after examining the written agreement to which we have previously alluded, allowed the overdraft to stand, and, to cover the same, made an entry of a loan of \$3,500 to the Abilene bank, which was placed to the credit of that bank, and, after absorbing the overdraft, left to its credit the sum of \$63.74. On the same day the

Hanover bank wrote to the Abilene bank saying: "As your account showed overdrawn to-day over \$3,000, have made you a temporary loan of \$3,500 against collateral in our hands." On the next day (January 18) the Abilene bank closed its doors.

115] *It is to be observed that of the letters, the one by the Hanover bank, written on the 17th of January, and the one written on the previous day by the Abilene bank, did not reach their destination until after the failure of the Abilene bank.

Thereafter Richard L. Van Zandt was appointed receiver, and, as we have said, commenced this action to recover the possession of the four notes which had been transmitted to the Hanover bank, as above stated, or the value of such notes, and, in the course of the action, the proceedings took place to which we have at the outset referred. The ground relied upon for recovery was that, as the notes had been sent to the Hanover bank for discount for the account of the Abilene bank, upon the Hanover bank refusing to discount them, that bank had no claim whatever upon the notes, and had no right to apply them as collateral to the payment of the voluntary overdraft which had been allowed on the 17th of January, and thus obtain a preference to the extent of the appropriation over the general creditors of the Abilene bank. It suffices to say that the defense of the Hanover bank controverted this contention, and asserted that the appropriation of the notes was justified under its general bankers' lien or under the terms of the special agreement of November 27, 1903. During the pendency of the action, the Hanover bank collected three of the notes, deducted from their proceeds the sum of \$3,725.86, then due, and paid to the receiver the balance, and also delivered to him the uncollected note, being the note of R. H. Logan and W. R. Logan, which had been transmitted to the Hanover bank on January 10 and was by it received on the 14th.

It is contended that the appellate court erred in affirming the ruling of the circuit court, directing a verdict for the receiver. The grounds for this contention are that the evidence showed that the Hanover bank had the right to retain the four notes or the balance of their proceeds, by virtue of its general bankers' lien; and, if not, as a result of the express provisions of the agreement of November 27, 1903; and, in any event, by the authority or consent of the Abilene bank. Without stopping to consider whether the third contention is not really involved in the first two, we pass to their consideration in the order mentioned.

1. *Was there a right of retention in the*

New York bank by virtue of its general bankers' lien?

The rulings of this court foreclose this question, since they conclusively establish that a general lien in favor of a bank cannot attach to securities which are delivered to it in order that it may do a particular thing with them, and that, when it refuses to do that thing, the duty to return exists. The general subject was elaborately considered, and the authorities were fully reviewed, in *Reynes v. Dumont*, 130 U. S. 354, 32 L. ed. 934, 9 Sup. Ct. Rep. 486. In that case securities had been sent to bankers for a specific purpose. That purpose having been accomplished, the securities were permitted to remain in the custody of the bankers as depositaries, because they were in a good market and a place convenient for procuring loans, and because the expressage upon their return would have been great. The right to a general bankers' lien upon the securities was denied. Such a lien, it was said, would arise "in favor of a bank or banker out of contract, expressed or implied, from the usage of the business, in the absence of anything to show a contrary intention." Ordinarily, it was declared the lien would attach in favor of a bank upon securities and moneys of the customer, deposited in the usual course of business, etc. It was, however, expressly declared not to "arise upon securities accidentally in the possession of the bank, or not in its possession in the course of its business, as such, nor where the securities are in its hands under circumstances, or where there is a particular mode of dealing, inconsistent with such general lien." *Biebinger v. Continental Bank*, 99 U. S. 143, 23 L. ed. 271, was one of the authorities cited in the opinion. In that case it appeared a deed had been deposited with the bank as collateral security for the customer's current indebtedness and discounts. After payment of this indebtedness and a temporary suspension of dealings, the customer incurred new indebtedness to the bank; but, as it did not appear that the money was loaned or debt created on the faith of the deposit of the deed, the bank's claim of a lien thereon was denied. *Bank of Montreal v. White*, 154 U. S. 660, and 26 L. ed. 307, 14 Sup. Ct. Rep. 1191, is also a pertinent decision. Without elaborating the issues which were there involved, it suffices to say that, in an action to recover upon a promissory note, in order to escape the contention that it was not an innocent holder, the bank contended that, before the note was sent to it for discount, the sender was under a promise to furnish security for advances to be made, and therefore the rights of the bank as an

innocent holder were to be determined by the state of its knowledge at the time the note was received, although the discount was declined, and not by the state of knowledge existing when, at a subsequent date, the note was actually discounted. In disposing of a contention that the trial court had committed error in not giving an instruction which the bank asked in accord with its contention as just stated, the court said:

"There can be no pretense in this case that the note in suit was ever actually delivered to the bank as collateral security for past or future indebtedness. In the letter transmitting it, the bank manager was asked to discount it and place the proceeds to the credit of the manufacturing company. In that event the 'overdraft kindly allowed on Friday' was to be charged against the credit; but it is nowhere, even in the remotest degree, intimated that, if the discount was declined, the note might be kept as collateral. The charge asked and refused was therefore, wholly immaterial; and the judgment cannot be reversed because it was not given."

2. *Was the Hanover bank entitled to retain the notes under the terms of the agreement of November 27, 1903?*

The material portions of the agreement are as follows:

"For and in consideration of \$1 [etc.], the undersigned agree with said bank that all [118] bills of exchange, notes, *checks, and the proceeds thereof, and all other securities, money, and property of every kind owned by the undersigned, or either or any of them, or in which they or any or either of them, have any interest, deposited with said bank, or which may hereafter be deposited with said bank, or which may be in any wise in said bank, or under its control, as collateral security for loans or advances already made or hereafter to be made to or for account of the undersigned, by said bank, or otherwise, may be held, collected, and retained by said bank until all liabilities, present or future, of the undersigned, or any or either of them, due or not due, of every kind, to said bank, now or hereafter contracted, shall be paid and fully satisfied."

For the Hanover bank it is contended that although the notes were not in its possession as collateral security for any debt due it, nevertheless, as it had the physical possession of the notes and they were not unlawfully in its hands, it had, under the agreement, the power to make the advance to cover the overdraft, and to attribute, without the consent of the Abilene bank, the notes in question as collateral security for the loan which was made. The construction upon which this proposition is

rested gives to the agreement the most latitudinarian meaning, and besides, in effect, depends upon considering one or more clauses separately from their context, thereby affixing to them a significance to which they would not be entitled if considered in connection with the text in which they are found. To illustrate: It is said the words which give the power to the Hanover bank to appropriate any securities "deposited with said bank, or which may hereafter be deposited with said bank, or which may be in any wise in said bank, or under its control," are broad enough to embrace securities in the hands of the Hanover bank, without considering how they came into the possession of that bank, or without taking into account whether that bank had any claim whatever aside from the agreement in question, and without considering whether it was under the plain duty to *return the securities [119 upon demand, and had no right to require the performance of any act or duty by the Abilene bank in respect thereto. But this broad interpretation is, we think, unreasonable, since it cannot be assumed, if there be room for implication to the contrary, that the agreement was intended to confer the right upon the Hanover bank to appropriate securities merely because such securities had come into its physical control, and with the obligation to return on demand. We say this because it is manifest that to attribute the broad meaning claimed would be in conflict with the precepts of duty and good faith, and would be destructive of that confidence and fair dealing so essentially necessary in commercial transactions. In the light of these considerations, we think the language relied upon should not receive the all-embracing meaning sought to be attributed to it, but should be limited so as to cause the same to embrace only property deposited with the Hanover bank, "or which may hereafter be deposited with said bank, or which may be in any wise in said bank, or under its control," under circumstances and conditions which gave to that bank, by operation of law or otherwise, some right to retain such property for a particular purpose. And irrespective of the meaning which we attribute to the language relied upon, when independently considered, we are of opinion that the want of merit in the construction given to the agreement by the Hanover bank is clearly demonstrated when the context is brought into view. That is to say, we consider that the provision of the agreement to which we have just referred is qualified by the language which follows it, viz., "as collateral security for loans or advances already made or hereafter to be made, to or for account of the undersigned,

by said bank, or otherwise." In other words, the provision just quoted, we think, must be considered as limitative in its character, and as controlling, therefore, the previous stipulations, thus confining the right to apply securities in the possession of the Hanover bank to such as had come into its possession or control for the purposes described.

120] *The contention that the words "or otherwise" deprive the provision in question of its limitative effect is, we think, clearly without merit, since that view cannot be upheld without causing the words in question to dominate and destroy the meaning of the agreement as derived from a consideration of all its provisions. Particularly is this the case, as those words are susceptible of a meaning in harmony with the context; that is to say, may be held to give the right to retain securities under the circumstances stated, even although the loan may not have been made directly to the Abilene bank; as, for instance, where the securities belonging to the Abilene bank came into the possession of the Hanover bank as the result of a rediscounting of paper of the Abilene bank. Conclusive as we think are the reasons just stated, they are additionally fortified by the consideration which the lower court so cogently pointed out in the opinion by it announced; that is, that the contract was one prepared by the Hanover bank, and embodied in a printed form in general use by that bank, and therefore should have expressed its purpose beyond doubt, and not ambiguously, if the language in question was intended to convey the far-reaching meaning now sought to be attributed to it.

3. *Was there otherwise a right of retention by the authority or consent of the Abilene bank?*

By its answer, the Hanover bank based its claim of right to retain the notes in question solely upon its general bankers' lien and the written collateral agreement. The letters to the Abilene bank, coupled with the statement of its vice president, make plain the fact that the sole reliance of the Hanover bank in asserting a claim upon the notes was, in reality, the written agreement. Thus, by its communication of January 12, 1905, confirming the telegram advising that the Logan and Hayden notes would not be discounted, the Hanover informed the Abilene that it held the notes as collateral for the indebtedness of the Abilene. Again, on the 17th of the same month, following the 121] allowance of the overdraft, *the New York bank wrote: "As your account showed overdrawn to-day over \$3,000, we have made you a temporary loan of \$3,500 against collateral in our hands." And the belief of the vice president, that the Hanover bank was entitled

to hold the four notes as collateral, which led to the allowance of the overdraft, is clearly shown by the record to have been induced by the terms of the collateral agreement, which he at the time inspected. It may well be that the check of January 11, 1905, for \$3,825.45, was issued in the expectation that it would be paid from the proceeds of the Logan note of \$2,000 and the Hayden note of \$3,000, forwarded for discount on January 9 and 10. But these and the subsequent notes were not sent to be held as collateral security, but to be discounted. The Abilene bank had been notified by telegram not only that the Logan and Hayden notes would not be discounted, but that it should either transfer credits from other banks or ship currency. The information plainly conveyed by this notification was that checks drawn upon the faith of the discount of the notes referred to must be protected with funds to be furnished. In reason, the Hanover bank was not entitled to act upon the assumption that the inaction of the Abilene bank was equivalent to a request to pay the drafts as presented, and to hold as collateral the notes which had been sent for discount. The Hanover bank should, on the contrary, in view of the action of the Abilene bank, have assumed the possibility that funds could not be supplied, and that the Abilene bank might therefore be unable to meet its paper and be compelled to cease business. It is apparent that the Hanover bank, in allowing the overdraft, did not act upon the assumption that the possession merely of the notes justified its reliance upon them as a security for the advance. We say this because the record leaves no doubt that the device of a temporary loan in order to secure the payment of the overdraft was resorted to upon the faith of rights supposed to inhere in the written agreement. There is no basis, therefore, for the contention that, from the circumstances of the *overdraft and the [122 possession of the notes, a right of retention existed, created by authority or consent of the Abilene bank.

Affirmed.

HANOVER NATIONAL BANK OF THE
STATE OF NEW YORK, Appt.,

v.

WILLIAM F. SUDDATH, as Receiver of the
American National Bank of Abilene.

(See S. C. Reporter's ed. 122-125.)

Equitable set-off — insolvency.

No right of equitable set-off in favor of a

NOTE.—On set-off in bankruptcy cases—see note to *Morgan v. Wordell*, 55 L.R.A. 33.

bank against the receiver of its insolvent correspondent arises out of the voluntary payment by the former bank of an overdraft of its correspondent, in reliance upon certain notes sent for discount and credit, after receiving no response to its notification that such notes would not be discounted, but would be held as collateral, and that credits should either be transferred from other banks or currency shipped.

[For other cases, see Equity, II. f, in Digest Sup. Ct. 1908.]

[No. 13.]

Argued April 20, 1909. Decided November 29, 1909.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of New York, sustaining a demurrer to and dismissing the bill in an action to enforce an equitable set-off. Affirmed.

See same case below, 82 C. C. A. 677, 153 Fed. 1022.

The facts are stated in the opinion.

Mr. Percy S. Dudley argued the cause and filed a brief for appellant:

The Hanover bank was entitled, in equity, to set off the indebtedness due to it from the Abilene bank against the claim of the receiver for the notes owned by the Abilene bank, or the proceeds thereof.

Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; Carr v. Hamilton, 129 U. S. 252, 32 L. ed. 669, 9 Sup. Ct. Rep. 295; Scammon v. Kimball, 92 U. S. 362, 23 L. ed. 483; Bispham, Eq. 1905, 7th ed. § 327; 2 Bolles, Modern Law of Banking, 1907, p. 742; North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 615, 38 L. ed. 565, 571, 14 Sup. Ct. Rep. 710; Armstrong v. Chemical Nat. Bank, 6 L.R.A. 226, 41 Fed. 234; New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199.

Even under the strict rules prevailing in the state courts of New York, the set-off claimed here would have been allowable in an action at law, and the contract indebtedness on the overdraft could have been counterclaimed under the Code against the claim in tort for the retention of the notes.

Fera v. Wickham, 135 N. Y. 223, 17 L.R.A. 456, 31 N. E. 1028; DeCamp v. Thomson, 159 N. Y. 444, 70 Am. St. Rep. 570, 54 N. E. 11; Empire Dairy Feed Co. v. Chatham Nat. Bank, 30 App. Div. 476, 52 N. Y. Supp. 387; Thompson v. Kessel, 30 N. Y. 383; Glen & H. Mfg. Co. v. Hall, 61 N. Y. 236, 19 Am. Rep. 278; Brown v. Buckingham, 21 How. Pr. 190.

54 L. ed.

Mr. Edward B. Whitney argued the cause, and, with Mr. Francis F. Oldham, filed a brief for appellee:

Set-off is a doctrine which applies as between two claims, each for a sum of money. The receiver's demand for relief shows his action to have been one of replevin.

2 Abbott, Forms of Pleading, p. 869.

And hence it is obviously not subject even to a statutory counterclaim, for a sum of money cannot be deducted from the possession of four notes.

Moffatt v. Van Doren, 4 Bosw. 609; 1 Nichols, New York Practice, 972; Dinan v. Coneys, 143 N. Y. 544, 38 N. E. 715.

Mr. Justice White delivered the opinion of the court:

This is an outgrowth of a litigation between the same parties, which we have just decided in case No. 12 [215 U. S. 110, ante, 115, 30 Sup. Ct. Rep. 58], and we shall therefore refer to the banks as we did in No. 12, the one as the Abilene bank and the other as the Hanover bank. On October 11, 1906, in reversing the judgment entered in that action on the first trial in favor of the Hanover bank, the circuit court of appeals observed (79 C. C. A. 26, 149 Fed. 130):

"The contention for the defendant in error, that it was entitled to set off or counterclaim the indebtedness owing to it by the Abilene bank when the latter became insolvent, is wholly untenable. Such a defense is not available in an action at law for conversion, and, if the defendant had any right of equitable set-off, this should have been asserted by a bill in equity."

On November 20, 1906, as we have seen, at the second trial of the action at law, the court directed the jury to find a verdict in favor of the Abilene bank. A few days afterwards the bill in this cause was filed on behalf of the Hanover bank, the receiver of the Abilene bank being the defendant, the suit, it is intimated, having been commenced because of the statement made by the circuit court of appeals in the passage from its opinion above quoted. The course of dealing between the two banks, the execution of the written agreement, the forwarding of the four notes for discount, the refusal to discount, the overdrawing by the Abilene bank of its account *with the Hanover [124 bank, the allowance of the overdraft and the temporary loan of \$3,500, the collection of three of the notes and retention of a sufficient sum to cancel the indebtedness created by the overdraft, and the surrender of the balance to the receiver, together with the uncollected note, were alleged in the bill substantially as we have stated them in the opinion in No. 12. The commencement and prosecu-

tion of the action at law was next averred, and the various steps in that litigation were detailed, culminating in an averment of the rendering upon the second trial of the action at law of a verdict in favor of the Abilene bank for \$3,725.86. It was charged that the receiver was threatening to enter judgment upon the verdict. Averring a right in equity to offset the indebtedness due to it by the Abilene bank on January 18, 1905, against the demand of that bank or its receiver for the four notes or their proceeds, the Hanover bank prayed that its set-off might be allowed against the receiver, and that he be enjoined from further prosecuting the action at law. A demurrer to the bill was sustained and a dismissal was entered. The decree was affirmed by the circuit court of appeals (82 C. C. A. 677, 153 Fed. 1022), and the cause was then brought here.

The decision just announced in case No. 12 establishes the want of equity in the bill. The mere possession of the notes by the Hanover bank after its refusal to discount them did not justify that bank in relying upon the notes as collateral security for the indebtedness which arose from the voluntary payment of the draft drawn by the Abilene bank upon the Hanover bank, when there were no funds in the latter bank to meet the draft. The notes forwarded January 9 and 10 were sent to be discounted, and the draft drawn on January 11, which created the overdraft, was presumably drawn upon the faith that those notes would be discounted, and that the draft would be paid out of the proceeds. As matter of fact however, the Hanover bank recouped itself out of the proceeds of but one of the notes, together with 125] the proceeds of notes *subsequently forwarded to it. In view of the fact that the Hanover bank not only notified the Abilene bank that the notes would not be discounted, but also by telegram in effect demanded that the Abilene bank should forward funds to meet its drafts, the assumption cannot be rightfully indulged that the Hanover bank allowed the overdraft in the belief that the silence of the Abilene bank signified that it expected the draft to be paid, and that, to enable the payment, the Hanover bank might use the notes sent for discount as it saw fit. It is not contended that there was an express agreement between the parties that the draft which created the overdraft should be paid, and that the funds should be realized in the mode pursued by the Hanover bank. Considering the transaction either from the standpoint of the forwarding of the notes for discount and the making of the draft, or from the standpoint of the sending of the notes for discount, and the failure of the Abilene bank to forward funds or to prompt-

ly make known to the Hanover bank its wishes in the matter, we are of the opinion that the circumstances of the transaction were not such as to raise the presumption of agreement for a set-off, available as against the general creditors. *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148.

Affirmed.

THOMAS J. KENNEY† et al., Plffs. in Err.,
v.

MICHAEL CRAVEN.

(See S. C. Reporter's ed. 125-130.)

Error to state court — Federal question — decision on non-Federal ground.

A judgment of a state court adverse to the plaintiff in an action in which he specially set up a title acquired by a purchase of property from a trustee in bankruptcy, under the sanction of the bankruptcy court, does not involve a decision of the Federal question so set up which will sustain a writ of error from the Supreme Court of the United States, where the state court rests its judgment solely upon the ground that, being a purchaser *pendente lite* from the trustee, he was bound by a decree rendered against the trustee in a suit brought by him in equity to set aside certain bills of sale executed by the bankrupt, covering the same property.

[For other cases, see Appeal and Error, 1465-1528.]

[No. 31.]

Argued November 12, 1909. Decided November 29, 1909.

IN ERROR to the Superior Court of the State of Massachusetts to review a judgment in favor of defendant in an action

†Death of William J. Corbett, original plaintiff in error herein, suggested November, 11, 1909, and Thomas J. Kenney and John R. MeVey, special administrators, substituted.

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On review of decisions of state courts in cases involving questions of bankruptcy—see note to *Thompson v. Fairbanks*, 49 L. ed. U. S. 577.

founded upon a purchase of property from a trustee in bankruptcy, entered by that court after the Supreme Judicial Court of that state had overruled certain exceptions to the opinion and rulings of the trial court. Dismissed for want of jurisdiction.

See same case below in Supreme Judicial Court, 196 Mass. 319, 82 N. E. 37; on first appeal, 193 Mass. 30, 78 N. E. 748.

Statement by Mr. Justice White:

James Connor, a manufacturer of woolen cloth, operating two mills located in Holyoke, Massachusetts, sold to Michael Craven machinery contained in the mills, and evidenced the same by three bills of sale executed respectively on October 12, 1883, April 6, 1885, and March 10, 1891. On June 18, 1901, Connor was adjudicated a bankrupt, and in August following Nathan B. Avery was appointed trustee. In the same month Avery, as trustee, commenced a suit in equity in a state court of Massachusetts, and therein assailed the validity of the bills of sale to Craven, above referred to, and prayed that they might be set aside and the property decreed to belong to the estate of the bankrupt. While that suit was pending, and on September 18, 1901, Avery, trustee, sold to William J. Corbett, as part of the bankrupt estate, certain of the machinery situated in the mills already referred to. In 1905, Corbett brought this action against Craven to recover from him the value of the machinery so as aforesaid transferred to him by Avery, trustee, alleging that Craven had taken possession of and converted the property sued for to his own use. During the pendency of the action, the equity cause was decided, and, after the entry of the decree therein, an amended answer was filed in this action. Therein, in addition to a general denial, the decree in the equity suit in favor of Craven was specially pleaded in bar, and it was averred that the title and right of possession of the property in controversy in this action was in issue in said equity cause, and had been adjudicated by the decree to be in Craven. An auditor was appointed "to hear the parties, to examine their vouchers and evidence, to state the accounts, and make report thereof to the court." After the taking of evidence had been concluded, the auditor filed a lengthy report, in which were embodied numerous [127] findings of fact. On the ultimate issues the auditor found for the plaintiff. As regards the decree in the equity cause pleaded in bar, it was found that the title to the property alleged in this action to have been converted by the defendant, Craven, had not been the subject of litigation in the equity cause, and that the decree in that cause was not a bar to a recovery by the plaintiff. The

case was then by the court committed to a jury, who found for the plaintiff, and assessed his damages at \$4,696.01. The defendant, on exceptions, carried the cause to the supreme judicial court of Massachusetts. There the exceptions were sustained, upon the sole ground that the decree in the suit in equity was a bar to the claim of plaintiff. 193 Mass. 30, 78 N. E. 748. Subsequently, in the trial court, the plaintiff was allowed to amend his declaration by adding thereto the following paragraph:

"And the plaintiff says that said goods and chattels were the property of one James Connor, who was adjudicated a bankrupt by the district court of the United States for the district of Massachusetts, June 18, 1901; that on August 3, 1901, Nathan P. Avery, of Holyoke, was duly appointed trustee in bankruptcy of the estate of said Connor; that on August 6, 1901, the said Avery duly filed bond, and duly qualified as such trustee; that on September 18, 1901, the said plaintiff acquired title to said goods and chattels by purchase from said Avery as trustee, aforesaid, the said Avery being duly authorized by said district court to make sale of said goods and chattels; and that the plaintiff in this action, relying upon such title, acquired as aforesaid from said Avery, specially sets up and claims that said title was acquired under an authority exercised under the United States, within the meaning of § 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575)."

A similar averment was also embodied in a reply filed at the same time to that part of the answer of defendant which sets up "a former judgment as a bar." Certain other matters were also stated in the replication in avoidance of the effect of the adjudication in the equity cause, but they need not be particularly referred to, as no [128] contention based upon them was pressed at bar or called to our attention in any form.

The action was again tried to a jury, who, by direction of the court, returned a verdict for the defendant. The cause was again heard on exceptions in the supreme judicial court of Massachusetts, and, after consideration of the new matter contained in the replication to the answer, the exceptions were overruled. 196 Mass. 319, 82 N. E. 37. The trial court thereupon entered judgment on the verdict, and this writ of error was prosecuted.

Mr. Christopher T. Callahan argued the cause and filed a brief for plaintiffs in error:

This case does not fall within the rule laid down in the cases where the only question adjudicated in the state court was

whether the trustee had acquired any title at all, and it was held, in the absence of a showing that the authority of the Federal court was denied, that the state court's determination of that question on principles of general law was not open to review here.

Scott v. Kelly, 22 Wall. 57, 22 L. ed. 729; *Mays v. Fritton*, 20 Wall. 414, 22 L. ed. 389; *McHenry v. La Société Francaise D'Espargnes*, 95 U. S. 58, 24 L. ed. 370; *Davis v. Friedlander*, 104 U. S. 570, 575, 26 L. ed. 818, 819; *McKenna v. Simpson*, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365; *Cramer v. Wilson*, 195 U. S. 408, 49 L. ed. 256, 25 Sup. Ct. Rep. 94.

The district court and the trustee, when they made the sale to the plaintiffs, certainly did not concede that the title was put in jeopardy by the pending equity suit, and their act was performed in the exercise of a Federal authority. The ruling and decision of the state court were flatly against their authority. In such a case, this court has jurisdiction to examine and determine the questions raised and determined in the state court against the validity of the title.

Clements v. Berry, 11 How. 398, 408, 13 L. ed. 745, 749; *Buck v. Colbath*, 3 Wall. 334, 340, 18 L. ed. 257, 260; *Sharpe v. Doyle*, 102 U. S. 686, 26 L. ed. 277; *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 506, 29 L. ed. 244, 246, 5 Sup. Ct. Rep. 1009; *Williams v. Heard*, 140 U. S. 529, 535, 35 L. ed. 550, 553, 11 Sup. Ct. Rep. 885; *Stanley v. Schwalby*, 147 U. S. 508, 519, 37 L. ed. 259, 263, 13 Sup. Ct. Rep. 418; *Hussman v. Durham*, 165 U. S. 144, 147, 41 L. ed. 664, 665, 17 Sup. Ct. Rep. 253; *Aldrich v. Ætna Ins. Co.* 8 Wall. 491, 495, 19 L. ed. 473, 475; *Dupasseur v. Rochereau*, 21 Wall. 130, 22 L. ed. 588; *O'Brien v. Weld*, 92 U. S. 81, 23 L. ed. 675; *Baldwin v. Stark*, 107 U. S. 463, 27 L. ed. 526, 2 Sup. Ct. Rep. 473; *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238; *Commercial Pub. Co. v. Beckwith*, 188 U. S. 567, 47 L. ed. 598, 23 Sup. Ct. Rep. 382; *Yates v. Jones Nat. Bank*, 206 U. S. 155, 167, 51 L. ed. 1002, 1009, 27 Sup. Ct. Rep. 638; *National Foundry & Pipe Works v. Oconto Water Supply Co.* 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111.

Mr. Charles G. Gardner argued the cause and filed a brief for defendant in error:

It will hardly be contended that any Federal question is presented by the mere fact that the plaintiffs claimed title from one who derived his authority from a Federal statute.

Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 579, 44 L. ed. 276, 280, 20 Sup. Ct. Rep. 222; *Continental Nat. Bank v. Buford*, 191 U. S. 119, 125, 48 L. ed. 119, 121, 24 Sup. Ct. Rep. 54.

A correct decision of the issue did not depend upon the construction of any Federal law, nor could the right or title set up by the plaintiffs in error be defeated by one construction of the law of the United States, or sustained by the opposite construction.

Cohen v. Virginia, 6 Wheat. 379, 5 L. ed. 285; *Osburn v. Bank of United States*, 9 Wheat. 739, 822, 6 L. ed. 204, 224.

When the question in a state court was not whether, if the bankrupt had title, it would pass to his assignee, but whether he had any title at all, and the state court decided that he had not, no Federal question was presented.

Cramer v. Wilson, 195 U. S. 408, 49 L. ed. 256, 25 Sup. Ct. Rep. 94; *Scott v. Kelly*, 22 Wall. 57, 22 L. ed. 729.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

The assertion that this court has jurisdiction is based upon the contention of the plaintiff in error that he specially set up in his replication, filed below, a title acquired under an authority exercised under the United States,—that is, a purchase of property from a trustee in bankruptcy under the sanction of the bankruptcy court, and that such title was denied by the decision of the state court. We are not called upon to consider these propositions from a purely abstract point of view, since, of course, we are only required to determine their import in so far as they are involved in the decision of the question arising on the record. Confining our contemplation to that subject, it, we think, becomes clear that the contentions are wholly irrelevant to the question of jurisdiction concerning which they are advanced and relied on. We say this, because it is obvious on the face of the record that the court below rested its decision solely on the ground that the plaintiff, as a purchaser *pendente lite* from the trustee, was bound by the decree rendered against the trustee in the equity cause, and that, giving to that decree the effect which it was entitled to have as the thing adjudged, under general principles of law it operated to estop the trustee and the plaintiff, his privy, from asserting title to the property. As, therefore, the court below did not, as an original question, consider and pass upon the nature and character of the [130 rights of the parties arising from the transaction of purchase and sale, but

its judgment was solely based upon the operation and effect of the prior judgment between the parties or their privies, it follows that the decision of the case was placed upon no Federal ground, but involved solely the decision of a question of general law,—that is, the effect and scope of the thing adjudged as arising from the prior judgment of the state court. *Chouteau v. Gibson*, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; *San Francisco v. Itsell*, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241; *Covington v. First Nat. Bank*, 198 U. S. 100, 107, 49 L. ed. 963, 967, 25 Sup. Ct. Rep. 562. Indeed, the fallacy underlying all the contentions urged in favor of our jurisdiction, and the arguments of inconvenience by which those propositions are sought to be maintained, in their ultimate conception involve the assumption either that the correctness of the state decree, which was held to be *res judicata*, is open for consideration on this record, or assail the conclusively settled doctrine that the scope and effect of a state judgment is peculiarly a question of state law, and therefore a decision relating only to such subject involves no Federal question.

Dismissed for want of jurisdiction.

† E. W. SIMMONS, Late Master of the Tug Helen, and Others, Appts.,
v.

THE STEAMSHIP JEFFERSON, the Old Dominion Steamship Company, Claimant and Owner.

(See S. C. Reporter's ed. 130-143.)

Direct appeal from district court — certificate of jurisdiction.

1. The absence of a certificate of the question of jurisdiction is not fatal to the right to maintain a direct appeal from a Federal district court to the Supreme Court, where, upon the face of the record, aside from the recitals in the order made on the allowance of the appeal, it is apparent that the only question which was decided below was one of jurisdiction, and the decree appealed from on its face shows that the cause was dismissed for want of jurisdiction.

[For other cases, see *Appeal and Error*, 927-930.]

† This case is reported by the Official Reporter under the title of "The Steamship Jefferson."

NOTE.—On direct review in Federal Supreme Court of judgments of district and circuit courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

On salvage—see note to *Stratton v. Jarvis*, 8 L. ed. U. S. 846.

As to the places to which the jurisdiction of admiralty is confined—see note to *Allen v. Newberry*, 16 L. ed. U. S. 110.

54 L. ed.

Direct appeal from district court — jurisdiction.

2. The jurisdiction of a Federal district court of the United States was in issue so as to sustain a direct appeal to the Federal Supreme Court, where the exceptions to a libel and intervening petition claiming salvage for services rendered to a vessel on fire in a dry dock challenged the jurisdiction because, from the situation of the vessel, the place where the services were rendered, and their nature and character, they afforded no basis for the jurisdiction of the court as a court of admiralty of the United States, and this was the conception upon which that court acted in dismissing such libel and intervening petition.

[For other cases, see *Appeal and Error*, 895-918.]

Admiralty jurisdiction — salvage — vessel on fire in dry dock.

3. A court of admiralty has jurisdiction of a libel claiming salvage for services rendered by tugs in subduing a fire communicated from the shore to a vessel undergoing repairs in a dry dock from which all the water had been emptied.

[For other cases, see *Admiralty*, I. 1, 7, in *Digest Sup. Ct.* 1908.]

[No. 243.]

Submitted April 26, 1909. Decided November 29, 1909.

APPEAL from the District Court of the United States for the Eastern District of Virginia to review a decree dismissing, for want of jurisdiction, a libel and intervening petition claiming salvage for services rendered by certain tugs in subduing a fire communicated from the shore to a vessel undergoing repairs in a dry dock. Reversed and remanded.

See same case below, 158 Fed. 358.

The facts are stated in the opinion.

Mr. D. Lawrence Groner submitted the cause for appellants. Messrs. R. T. Thorp and Henry Bowden were on the brief:

This appeal properly comes before this court.

The *Allianec*, 17 C. C. A. 124, 44 U. S. App. 52, 70 Fed. 276; *Cope v. Vallette Dry Dock Co.* 119 U. S. 625-627, 30 L. ed. 501, 502, 7 Sup. Ct. Rep. 336.

The question of jurisdiction is properly certified.

Shields v. Coleman, 157 U. S. 176, 39 L. ed. 662, 15 Sup. Ct. Rep. 570; *Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; *Chappell v. United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; *Merritt v. Bowdoin College*, 167 U. S. 745, 42 L. ed. 1209, 17 Sup. Ct. Rep. 996; *Filhiol v. Torney*, 194 U. S. 356, 48 L. ed. 1014, 24 Sup. Ct. Rep. 698; *Petri v. F. E. Creelman Lumber Co.* 199 U. S. 487, 50 L. ed. 281, 26

Sup. Ct. Rep. 133; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 282-284, 46 L. ed. 910-913, 22 Sup. Ct. Rep. 681.

The circuit court of appeals has no jurisdiction to review a judgment of a circuit or district court which sustains objections to its jurisdiction and on that ground dismisses the suit.

Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 48 C. C. A. 349, 109 Fed. 497; *The Alliance*, supra; *Dudley v. Lake County*, 43 C. C. A. 184, 103 Fed. 209; *Sun Printing & Pub. Co. v. Edwards*, 58 C. C. A. 162, 121 Fed. 826.

Admiralty jurisdiction depends not upon whether the vessel is actually afloat or actually engaged in navigation, but rather upon the purposes for which she was used and intended to be used.

The Old Natchez, 9 Fed. 476.

While a dry dock itself is not a subject of salvage, a vessel in dry dock would be.

The Robert W. Parsons (*Perry v. Haines*) 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8; *Cope v. Vallette Dry Dock Co.* 119 U. S. 625, 30 L. ed. 501, 7 Sup. Ct. Rep. 336.

Admiralty has jurisdiction in cases of marine torts and contracts in dry docks.

Simpson's Patent Dry Dock Co. v. Atlantic & E. S. S. Co. 47 C. C. A. 443, 108 Fed. 425; *Brooklyn Water Front Warehouse & Dry Dock Co. v. The Sappho*, 44 Fed. 359; *Haffner v. Crane*, 115 Fed. 404.

In cases purely dependent upon the locality of the act done, the admiralty jurisdiction is limited to the sea and to the tide water so far as the tide flows. Mixed cases may arise and often do arise where the act and services done are of a mixed nature, as where salvage services are performed partly on tide water and partly on shore, for the preservation of the property, in which the admiralty jurisdiction has been constantly exercised to the extent of decreeing salvage.

United States v. Coombs, 12 Pet. 72, 9 L. ed. 1004.

Vessels afloat, saved by being towed from a fire originating on land, are subjects of salvage.

The Kaiser Wilhelm der Grosse, 106 Fed. 963; *The John I. Brady*, 109 Fed. 912; *The Barge No. 127*, 113 Fed. 529; *The Old Natchez*, supra; *The Lone Star*, 35 Fed. 793; *Gunby v. The Khio*, 46 Fed. 207; *The Oregon*, 27 Fed. 871; *Wilson v. Winchester*, 30 Fed. 204.

In *The Ella*, 48 Fed. 569, where the vessel was carried ashore 1,200 feet beyond the water's edge by an unusual storm, and a channel was dug out by which she was brought back to the sea, it was held that

this was a salvage service, although completely performed on land.

Again, in the case of *The Huntsville*, Fed. Cas. No. 6,916, it was held that admiralty jurisdiction extends to a salvage suit for services rendered from the land to a vessel burning at the city's wharves, and it extends to services rendered from the land in completion of services rendered by other salvors at sea.

Mr. Harrington Putnam submitted the cause for appellee. Mr. Walter H. Taylor was on the brief:

This court is without jurisdiction, as the appeal should have been taken to the circuit court of appeals.

Smith v. McKay, 161 U. S. 355, 358, 359, 40 L. ed. 731, 732, 16 Sup. Ct. Rep. 490; *Louisville Trust Co. v. Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; *Maynard v. Hecht*, 151 U. S. 324, 328, 38 L. ed. 179, 181, 14 Sup. Ct. Rep. 353; *United States v. Jahn*, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; *Blythe Co. v. Blythe*, 172 U. S. 644, 43 L. ed. 1183, 19 Sup. Ct. Rep. 873; *Blythe v. Hinckley*, 173 U. S. 506, 507, 43 L. ed. 785, 786, 19 Sup. Ct. Rep. 497; *Schweer v. Brown*, 195 U. S. 171, 49 L. ed. 144, 25 Sup. Ct. Rep. 15.

The *Jefferson* was neither at sea, nor on shore, nor engaged in navigation.

The *Warfield*, 120 Fed. 847.

The *Jefferson* was not saved from sea perils.

1 *Parsons, Marine Ins.* p. 544; *Phillips v. Barber*, 5 Barn. & Ald. 161; *Frame v. The Ella*, 48 Fed. 569.

The property salvaged must be a vessel engaged in commerce, or the cargo of a vessel.

The *Murphy Tugs*, 28 Fed. 429; *The Island City*, 1 Low. Dec. 375, Fed. Cas. No. 7,109; *The Pulaski*, 33 Fed. 383; *The Hendrick Hudson*, 3 Ben. 419, Fed. Cas. No. 6,355.

Salvage is awarded only for saving property from sea perils.

Mason v. The Blaireau, 2 Cranch, 240, 266, 2 L. ed. 266, 274; *Benedict, Admiralty*, 3d ed. §§ 111, 300; *The Emulous*, 1 Sumn. 207, Fed. Cas. No. 4,480; 3 *Kent, Com.* *245; *Marvin, Wreck & Salvage*, 1858 ed. § 97, p. 104; *Desty, Shipping & Admiralty*, § 303; 5 *Benfante, Revue Int. du Droit Maritime*, p. 568; *Schaps, Das Deutsche Seerecht*, pp. 701, 702; *Sieveling, German Law Relating to Carriage of Goods by Sea*, Eng. trans., p. 145 [London, 1907]; Part 1, *Hanseatische Gerichtszeitung*, 1888, No. 120, p. 276; *Burchard, Salvage & Assistance* (*Bergung und Hülfeleistung in Seenoth*), Hanover, 1897, p. 29; *Abbott, Merchant Shipping*, 12th ed. p. 539; 11 *Enc. Laws of England*, p. 368; *Kennedy, Civil Salvage*,

1907, 2d ed. p. 2; *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373; *Re 50,000 Feet of Timber*, 2 Low. Dec. 64, Fed. Cas. No. 4,783; *The Plymouth* (*Hough v. Western Transp. Co.*) 3 Wall. 20, 18 L. ed. 125; *Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co.* 208 U. S. 316, 52 L. ed. 508, 28 Sup. Ct. Rep. 414, 13 A. & E. Ann. Cas. 1215; *The Troy*, 208 U. S. 321, 52 L. ed. 512, 28 Sup. Ct. Rep. 416; *The Poughkeepsie*, 162 Fed. 494; 9 Columbia L. Rev. 1.

The tendency of later cases is not to enlarge, but rather to restrict, the subject of salvage.

Wells v. The Gas Float Whitton No. 2 [1897] A. C. 337; *Cope v. Vallette Dry Dock*, 119 U. S. 625, 30 L. ed. 501, 7 Sup. Ct. Rep. 336; *Hughes*, Admiralty, p. 129.

Mr. Justice White delivered the opinion of the court:

From a decree dismissing this suit for [134] want of jurisdiction, *the present direct appeal is prosecuted. Dismissal of the appeal is moved on the ground that the jurisdiction of the court below was not involved in the sense of the 5th section of the act of 1891, and, in any event, because the question of jurisdiction was not certified as required by that act. 26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488.

The libel by which the suit was commenced was filed on behalf of the master of the tug *Helen*, for himself and others entitled to participate in a salvage allowance if made. The cause of action was thus stated:

"1. That, in the afternoon of the 25th day of December, 1906, the tug *Helen*, whereof said E. W. Simmons was master, and having a crew of six men besides said master, was, together with the tug *Alice*, towing a certain barge from Norfolk, in said district, to the piers of the Chesapeake & Ohio Railway Company at Newport News, in said district; that about 4 or 4:30 o'clock on said day, when said tugs had arrived almost at their destination at Newport News, it was discovered that a fire was raging in the shipyard of the Newport News shipyard & Dry Dock Company, and thereupon the libellant, with the said tug *Helen*, docked his tow at one of the said piers of the Chesapeake & Ohio Railway Company, and proceeded with all possible speed to the said fire.

"2. That when libellant arrived at the said shipyard it was found that a large and fierce fire was raging therein, and that said steamship *Jefferson*, which had been undergoing repairs at the said shipyard, was locked in one of the dry docks, out of which the water had been emptied, and was a fire, her upper works being then in full blaze and her hull

smoking throughout nearly its whole length; that there was no one on board at the time, and no one could have stayed aboard under the circumstances; that the water pipes intended for the use of the fire department were frozen up and there was no water available for their use, and that this, together with the fact that the *Jefferson* was in a peculiar and inaccessible situation, being *in a dry dock, rendered the fire [135] engines and fire department totally unable to render any assistance whatsoever; under which circumstances said steamer would have been completely destroyed but for the assistance rendered by libellant and other salvors hereinafter mentioned.

"3. That thereupon libellant, with his said tug *Helen* and crew, lay at a bulkhead of one of the piers, as close to the said dry dock as possible, and together with the tugs *Alice* and *James Smith, Jr.*, played streams of water from their fire house upon said steamship *Jefferson*, and continued so to do until the fire was completely extinguished; that libellant and other salvors were thus engaged from about 4:30 o'clock in the afternoon of said day until about 8:30 o'clock at night, during all of which time libellant and said salvors rendered every possible assistance to said steamship, and during all of which time libellant and others entitled as salvors as aforesaid underwent great suffering from smoke, flame, and sparks, and endured great hardship from exposure to the wind and water in the bitter coldness of the weather, and libellant and other salvors incurred great danger from said smoke, flames, and sparks, and from electric wires, falling poles, adjacent burning buildings, etc.

"4. That the said steamship *Jefferson* is of great value; that the aforementioned efforts and services rendered by libellant and other salvors saved the said steamship from total and complete destruction; that libellant, by reason of the hardships necessarily incurred, and especially by reason of the nature and the great importance of the services rendered in saving said steamship, reasonably deserved to have and therefore claim a commensurate reward for salvage therefor."

By an intervening petition, the crew of the tug *Helen* and the masters and crews of two other tugs, the *James Smith, Jr.*, and the *Alice*, asserted claims to salvage, on the ground that they had rendered services at the same time and under the same conditions as those which the libel alleged had been rendered by the *Helen*. The libel and intervening petition *were excepted to [136] by the owner and claimant of the *Jefferson* upon these grounds:

"First. That the property proceeded

against was not at sea or on the coast of the sea, or within public navigable waters, or on the shores thereof.

"Second. That the property proceeded against was not a vessel engaged in maritime commerce.

"Third. That the libellants did not render any service at sea or in saving property from any peril of the sea.

"Fourth. That there is not shown any sea peril or such peril as may be the basis of a claim for salvage.

"Fifth. That the Jefferson, while in a dry dock, from which all the water had been emptied, when threatened with fire from land, was not a subject of salvage services.

"Sixth. That there is not shown any admiralty or maritime lien upon the Jefferson in favor of the libellants for salvage."

The court, on January 14, 1908, handed down an opinion, stating its reasons for concluding that the exceptions were well taken, and hence that it had no jurisdiction over the cause. 158 Fed. 358. On the 29th of the same month a final decree was entered dismissing the libel and intervening petitions. In this decree it was recited:

"The court is of opinion, for the reasons stated in the opinion filed, on the 14th day of January, 1908, that it is without jurisdiction in the premises and that the exceptions should be sustained. . . ."

In the following July the present appeal was prayed on the ground that, as the court had dismissed the case for want of jurisdiction, its action was susceptible of review by direct appeal to this court. In its order allowing the appeal the court stated that "the claim of appeal is allowed as prayed for from the final order and decree dismissing said cause for want of jurisdiction. . . ." As upon the face of the record, irrespective of the recitals in the order made on the allowance of the appeal, it is apparent that [137] the only question which was decided below was one of jurisdiction, and as the decree which was appealed from on its face shows that the cause was dismissed for want of jurisdiction, the question of jurisdiction, if it is of such a character as to sustain the appeal, was sufficiently certified. *United States v. Larkin*, 208 U. S. 333, 338, 52 L. ed. 517, 519, 28 Sup. Ct. Rep. 417. We therefore put the contentions as to the absence of a certificate out of view.

It is settled that, under the act of 1891, in order to entitle to a direct appeal from the decree of a district or circuit court dismissing a cause for want of jurisdiction, the decree which is sought to be reviewed must have involved the jurisdiction of the court below as a Federal court. *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293; *Schweer v.*

Brown, 195 U. S. 171, 49 L. ed. 144, 25 Sup. Ct. Rep. 15. Relying upon this doctrine, the contention is that the appeal was wrongfully allowed, because, although it may be that, in form of expression, the court below dismissed the suit for want of jurisdiction, its action was, in substance, alone based upon the conclusion that the facts alleged were insufficient to authorize recovery, even although the cause was within the jurisdiction of the court. The claim which the libel asserted was for salvage compensation, and it therefore presented a character of action cognizable exclusively by a court of admiralty of the United States. *Honseman v. The North Carolina*, 15 Pet. 40, 48, 10 L. ed. 653, 656. It is clear that the exceptions to the libel and intervening petition challenged the jurisdiction of the court over the cause of action which the libel asserted, because, from the situation of the vessel, the place where the alleged salvage services were rendered, and the nature and character of those services, they afforded no basis for the jurisdiction of the court as a court of admiralty of the United States. That this was also the conception upon which the court below acted in dismissing the libel and intervening petition is apparent from its opinion and the terms of the decree which we have previously referred to. After stating the elements constituting a salvage service, the court observed:

"These, however, have relation to [138] perils encountered and services rendered and performed to vessels actually engaged in commerce, either on the high seas or other public navigable waters. . . . The Jefferson, at the time of the service sued for, was not a medium of commerce subject to dangers and hazards of the seas. She, on the contrary, was in an unseaworthy condition, undergoing repairs. She could not move of her own volition nor could she be used at the time in furtherance of commerce. She was neither pursuing nor capable of engaging in her ordinary business of navigation of the seas."

Again, in considering the averments of the libel concerning the origin of the fire which, it was alleged, enveloped the Jefferson, and which, it was asserted, had been extinguished by the exertions of the alleged salvors, the court observed:

"This language makes it clear that the peril in which the Jefferson was placed arose from a fire on the shore, and that there was no peril in connection with the sea or the navigation thereof."

In summing up its conclusion, the court said:

"The mere fact that the property upon which the fire was extinguished was that of

a vessel will not suffice. There must have been a sea peril from which it was rescued, and the vessel itself must have been at the time the subject of a sea peril, in order to support a maritime lien and afford jurisdiction *in rem* in the admiralty."

As the foregoing considerations demonstrate that the case was dismissed below because of the conclusion that there was no jurisdiction as a Federal court over the subject-matter of the controversy, it results that the motion to dismiss is without merit. *Cope v. Vallette Dry Dock Co.* 119 U. S. 625, 30 L. ed. 501, 7 Sup. Ct. Rep. 336; *The Resolute*, 168 U. S. 437, 42 L. ed. 533, 18 Sup. Ct. Rep. 112; *Cleveland Terminal Valley R. Co. v. Cleveland S. S. Co.* 208 U. S. 316, 52 L. ed. 508, 28 Sup. Ct. Rep. 414, 13 A. & E. Ann. Cas. 1215; *The Troy*, 208 U. S. 321, 52 L. ed. 512, 28 Sup. Ct. Rep. 416; *Scully v. Bird*, 209 U. S. 481, 52 L. ed. 899, 28 Sup. Ct. Rep. 597; *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726.

139] *Passing to the merits, the question is this: Did the facts set forth in the libel *prima facie* state a claim for salvage within the admiralty jurisdiction?

The contention on the part of the appellee that a negative answer should be given to this question is based upon the propositions which controlled the action of the court below. They are: a, that, at the time the services sued for were rendered, the *Jefferson* was in a dry dock undergoing repairs, was not on the sea, but was virtually on the shore, and was consequently at such time not an instrumentality of navigation, subject to the dangers and hazards of the sea; b, the services were not rendered in saving the *Jefferson* from a maritime peril, as the danger relied on arose outside of the admiralty jurisdiction, and not in connection with the sea or the navigation thereof. We shall consider the contentions together.

In the nature of things it is manifest, and indeed it is settled, that, because of the broad scope of the admiralty jurisdiction in this country, the perils out of which a salvage service may arise are all of such perils as may encompass a vessel when upon waters which are within the admiralty jurisdiction of the United States; from which it follows that the right to recover for salvage services is not limited to services concerning a peril occurring on the high seas or within the ebb and flow of the tide. And although, in defining salvage, the expression "peril of the sea" has sometimes been used as equivalent to "peril on the sea," it is settled that the distress or danger from which a vessel has been saved need not, in order to justify a recovery of salvage compensation,

have arisen solely by reason of a peril of the sea in the strict legal acceptance of those words. The varied character of services upon which a claim to salvage may be based was pointed out in the definition of salvage given in the opinion in *The Blackwall*, 10 Wall. 1, 19 L. ed. 870, where it was said (p. 12): "Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending *peril on the [140 sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict, or recapture."

In *The Blackwall* the facts, in substance, were these: An English ship, with cargo aboard and ready to sail, while lying at anchor in the harbor of San Francisco, about seven or eight hundred yards from the wharves, was discovered to be on fire. A steam tug was utilized in conveying alongside of the ship members of the fire department and two steam fire engines belonging to the city. After the fire had been extinguished, the tug took the ship in tow and safely placed her on adjacent flats, in charge of her master and crew. Upholding the right of the owners of the steam tug and her master and crew to salvage compensation, the court said:

"Service, undoubtedly, was performed by the members of the fire department; but it is a mistake to suppose that service was not also performed by the steam tug, as it is clear that, without the aid of the steam tug and the services of her master and crew, the members of the fire company would never have been able to reach the ship with their engines and necessary apparatus, or to have subdued the flames and extinguished the fire. Useful services of any kind rendered to a vessel or her cargo, exposed to any impending danger and imminent peril of loss or damage, may entitle those who render such services to salvage reward.

"Persons assisting to extinguish a fire on board a ship, or assisting to tow a ship from a dock where she is in imminent danger of catching fire, are as much entitled to salvage compensation as persons who render assistance to prevent a ship from being wrecked, or in securing a wreck or protecting the cargo of a stranded vessel. *The Rosalie*, 1 Spinks, Eccl. & Adm. Rep. 188; *The Eastern Monarch*, Lush. 81; *The Tees*, Lush. 505; *Williams & B. Adm. Pr.* 92."

The case of *The Rosalie* was one of salvage of a vessel in danger from a fire at sea, and among other things treated as constituting the salvaging services was the unloading of the cargo upon land. In *The Tees*, salvage was awarded for towing *to [141 a place of safety a vessel lying in a dock and in danger of catching fire from the

surrounding warehouses which were in flames. To the English cases cited in the opinion in *The Blackwall* may be added that of *The City of Newcastle*, 7 Asp. Mar. L. Cas. N. S. 546. That case was heard before Justice Bruce, assisted by the Trinity masters, and the facts in brief were as follows: A fire broke out on board a vessel which was lying alongside a jetty at the entrance to a dock. The vessel was under repairs, with no steam up, and had no one but the master and watchman on board. At the request of the master, a steamship, which had just arrived, hove alongside, and, getting her hose on board the burning vessel, extinguished the fire, which, if it had remained unchecked, would have caused a very serious damage. The services were such as might have been rendered by a fire engine on shore. The value of the salvaged vessel was £9,500. The defendants tendered £200. The court upheld the tender, being of opinion that the services were not of such character as to require that the award should be assessed upon the same liberal principles as obtained in the ordinary cases of sea salvage rendered by one ship to another.

And the doctrine of *The Blackwall* and the other cases just reviewed was in substance reiterated in *The Clarita* and *The Clara*, 23 Wall. 1, 23 L. ed. 146. In that case remuneration was claimed by the libellants as owners of the steam tug *Clarita* for salvage services rendered by the tug and the officers and crew, in subduing a fire on board the schooner *Clara*. While at anchor in the middle of the Hudson river, the *Clara* caught fire from contact with a burning ferryboat, which, after being towed from a ferry slip, had gotten adrift. It was not questioned that the services, intrinsically considered, were salvage services, but, because the injury to the schooner was occasioned by the fault of the tug whose owner, master, and crew asserted the salvage claim, the right to salvage was denied. And the principles just announced, when duly appreciated, also establish that the *Jefferson*, 142] while in dry dock, undergoing *repairs, was subject to the jurisdiction of a court of admiralty and liable for a salvage service. By necessary implication it appears from the averments of the libel that the steamship, before being docked, had been engaged in navigation, was dedicated to the purposes of transportation and commerce, and had been placed in the dry dock to undergo repairs to fit her to continue in such navigation and commerce. As said in *Cope v. Vallette Dry Dock Co.* 119 U. S. 625, 30 L. ed. 501, 7 Sup. Ct. Rep. 336: "A ship or vessel used for navigation and commerce,

though lying at a wharf and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects, and are capable of receiving salvage services." In reason, we think it cannot be held that a ship or vessel employed in navigation and commerce is any the less a maritime subject within the admiralty jurisdiction when, for the purpose of making necessary repairs to fit her for continuance in navigation, she is placed in a dry dock and the water removed from about her, than would be such a vessel if fastened to a wharf in a dry harbor, where, by the natural recession of the water by the ebbing of the tide, she for a time might be upon dry land. Clearly, in the case last supposed, the vessel would not cease to be a subject within the admiralty jurisdiction merely because, for a short period, by the operation of nature's laws, water did not flow about her. Nor is there any difference in principle between a vessel floated into a wet dock, which is so extensively utilized in England for commercial purposes in the loading and unloading of vessels at abutting quays, and the dry dock into which a vessel must be floated for the purpose of being repaired, and from which, after being repaired, she is again floated into an adjacent stream. The status of a vessel is not altered merely because, in the one case, the water is confined within the dock by means of gates closed when the tide begins to ebb, while, in the other, the water is removed and the gates are closed to prevent the inflow of the water during the work of repair.

It was long ago recognized by this court that a service rendered in making repairs to a ship or vessel, whether in or *out [143 of the water, was a maritime service. *Peyroux v. Howard*, 7 Pet. 324, 8 L. ed. 700.

But we need not further pursue the subject, since the error of the contention that a vessel, merely because it is in a dry dock, ceases to be within the admiralty jurisdiction, was quite recently established in *The Robert W. Parsons* (*Perry v. Haines*) 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8. In disposing of the proposition we are now considering, it was further said (p. 33):

"A further suggestion, however, is made that the contract in this case was not only made on land, but was to be performed on land, and was, in fact, performed on land. This argument must necessarily rest upon the assumption that repairs put upon a vessel while in dry dock are made upon land. We are unwilling to admit this proposition. . . . A dry dock differs from an ordinary dock only in the fact that it is smaller, and provided with machinery for pumping out the water in order that the

vessel may be repaired. All injuries suffered by the hulls of vessels below the water line, by collision or stranding, must necessarily be repaired in a dry dock, to prevent the inflow of water; but it has never been supposed, and it is believed the proposition is now for the first time made, that such repairs were made on land. . . . But, as all serious repairs upon the hulls of vessels are made in dry docks, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs. No authorities are cited to this proposition, and it is believed none such exist."

There is in reason no distinction between the continued control of admiralty over a vessel when she is in a dry dock for the purpose of being repaired, and the subjection of the vessel when in a dry dock for repairs to the jurisdiction of a court of admiralty for the purpose of passing upon claims for salvage services, by which it is asserted the vessel, while in the dock, was saved from destruction.

Reversed and remanded.

144] *MATTHEW SCULLY, Plff. in Err.,
v.
LOUISE SQUIER, John M. Fix, and John
Q. Moxley.

(See S. C. Reporter's ed. 144-155.)

Error to state court—decision of Federal question—town sites.

1. A judgment of a state court, dismissing a suit founded upon the making and approval of a plat of a town site, although resting in some respects upon the proposition that, under Idaho act of January 8, 1873, enacted pursuant to U. S. Rev. Stat. § 2387, U. S. Comp. Stat. 1901, p. 1457, to provide for the disposal of the land, there was no power given to make a survey or plat which did not conform to the lines of occupation, is reviewable in the Federal Supreme Court, where the basis of the suit is

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On error to state courts in cases involving land titles—see note to *O'Connor v. Texas*, 50 L. ed. U. S. 1120.
54 L. ed.

that the Federal laws authorize an official ascertainment of boundaries; that equitable rights under those laws vest upon condition that the owners, within a reasonable time, have their rights confirmed by the trustee upon an official survey; and that those laws require each town-site occupant to see that the official ascertainment is true before accepting confirmation.

[For other cases, see *Appeal and Error*, 1319-1528, in *Digest Sup. Ct.* 1909.]

Public lands—town sites—rights of occupants.

2. The rights of the occupants of town-site lots, fixed by the extent of their occupancy, could not be diminished by a plat made and filed under Idaho act of January 8, 1873, enacted pursuant to U. S. Rev. Stat. § 2387, U. S. Comp. Stat. 1901, p. 1457, to provide for the disposal of the lots,—especially where the state supreme court construes such statute as not giving the power to make a survey or plat which did not conform to the lines of occupation. [For other cases, see *Public Lands*, I. d., in *Digest Sup. Ct.* 1908.]

[No. 21.]

Argued and submitted November 5, 1909.
Decided November 29, 1909.

IN ERROR to the Supreme Court of the State of Idaho to review a decree which affirmed a decree of the District Court of Nez Percés County, in that state, dismissing a suit to enjoin an alleged encroachment upon a highway by owners of town-site lots. Affirmed.

See same case below, 13 Idaho, 417, 90 Pac. 573.

The facts are stated in the opinion.

Mr. H. Winship Wheatley argued the cause, and, with Mr. Ben. F. Tweedy, filed a brief for plaintiff in error:

The record presents Federal questions which can be reviewed upon writ of error to the state supreme court of the state of Idaho, inasmuch as that court decided that U. S. Rev. Stat. § 2387, U. S. Comp. Stat. 1901, p. 1457, made the official survey of congressional grants and the confirmation thereof void because not a proper and lawful execution of the trusts, as required by said section, and thereupon, upon parol testimony, attempted, in the execution of the trusts under said section, to ascertain, establish, and confirm to the defendants in error, against the rights of the plaintiff in error, a part of D street, in direct conflict with the confirmations accepted by the predecessors of all the parties to this action in the year of 1875, upon the official survey by the mayor-trustee.

Dunton v. Muth, 45 Fed. 395; *Ashby v. Hall*, 119 U. S. 526, 30 L. ed. 469, 7 Sup. Ct. Rep. 308; *Magwire v. Tyler*, 1

Black, 196, 17 L. ed. 137; Carondelet v. St. Louis, 1 Black, 179, 17 L. ed. 102; M'Donogh v. Millaudon, 3 How. 693-706, 11 L. ed. 787-794; Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 L. ed. 266, 23 Sup. Ct. Rep. 170; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253; Northern P. R. Co. v. Colburn, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; Pickering v. Lomax, 145 U. S. 310, 36 L. ed. 716, 12 Sup. Ct. Rep. 860; Anderson v. Carkins, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; Neilson v. Lagow, 7 How. 772, 12 L. ed. 908; Chouteau v. Eckhart, 2 How. 344, 11 L. ed. 293; Pollard v. Kibbe, 14 Pet. 353, 10 L. ed. 490; Wallace v. Parker, 6 Pet. 680, 8 L. ed. 543; Ross v. Doe, 1 Pet. 655, 7 L. ed. 302; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; Stanley v. Schwalby, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754; Hammond v. Whittredge, 204 U. S. 538, 51 L. ed. 606, 27 Sup. Ct. Rep. 396; Lavagnino v. Uhlig, 198 U. S. 443, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; Boise City v. Flanagan, 6 Idaho, 149, 53 Pac. 453; Ming v. Foote, 9 Mont. 201, 23 Pac. 515; Anderson v. Bartels, 7 Colo. 256, 3 Pac. 225; Almonester v. Kenton, 9 How. 1, 13 L. ed. 21; Mackay v. Dillon, 4 How. 421, 11 L. ed. 1038; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; Hussey v. Smith, 99 U. S. 20, 25 L. ed. 314; Cofield v. McClelland, 16 Wall. 331, 21 L. ed. 339; Stringfellow v. Cain, 99 U. S. 610, 25 L. ed. 421.

The official survey of the town site is a necessary, essential part of the confirmations accepted in 1875 by the predecessors of the parties to this action, and when the town-site occupants accept deeds from the trustee, and in confirmation of all their equitable rights, they can never thereafter, in a court of law or equity, claim that they ought to have had another and different confirmation, and that all their equitable rights had not been confirmed to them; but the official survey and the confirmation thereupon become the exclusive, conclusive, and only evidence of not only their legal rights, but all their equitable rights.

Smith v. Pipe, 3 Colo. 187; State ex rel. Hicklin v. Webster, 28 Mont. 104, 72 Pac. 295; Ming v. Foote and Anderson v. Bartels, supra; Polk v. Wendal, 9 Cranch, 87, 3 L. ed. 665; Moore v. Walla Walla, 2 Wash. Terr. 184, 2 Pac. 187; Boise City v. Flanagan, supra; Laughlin v. Denver, 24 Colo.

255, 50 Pac. 917; Ashby v. Hall, supra; Cofield v. McClelland, 16 Wall. 334, 21 L. ed. 340; Newhouse v. Simino, 3 Wash. 648, 29 Pac. 263; Cragin v. Powell, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; Carondelet v. St. Louis, supra; Galt v. Galloway, 4 Pet. 332, 7 L. ed. 876; Haydel v. Dufresne, 17 How. 23, 15 L. ed. 115; Greer v. Mezes, 24 How. 268, 16 L. ed. 661; Harrington v. Boehmer, 134 Cal. 196, 66 Pac. 214, 489; Whiting v. Gardner, 80 Cal. 78, 22 Pac. 71; Martin v. Carlin, 19 Wis. 454, 88 Am. Dec. 696; McEvoy v. Loyd, 31 Wis. 142; Campbell v. Clark, 8 Mo. 553; Greer v. Squire, 9 Wash. 359, 37 Pac. 545; Amador County v. Gilbert, 133 Cal. 51, 65 Pac. 130; Parchen v. Ashby, 5 Mont. 68, 1 Pac. 204; Watkins v. Havighorst, 13 Okla. 128, 74 Pac. 318; Stonerod v. Stonerod, 158 U. S. 240, 39 L. ed. 966, 15 Sup. Ct. Rep. 822.

Congress intended an official survey under regulations of the state or territory in order to designate and fix the boundaries of the several congressional grants brought into existence under U. S. Rev. Stat. § 2387, U. S. Comp. Stat. 1901, p. 1457, upon entry of the town site, in order to separate the grants from each other, that confirmation as separated might be given by the trustee, acting as an officer of the United States, in the enforcement of a trust created by that section; and the rules of law relating to an official survey by the officers of the Land Department of the United States apply with equal force to the survey of the trustee.

West v. Cochran, 17 How. 403, 15 L. ed. 110; Central P. R. Co. v. Nevada, 162 U. S. 526, 40 L. ed. 1061, 16 Sup. Ct. Rep. 885; Clemmons v. Gillette, 33 Mont. 321, 114 Am. St. Rep. 814, 83 Pac. 879; United States v. Birdseye, 70 C. C. A. 100, 137 Fed. 516; Robinson v. Forrest, 29 Cal. 325; Territory v. Delinquent Taxpayers, 12 N. M. 169, 76 Pac. 316; Maguire v. Tyler, 8 Wall. 650, 19 L. ed. 320; Ledoux v. Black, 18 How. 473, 15 L. ed. 457; Menard v. Massey, 8 How. 301, 12 L. ed. 1088; Tubbs v. Wilhoit, 138 U. S. 134, 34 L. ed. 887, 11 Sup. Ct. Rep. 279; United States v. Curtner, 38 Fed. 1; Denver v. Kent, 1 Colo. 336.

The state supreme court cannot, upon parol evidence, after confirmation by the trustee, without an official survey of that land claimed by the defendants in error as private property, to be confirmed to them, even attempt to enforce any trust under U. S. Rev. Stat. § 2387, U. S. Comp. Stat. 1901, p. 1457, when the land has remained surveyed as a part of a street for over thirty years, without an attempt on the part of anyone to have the land claimed surveyed officially as private property.

Loeber v. Butte General Electric Co. 16 Mont. 1, 50 Am. St. Rep. 468, 39 Pac. 912; *Hershfield v. Rocky Mountain Bell Teleph. Co.* 12 Mont. 102, 29 Pac. 883; *Kenyon v. Knipe*, 2 Wash. 394, 13 L.R.A. 142, 27 Pac. 227; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Abraham v. Ordway*, 158 U. S. 416, 39 L. ed. 1036, 15 Sup. Ct. Rep. 894; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; *Gallihier v. Cadwell*, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; *Cooke v. Barrett*, 155 Mass. 413, 29 N. E. 625; *Lutjen v. Lutjen*, 64 N. J. Eq. 773, 53 Atl. 625.

It was never the intention of Congress to have confirmation of equitable titles by "parcels," one part by the trustee and the other part by the court; and without the land claimed by the defendants in error being surveyed as private property officially by the trustee, the court is without jurisdiction to enforce any trust under U. S. Rev. Stat. § 2387, U. S. Comp. Stat. 1901, p. 1457.

Ibid.

The occupation of a part of the officially surveyed, established street, in conflict with the official survey, and the accepted confirmation upon the official survey by the predecessors of the parties to this action, is the maintenance of a public and private nuisance, and can be abated by the plaintiff in error, however long continued, in order to protect his rights of equity merging in the confirmation accepted by his predecessor under U. S. Rev. Stat. § 2387, U. S. Comp. Stat. 1901, p. 1457, as by such section he is the owner of private rights in the street appurtenant to his lot.

Woodrull v. North Bloomfield Gravel Min. Co. 9 Sawy. 517, 18 Fed. 753; *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160; *McLean v. Llewellyn Iron Works*, 2 Cal. App. 346, 83 Pac. 1083, 1085; *Laughlin v. Denver*; *Moore v. Walla Walla*; and *Boise City v. Flanagan*,—*supra*; *Dooly Block v. Salt Lake Rapid Transit Co.* 9 Utah, 31, 24 L.R.A. 610, 33 Pac. 229; *Grogan v. Hayward*, 6 Sawy. 498, 4 Fed. 161; *Simplot v. Chicago, M. & St. P. R. Co.* 5 McCrary, 158, 16 Fed. 350; *First Nat. Bank v. Tyson*, 133 Ala. 459, 59 L.R.A. 399, 91 Am. St. Rep. 46, 32 So. 144; *Brauer v. Baltimore Refrigerating & Heating Co.* 99 Md. 367, 66 L.R.A. 403, 105 Am. St. Rep. 304, 58 Atl. 21; *Healey v. Kelly*, 24 R. I. 581, 54 Atl. 588; *Ashby v. Hall*, *supra*.

The official survey of D street was for the benefit and use of all abutting property as surveyed and established, and the owners of such abutting property, when they accepted their deeds, consented to such use of the street as surveyed, and the bound-

aries cannot be changed by parol evidence in 1907, so many years after confirmation.

Moore v. Walla Walla; *Boisé City v. Flanagan*; *Laughlin v. Denver*; and *Dooly Block v. Salt Lake Rapid Transit Co.*,—*supra*; *Hall v. Breyfogle*, 162 Ind. 494, 70 N. E. 883; *Wolfe v. Sullivan*, 133 Ind. 331, 32 N. E. 1018.

And the right of use and benefit extend to adjoining property.

First Nat. Bank v. Tyson and Healey v. Kelly, *supra*; *Tilly v. Mitchell & L. Co.* 121 Wis. 1, 105 Am. St. Rep. 1007, 98 N. W. 969; *Brauer v. Baltimore Refrigerating & Heating Co.* and *Ashby v. Hall*, *supra*.

Mr. James H. Forney submitted the cause for defendants in error. Mr. Isham N. Smith was on the brief:

The question of admission or rejection of evidence is not a Federal question.

Sherman v. Grinnell, 144 U. S. 198, 36 L. ed. 403, 12 Sup. Ct. Rep. 574; *Marsh v. Citizens' Ins. Co.* 131 U. S. cccxiii Appx. and 25 L. ed. 90; *Baldwin v. Kansas*, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; *Brooks v. Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; *Brown v. Colorado*, 106 U. S. 95, 27 L. ed. 132, 1 Sup. Ct. Rep. 175; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

The nature of the grant under the Federal town-site laws is that of confirmation of rights in existence. No new grant is made,—simply the ascertainment of rights already in existence, and their certification. This is analogous to the deed of confirmation described by Blackstone.

Scully v. Squier, 13 Idaho, 417, 90 Pac. 573; *Goldberg v. Kidd*, 5 S. D. 169, 58 N. W. 577; *Pueblo v. Budd*, 19 Colo. 579, 36 Pac. 599; *Cofield v. McClelland*, 16 Wall. 334, 21 L. ed. 340; *Stringfellow v. Cain*, 99 U. S. 610, 25 L. ed. 421; *Winfield Town Co. v. Maris*, 11 Kan. 128; *Rathbone v. Sterling*, 25 Kan. 444; *Helena v. Albertrose*, 8 Mont. 499, 20 Pac. 817; *McCloskey v. Pacific Coast Co.* 22 L.R.A. (N.S.) 673, 87 C. C. A. 568, 160 Fed. 794.

The mayor-trustee and the surveyor were not "granting" lands to these occupants. Their rights and duties were prescribed by the law itself, and neither could, by exceeding the power given him, divest property rights nor defeat vested rights.

Scully v. Squier, *supra*.

The statute having set forth, defined, and limited the authority of these officers, any act of theirs in excess of the authority must be absolutely void, and hence impeachable at any stage of the proceedings, in any court, and at any time.

United States v. Thurber, 28 Fed. 56.

The mayor-trustee and the surveyor could not take private property.

Parchen v. Ashby, 5 Mont. 68, 1 Pac. 204; *Ashby v. Hall*, 119 U. S. 526, 30 L. ed. 469, 7 Sup. Ct. Rep. 308; *Bingham v. Walla Walla*, 3 Wash. Terr. 68, 13 Pac. 412; *Goldberg v. Kidd*; *Cofield v. McClelland*; *Stringfellow v. Cain*; *McCloskey v. Pacific Coast Co.*; *Pueblo v. Budd*; and *Helena v. Albertrose*,—*supra*; *Treadway v. Wilder*, 8 Nev. 91; *Hall v. Ashby*, 2 Mont. 489; *Aleman v. Petaluma*, 38 Cal. 553; *Aspen v. Rucker*, 10 Colo. 184, 15 Pac. 791; *Denver v. Kent*, 1 Colo. 336; *Winfield Town Co. v. Maris*; *Rathbone v. Sterling*; and *Scully v. Squier*,—*supra*.

A mere question of boundary does not vest jurisdiction in the Supreme Court of the United States to review the adjudication of a state tribunal.

Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245. See also *Moreland v. Page*, 20 How. 523, 15 L. ed. 1010; *M'Donogh v. Millaudon*, 3 How. 693, 11 L. ed. 787; *Lanfear v. Hunley*, 4 Wall. 204, 18 L. ed. 325; *Almonester v. Kenton*, 9 How. 1, 13 Sup. Ct. Rep. 21; *Doe ex dem. Barbarie v. Eslava*, 9 How. 421, 13 L. ed. 200; *Doe ex dem. Barbarie v. Mobile*, 9 How. 450, 13 L. ed. 212.

The record affirmatively shows a decision upon questions other than Federal, sufficiently broad to support the decision and judgment of the supreme court of Idaho, without regard to any Federal question (if any there be) which might otherwise be involved.

Chapman & D. Land Co. v. Bigelow, 206 U. S. 41, 51 L. ed. 953, 27 Sup. Ct. Rep. 679; *Rutland R. Co. v. Central Vermont R. Co.* 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113.

Questions of limitations, estoppel, and laches all relate to state procedure, and do not involve a Federal question.

Weyerhaeuser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; *Minneapolis & St. L. R. Co. v. Minnesota*, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396.

No Federal right was especially set up or claimed until after the judgment in the highest court in the state of Idaho. This being true, the writ should be dismissed.

California Nat. Bank v. Thomas, 171 U. S. 441, 43 L. ed. 231, 19 Sup. Ct. Rep. 4; *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; *Sweringen v. St. Louis*, 185 U. S. 38, 46 L. ed. 795, 22 Sup. Ct. Rep. 569.

Mr. Justice McKenna delivered the opinion of the court:

The relation of the parties to the cause of

action is the same in this court as in the state courts, and we will refer to plaintiff *in error as plaintiff and to the de- [149] fendants in error as defendants.

The pleadings in the case are exceedingly voluminous and equally so are the findings of fact. It is enough for our purpose to say that the city of Lewiston, state of Idaho, was entered as a town site under § 2387 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1457), hereinafter quoted, and a patent was issued by the United States to the mayor of the city in trust for the occupants of the lands conveyed. In pursuance of the trust, the mayor executed conveyances to the predecessors in title of plaintiff and defendants. The rights derived through these deeds, and the occupation of the land preceding and subsequent to them, and the effect of a survey made by one E. P. True, hereinafter referred to, and the plat thereof filed by him, constitute the questions in the case. Plaintiff seeks by this suit to enjoin defendants from encroaching on D street, as laid down on said plat, by certain buildings which, it is alleged, they proposed to erect. It is prayed, besides, that the buildings, if erected before an injunction can be obtained, be declared a public nuisance, "damaging the public and this plaintiff's private rights," and be abated. The special damage alleged is that plaintiff, having erected a building on what he alleges to be the true boundary line of D street, will be, as it was said in the argument, "put into a hole" by the buildings of defendants projecting beyond it, and that light and air thereto, through the doors and windows of plaintiff's building, will be prevented, and the view therefrom to all parts of D street obstructed, and that "the light and air and view from all parts of the said D street as the said building [plaintiff's building] is constructed necessarily ensue and benefit the said property materially, and are of great value to the plaintiff, and as is also the right of egress and ingress."

It is further alleged that, before erecting his building, plaintiff applied to the city engineer to be shown the original south line of D street according to the original survey, and the engineer ran "the lines on the ground according to the said *original [150] survey and plat," and that plaintiff erected his building in accordance therewith, "covering the entire lot."

It is also alleged that the lots owned by defendants were conveyed by the mayor to the original owners according to the original survey, and "deeds thereto accepted according to the said original survey and plat, and said lots have since been conveyed to the defendants and their grantors according to the said original survey and plat." A dedication of the street to the public is averred as

hence resulting, and an estoppel against defendants to dispute the survey and plat. The answer of the defendants, in effect, denies the correctness of the survey and plat made by True, and avers that there was an amendment of the latter which exhibited the streets and alleys according to the occupation of the respective claimants of the lots. It is admitted, however, that some of the deeds issued were in accordance with the plat, but it is denied that all the deeds were, and averred "that the same were in accordance with the use and occupation of the lands prior to the survey, and with the said survey and plat, as the same were and had been amended."

The findings of the trial court sustained these averments, and found further that the True survey as originally made disregarded the lines of occupation of the lots, and "ran through buildings then in the actual use and occupancy of the claimants of land, and cut off approximately 4 feet from the north end of buildings there standing and in actual use and occupation of bona fide claimants."

A decree was passed dismissing the suit, which was affirmed by the supreme court. 13 Idaho, 417, 90 Pac. 573.

All of the parties, as we have said, derived their rights and titles under § 2387 of the Revised Statutes, providing for the reservation and sale of town sites on the public lands. That section is as follows:

"[Entry of town authorities in trust for occupants.] Whenever any portion of the public lands have been or may be settled upon and occupied as a town site, not subject 151] to entry *under the agricultural preemption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust, for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated."

We have not recited, nor do we think that it is necessary to recite, all of the facts found by the lower courts. We may add to those which we have stated that the city of Lewiston was incorporated under the laws of the territory of Washington, it then being within that territory, and was reincorporated by an act of the legislature of Idaho in 1866, it then being within Idaho. The

act defined the boundaries of the city. Levi Ankeny was mayor of the city in 1871, and on November 21 of that year he filed his declaratory statement No. 39 in the United States land office at Lewiston, proposing to enter the lands included within the borders of the city as incorporated, in trust for its inhabitants, claiming settlement in 1861. Cash entry was made for the lands June 6, 1874, by Henry W. Stainton, mayor, in trust for the inhabitants. "The legislature of the territory [we quote from the opinion of the supreme court of the state], by an act approved January 8, 1873 (7 Sess. Laws, p. 16), provided for the survey, platting, and disposal of the land in the city of Lewiston pursuant to the United States statutes in regard to such matters. Said act provides that the mayor trustee shall cause to be made and filed in his office by a competent person a plat of the land within said city, divided into blocks and lots, and 'to make and deliver to the bona fide occupants of such portions of said lands described in said patent from the government of *the [152 United States, who may be entitled thereto, good and sufficient deeds of conveyance in fee simple, according to their respective rights.'

"Under the provisions of said laws, one E. B. True was employed to survey and plat the lands in said town, and was commanded to adjust said plat so as to conform to the conditions of the improvements and the use and occupation of such lands by the settler, and the mayor was required to make and deliver to the bona fide occupants of such lands good and sufficient deeds of conveyance in fee simple, according to their respective interests, under the provisions of said law.

"It appears from the evidence in the case that said True made a plat of said town, including block 24, in which block are the lots involved in this case, so as to make the lots about 46 feet long, north and south, when, as a matter of fact, most, if not all, of the lots in that block, were 50 feet long, north and south, as indicated by the buildings and other improvements thereon."

The supreme court said:

"The question is fairly presented as to whether said True had any authority whatever to make said plat so as to interfere with and cut off a part of the buildings and improvements of the occupants of such lots. In other words, whether, under the law, a surveyor who is employed to plat such a town site, after its entry by the proper officer, can widen a street, and, in doing so, can cut off a portion of the buildings and improvements of the lot owners bordering on such street."

The question was answered in the negative, and the judgment of the trial court,

which was adverse to plaintiff, was affirmed. In some aspects the answer may be said to have been put upon the statute of the state of January 8, 1873, providing for the survey, platting, and disposal of the land. The court observed that there was no dispute that the evidence established that the defendants claimed and occupied their lots to the extent they had claimed for many years prior and subsequently to the survey, 153] and that it was not shown or *claimed that part of the lots was used as a street, nor that the city ever claimed any part of them as a street. And it was said: "The city surveyor cannot make any portion of said lots a street by simply making a plat and indicating on such plat that said lots were only 45 or 46 feet in length." The claim by defendants was of 50 feet. The court further said: "The mayor-trustee had no judicial power in this matter; neither had the surveyor. The surveyor and mayor cannot dedicate to the public as a street parts of lots occupied and possessed by individuals." This, it may be contended, is a mere construction of the statute of the state of Idaho, and nothing more; in other words, a decision that, under the statute, there was no power given to make a survey or plat which did not conform to the lines of occupation. The contention of plaintiff, however, is that "the laws of Congress authorize an official ascertainment" of the boundaries of the city, and "that the equitable right under the said laws of Congress vests upon a condition subsequent, which is that the owner of the equity must, within a reasonable time, have his right confirmed by the trustee upon an official survey ascertaining and settling its boundaries and nature, and that the laws of Congress require each town-site occupant to see to it that the official ascertainment is true and correct and satisfactory before accepting confirmation of his equitable rights from the mayor-trustee." It is hence insisted that a construction of the laws of Congress is involved. This contention, we think, is the basis of plaintiff's bill of complaint, and it seems also to have been passed on by the supreme court of the state. The court said: "The appellant [plaintiff in error here] rests his case here on the making and approval of said plat" (that is, the plat made by True), and the contention was discussed. We think, therefore, the motion to dismiss should be overruled.

But a little more discussion is necessary to pass on its merits. Section 2387 constitutes the grant of title, and it is very explicit as to grantees to the matter granted, 154] and for whose use *it is granted. The grant is of lands occupied as a town site, the grantees are the corporate authorities there-

of, or the judge of the county court where the town is situated, "in trust for the several use and benefit of the occupants thereof, according to their respective interests." And the legislation of Idaho, enacted in pursuance of § 2387, provides, as we have seen, that the mayor shall cause to be made and filed in his office a plat of the land divided into lots and blocks, but it is also provided that he is required, as trustee, "to make and deliver to the bona fide occupants of such portions of said lands described in said patent from the government of the United States, who may be entitled thereto, good and sufficient deeds of conveyance in fee simple, according to their respective rights." The object of the state legislation, therefore, was to consummate the grant of the government to the occupants of the land, not to alter or diminish it. The grant was through the mayor to the occupants of the lands. The extent of their occupation was the extent of their rights; determined, therefore, the relation of their lots to the streets and alleys; fixed the location of the streets and alleys. Or, as it is epigrammatically expressed by the supreme court of the state, "it must be kept in mind that Lewiston existed prior to the True survey. The settlers did not acquire their right under the plat nor by virtue of it. The survey and plat were made for them; they were not made for the survey and plat." But we need not make a universal application of this. It is enough for the present case that the supreme court so construed the power of the mayor and the surveyor under the Idaho statute. It may well be contended, however, that the supreme court expressed a principle that has broader application,—expressed as well the meaning of the act of Congress. In *Ashby v. Hall*, 119 U. S. 526, 30 L. ed. 469, 7 Sup. Ct. Rep. 308, this court said, speaking by Mr. Justice Field, that "the power vested in the legislature of the territory [Montana] in the execution of the trust [under § 2387] upon which the entry was made was confined to regulations for the disposal of the lots and the proceeds of the sales. These regulations might *extend to provisions for the ascer- [155] tainment of the nature and extent of the occupancy of different claimants of lots, and the execution and delivery to those found to be occupants in good faith of some official recognition of title, in the nature of a conveyance. But they could not authorize any diminution of the rights of the occupants when the extent of their occupancy was established. The entry was in trust for them, and nothing more was necessary than an official recognition of the extent of their occupancy. Un-

der the authority conferred by the town-site act, the legislature could not change or close the streets, alleys, and blocks of the town by a new survey. Whatever power it may have had over them did not come from that act, but, if it existed at all, from the general grant of legislative power under the organic act of the territory." See also *Stringfellow v. Cain*, 99 U. S. 610, 25 L. ed. 421; *Cofield v. McClelland*, 16 Wall. 331, 21 L. ed. 339; *Hussey v. Smith*, 99 U. S. 20, 25 L. ed. 314. Many state cases are to the same effect, and may be found in the notes to § 2387 in *United States Federal Statutes Annotated*, vol. 6, pages 344 et seq.

Further discussion is unnecessary. Plaintiff's other contentions are either disposed of by the facts found by the state courts or do not present Federal questions.

Judgment affirmed.

156] *RUMFORD CHEMICAL WORKS,
Petitioner,

v.

HYGIENIC CHEMICAL COMPANY OF
NEW JERSEY. (No. 9.)

HYGIENIC CHEMICAL COMPANY OF
NEW YORK, James E. Haller, and Adolph
Hirsh, Petitioners,

v.

RUMFORD CHEMICAL WORKS. (No.
121.)

(See S. C. Reporter's ed. 156-160.)

Appeal — questions reviewable — concurrent findings of fact.

1. Concurrent findings of fact by the two lower courts on the question of infringement of a patent will ordinarily not be revised by the Federal Supreme Court. [For other cases, see *Appeal and Error*, 4931-4959, in *Digest Sup. Ct.* 1908.]

Evidence — former testimony — privy to former suit.

2. Contribution by a corporation to the expenses of the defense of a patent infringement suit, induced by business reasons and indirect interest, but without the right to intermeddle in any way with the conduct of the case, does not make such corporation a privy to the suit, so as to render admissible, in a suit against it for infringement of the same patent, the testimony in the former suit of a witness since deceased. [For other cases, see *Evidence*, X. m, in *Digest Sup. Ct.* 1908.]

[Nos. 9, 121.]

Argued November 1, 1909. Decided November 29, 1909.

NOTE.—On admissibility of former testimony—see note to *Rueh v. Rock Island*, 24 L. ed. U. S. 1101.

54 L. ed.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree which affirmed a decree of the District Court for the District of New Jersey, dismissing the bill in a suit for the infringement of a patent. Affirmed. Also

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of the Circuit Court for the Northern District of New York, dismissing the bill in a suit for the infringement of the same patent. Reversed.

See same case below in No. 9, 83 C. C. A. 177, 154 Fed. 65; in No. 121, 86 C. C. A. 416, 159 Fed. 436.

The facts are stated in the opinion.

Mr. Philip Mauro argued the cause, and, with Mr. C. A. L. Massie, filed a brief for the Rumford Chemical Works:

A court of equity may take judicial notice of its own records in a former litigation, and particularly in litigation in which the present parties were privies.

Butler v. Eaton, 141 U. S. 240, 242, 35 L. ed. 713, 714, 11 Sup. Ct. Rep. 985; *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 31, 38, 37 L. ed. 986, 989, 14 Sup. Ct. Rep. 4; *Craemer v. Washington*, 168 U. S. 124, 129, 42 L. ed. 407, 409, 18 Sup. Ct. Rep. 1; *Re Boardman*, 169 U. S. 39, 44, 42 L. ed. 653, 654, 18 Sup. Ct. Rep. 291; *Bresnahan v. Tripp Giant Leveller Co.* 19 C. C. A. 237, 33 U. S. App. 421, 72 Fed. 922; *Cushman Paper Box Mach. Co. v. Goddard*, 37 C. C. A. 221, 95 Fed. 666.

Parties include not only those whose names appear upon the record, but all others who participate in the litigation by employing counsel, or by contributing toward expenses, or who, in any manner, direct the course of the proceedings, as well as those who derive their rights from persons primarily interested in the suit.

3 *Robinson, Patents*, p. 566, § 1176; *Robbins v. Chicago*, 4 Wall. 657, 672, 18 L. ed. 427, 430; *Penfield v. Potts*, 61 C. C. A. 371, 126 Fed. 480.

The doctrine of estoppel by judgment as to every matter adjudged in the test case applies to both corporations and to the individual defendants.

Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195.

Mr. Edwin T. Rice argued the cause, and, with Messrs. Willard Parker Butler and Whitridge, Butler, & Rice, filed a brief for the Hygienic Chemical Company et al:

Privy was not shown between any of the defendants in either suit and the defendants in the prior suit against the New York Baking Powder Co. et al.

Litchfield v. Goodnow, 123 U. S. 549, 31 L. ed. 199, 8 Sup. Ct. Rep. 210.

The test of privity lies in the fact, first, of the existence of a test case; and second, of the contribution to its prosecution or defense in pursuance of an agreement to that effect.

Theller v. Hershey, 89 Fed. 575; United States & F. S. Felting Co. v. Asbestos Felting Co. 4 Fed. 816; Miller v. Liggett & M. Tobacco Co. 7 Fed. 91; American Bell Teleph. Co. v. National Improved Teleph. Co. 27 Fed. 663; Eagle Mfg. Co. v. David Bradley Mfg. Co. 50 Fed. 193, 6 C. C. A. 661, 18 U. S. App. 349, 57 Fed. 980; National Folding-Box & Paper Co. v. Dayton Paper Novelty Co. 95 Fed. 991; Lane v. Welds, 39 C. C. A. 528, 99 Fed. 286.

While courts will take notice of their own orders or prior proceedings in the same case, they will not take notice of the pendency of another action in the same or another court, nor will they take notice of a former judgment or a decree between the same or other parties in the same or in another court, unless the same be properly offered in evidence.

Stanley v. McElrath, 86 Cal. 449, 10 L.R.A. 545, 25 Pac. 16; Downing v. Howlett, 6 Colo. App. 291, 40 Pac. 505; Adler v. Lang, 26 Mo. App. 226; Grace v. Ballou, 4 S. D. 333, 56 N. W. 1075; Re Manderson, 2 C. C. A. 490, 3 U. S. App. 199, 51 Fed. 501; Streeter v. Streeter, 43 Ill. 155; Taylor v. Adams, 115 Ill. 570, 4 N. E. 837; Loomis v. Griffin, 78 Iowa, 482, 43 N. W. 296; Granger v. Griffin, 78 Iowa, 759, 43 N. W. 297; Banks v. Burnam, 61 Mo. 76; Spurlock v. Missouri P. R. Co. 76 Mo. 67; Daniel v. Bellamy, 91 N. C. 78; People ex rel. Carrillo v. De La Guerra, 24 Cal. 73; State v. Edwards, 19 Mo. 674; Baker v. Mygatt, 14 Iowa, 131; Allison v. Fidelity Mut. F. Ins. Co. 74 Neb. 366, 104 N. W. 753; Re Osborne, 52 C. C. A. 595, 115 Fed. 1; Bank of Montreal v. Taylor, 86 Ill. App. 388; Ralphs v. Hensler, 97 Cal. 296, 32 Pac. 243; McCormick v. Herndon, 67 Wis. 648, 31 N. W. 303; Enix v. Miller, 54 Iowa, 551, 6 N. W. 722; Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; State v. Wilson, 39 Mo. App. 114; 1 Wharton, Ev. § 326; Lake Merced Water Co. v. Cowles, 31 Cal. 215; 1 Jones, Ev. 1896, § 124.

The extract from the Clotworthy deposition was clearly inadmissible as against the defendants.

Metropolitan Street R. Co. v. Gumby, 39 C. C. A. 455; 99 Fed. 192; Chase's Stephen's Digest of Ev. 2d ed. art. 32; Greenl. Ev. §§ 163, 168.

138

Mr. Justice Holmes delivered the opinion of the court:

These are two suits in equity, brought by the Rumford Chemical Company for the infringement of a patent for baking powders; one, No. 9, brought in the third circuit, New Jersey, against the Hygienic Chemical Company, a corporation of that state; the other, No. 121, brought in the second circuit, New York, against a New York corporation of the same name. The two cases were tried on substantially the same record and evidence, with the result that in New Jersey the bill was dismissed by the circuit court of appeals (83 C. C. A. 177, 154 Fed. 65), but in New York the bill was sustained (86 C. C. A. 416, 159 Fed. 436). Writs of certiorari were granted by this court.

The defendants rested on the plaintiff's evidence, and the question in both suits was whether a prima facie case had been made out. It did not appear that the defendants made or sold baking powders as such, but the New Jersey company did make acid phosphates for baking powders and other purposes, and the New York com- [159] pany sold the great part of its products. The plaintiff contended that this acid phosphate had the characteristics described in its patent, and was made and sold for use in baking powders, and that the manufacture and sale were an infringement of its rights. A previous decision (Rumford Chemical Works v. New York Baking Powder Co. 67 C. C. A. 367, 134 Fed. 385) establishing the patent, was relied upon as a test case by which the defendants were bound; but, except the final decree, entered after the beginning of the present suits, the record was not put in. It would seem, from a late case, that the plaintiff was correct in point of fact (Provident Chemical Works v. Hygienic Chemical Co. 170 Fed. 523), but the question here must be discussed, of course, on the evidence before the court below. The question is material as bearing upon the admissibility of the evidence of one Clotworthy, since dead, given in the suit against the New York Baking Powder Company, upon which the plaintiff relied.

Clotworthy was the president and general manager of the Clotworthy Chemical Company, and was a manufacturer of baking powder. He testified to the purchase from the Hygienic Company of New York of a barrel of granular acid phosphate, shown to be similar to that described in the plaintiff's patent. A bill from the New Jersey company and a receipt from the New York company also were produced and put in.

215 U. S.

The courts in both circuits rightly regarded this as the most important, if not the only, evidence to make out the infringement alleged. Therefore it was necessary that the plaintiff should prove that the defendants were privy to the New York Baking Powder Company's case.

To prove privity, Heller, the president of the defendant companies, was called and asked as to his testimony on the former occasion. He admitted that he then had testified that "we are manufacturers of granulated acid phosphate, and are selling to the trade in the same way as" the former defendants; also that he had testified that "we have [undertaken to assist in bearing the burdens of this defense, and have contributed] tributed to [the defense] financially and otherwise." By the natural interpretation of the word in the connection in which it was used, "we" embraced the New Jersey company, and fairly may be argued to have meant both. Heller swore that these answers were true, but with the qualification that he did not think that the New Jersey corporation contributed financially, and that he did not remember whether it did otherwise. All the courts agree that the privity of the New Jersey corporation was not made out. Probably all, and at least the circuit court of appeals and the circuit court for the third circuit (148 Fed. 862), agree that, if Clotworthy's testimony is excluded, infringement is not proved. We should not revise this finding of both courts on the facts, and therefore it follows that the New Jersey decree must be affirmed. The evidence on both sides is discussed in 148 Fed. 862.

It appears that the New York company contributed to the expenses of the former case. But that fact alone is not enough to warrant a different result. The agreement disclosed in 170 Fed. 523 was not before the court. We may reject as extravagant the suggestion that the contribution may have been made from charitable motives, and assume that it was induced by reasons of business and indirect interest; but it was not shown that, as between the present and former defendants, either Hygienic Company had the right to intermeddle in any way in the conduct of the case. The Hygienic Companies would have been glad to see the Rumford patent declared void, and were willing to pay something to that end. That was all, and that did not make them privies; and therefore the Clotworthy deposition was not admissible against them. *Litchfield v. Goodnow*, 123 U. S. 549, 550, 31 L. ed. 199, 201, 8 Sup. Ct. Rep. 210. Whether, if it had been admitted, infringement could have been inferred from the 54 L. ed.

sale of a barrel of granular acid phosphate to a manufacturer of baking powder, need not be considered. There was other evidence in the case.

Decree in No. 9 affirmed.

Decree in No. 121 reversed.

***DEMETRIUS M. STEWARD**, Moritz, [161 Kirchberger, Benno von Schwarz, R. H. Williams, Administrator of George von Schwarz, Deceased, Philip von Frays, and Henry Iden, as Executor of the Last Will and Testament of Charles W. Iden, Deceased, Petitioners,

v.

AMERICAN LAVA COMPANY and Paul J. Kruesi. (No. 27.)

MORITZ KIRCHBERGER, Benno von Schwarz, R. H. Williams, Administrator of George von Schwarz, Deceased, Philip von Frays, and Henry Iden, as Executor of the Last Will and Testament of Charles W. Iden, Deceased, Petitioners,

v.

AMERICAN LAVA COMPANY and Paul J. Kruesi. (No. 28.)

(See S. C. Reporter's ed. 161-170.)

Patents — amendment of specification — oath.

1. The amended specification of the Dolan patent, No. 589,342, for a duplex acetylene gas burner or tip of the Bunsen type, having a series of inclined air passages in the sides, which, for the first time, if at all, indicates as the essence of the invention so short a chamber or cylinder as to prevent the mixing of the air taken into it, and to emit the current of gas surrounded by the greater part of such air as an envelop or film, is void under U. S. Rev. Stat. § 4892, U. S. Comp. Stat. 1901, p. 3384, because introducing entirely new matter not sworn to, where the original application made no claim for a process, and disclosed no invention of a device.

[For other cases, see Patents, VII. c, in Digest Sup. Ct. 1908.]

Patents — specifications — definiteness.

2. A statement in the specifications of the Dolan patent, No. 589,342, for a duplex acetylene gas burner or tip of the Bunsen type, having a series of inclined air passages on the sides, that, if the burner were cut off, the general shape and condition of the flame would be the same, does not indicate with sufficient definiteness that the essence

NOTE.—On amendment of application for patent—see note to *Cleveland Foundry Co. v. Detroit Vapor Stove Co.* 68 C. C. A. 239.

On anticipation of patent—see notes to *Evans v. Eaton*, 4 L. ed. U. S. 433; *Leggett v. Standard Oil Co.* 37 L. ed. U. S. 737; *Wollensak v. Sargent & Co.* 38 L. ed. U. S. 138; and *Dashiell v. Grosvenor*, 40 L. ed. U. S. 1025.

of the invention is to have so short a chamber or cylinder as to prevent the mixing of the air taken into it, and to emit a current of gas surrounded by the greater part of such air as an envelop or film.

[For other cases, see Patents, VII. b, in Digest Sup. Ct. 1908.]

Patents — anticipation — acetylene gas burner.

3. The Dolan patent, No. 589,342, for a duplex acetylene gas burner of the Bunsen type, having a series of inclined air passages on the sides, is anticipated by the French patents to Bullier and Letang, which provide for a mixture of air with the gas, sufficient to secure complete combustion of all that is burned near the point of emergence, but insufficient to burn all the gas.

[For other cases, see Patents, V. e, in Digest Sup. Ct. 1908.]

[Nos. 27, 28.]

Argued November 10, 11, 1909. Decided November 29, 1909.

TWO WRITS of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review decrees which reversed decrees of the Circuit Court for the Eastern District of Tennessee in favor of complainants in suits for the infringement of a patent, and remanded the causes to the Circuit Court, with directions to dismiss the bills. Affirmed.

See same case below, No. 27, 84 C. C. A. 157, 155 Fed. 731; No. 28, 84 C. C. A. 166, 155 Fed. 740.

The facts are stated in the opinion.

Mr. Louis C. Raegener argued the cause and filed a brief for petitioners:

The mere use of reference letters in the claims of a pioneer combination patent does not, of itself, limit the scope of the claims to the exact form shown.

McCormick Harvesting Mach. Co. v. C. Aultman & Co. 16 C. C. A. 259, 37 U. S. App. 299, 69 Fed. 371.

To the same effect see Bonnette Arc Lawn Sprinkler Co. v. Koehler, 27 C. C. A. 200, 54 U. S. App. 267, 82 Fed. 428.

It may well be that on the 18th of February, 1897, Dolan did not clearly understand the process which produced the hollow funnel-shaped flame, nor the theory of operation; but, so long as he described the phenomena peculiar to his process, and a tip which would produce them, what of it?

Cleveland Foundry Co. v. Detroit Vapor Stove Co. 68 C. C. A. 233, 131 Fed. 853.

The specifications were not altered in essential particulars by amendment bringing in new matter. A new oath to the amended specification was not necessary.

Seymour v. Osborne, 11 Wall. 541, 20 L. ed. 37; De La Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 210,

37 L. ed. 139, 13 Sup. Ct. Rep. 283; John R. Williams Co. v. Miller, Du B. & P. Mfg. Co. 107 Fed. 290; Keasbey & M. Co. v. Philip Carey Mfg. Co. 139 Fed. 578; Cleveland Foundry Co. v. Detroit Vapor Stove Co. supra.

The air-envelop process, as such, is clearly patentable, as it is a physical, and not a mechanical, process, and the statement by the court that more than one apparatus capable of carrying out the process must be described is clearly error.

Corning v. Burden, 15 How. 252, 14 L. ed. 683; Tilghman v. Proctor, 102 U. S. 728, 26 L. ed. 287; Melvin v. Thomas Roter Sons & Co. 91 Fed. 151.

Mr. Charles Neave argued the cause, and, with Messrs. F. P. Fish and William G. McKnight, filed a brief for respondents:

The Dolan patent is invalid for lack of a sufficient description.

Bullock Electric Mfg. Co. v. General Electric Co. 79 C. C. A. 229, 149 Fed. 409; Germer Stove Co. v. Art Stove Co. 80 C. C. A. 9, 150 Fed. 145; Wood v. Underhill, 5 How. 4, 12 L. ed. 24; Re Incandescent Lamp Patent, 159 U. S. 465, 474, 475, 40 L. ed. 221, 224, 225, 16 Sup. Ct. Rep. 75; Matheson v. Campbell, 69 Fed. 597; Cerealine Mfg. Co. v. Bates, 41 C. C. A. 341, 101 Fed. 280; Bates v. Coe, 98 U. S. 31, 39, 25 L. ed. 68, 71.

The third claim of the patent in suit is invalid for lack of invention.

E. M. Miller Co. v. Meridan Bronze Co. 80 Fed. 523; Stuart v. Auger & S. Silk Dyeing Co. 139 Fed. 940.

The process claims are invalid being merely for the function of the apparatus.

Corning v. Burden, 15 How. 252, 268, 14 L. ed. 683, 690; Le Roy v. Tatham, 14 How. 156, 175, 14 L. ed. 367, 375; Westinghouse v. Boyden Power Brake Co. 170 U. S. 537, 556, 557, 42 L. ed. 1136, 1143, 1144, 18 Sup. Ct. Rep. 707; American Strawboard Co. v. Elkhart Egg-Case Co. 84 Fed. 960; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. 99 Fed. 768.

Amendments embracing any material variation from the original application—anything new, not comprised in that—cannot be sustained on the original application, and should not be allowed.

Chicago & N. W. R. Co. v. Sayles, 97 U. S. 554, 24 L. ed. 1053; Eagleton Mfg. Co. v. West, B. & C. Mfg. Co. 111 U. S. 490, 28 L. ed. 493, 4 Sup. Ct. Rep. 593; Michigan C. R. Co. v. Consolidated Car-Heating Co. 14 C. C. A. 232, 31 U. S. App. 462, 67 Fed. 121.

Mr. Justice Holmes delivered the opinion of the court:

These are bills in equity, brought by the

petitioners to restrain the infringement of letters patent No. 589,342, issued to the assignee of Edward J. Dolan, and dated August 31, 1897. The patent was held invalid by the circuit court of appeals for the sixth circuit. 84 C. C. A. 157 and 166, 155 Fed. 731 and 740. It had been sustained by the circuit court of appeals for the second circuit (*Kirchberger v. American Acetylene Burner Co.* 64 C. C. A. 107, 128 Fed. 599), and a writ of certiorari was granted by this court to the first-mentioned circuit court of appeals.

The patent, so far as it comes in question here, is for a tip for acetylene gas burners and for the process of burning acetylene [162] *gas in the mode set forth. The court below held that the tip was not new, that the description was too indefinite, that the amended specifications brought in entirely new matter not sworn to, and that the claims for processes, so called, were only claims for the functions of the tip described.

A few words as to the conditions and knowledge at the time of the alleged invention will help to make the discussion plain. Acetylene gas began to be produced on a large scale for commercial purposes about 1895. It is very rich in carbon, and therefore has great illuminating power, but, for the same reason, coupled with the relatively low heat at which it dissociates and sets carbon free, it deposited soot or unconsumed carbon, and soon clogged the burners then in use. It was possible to secure a complete consumption of carbon by means of the well-known Bunsen burner. This consists of a tube or cylinder pierced on the sides with holes for the admission of the air, into one end of which a fine stream of gas is projected through a minute aperture, and from the other end of which it escapes and then is burned. A high pressure is necessary for the gas in order to prevent its burning back. The ordinary use of the Bunsen burner is to develop heat, and to that end a complete combustion, of course, as desired. But, with an immediately complete combustion, there is little light. The yellow light of candles and gas jets is due to free particles of carbon at a red heat, but not yet combined with oxygen, or, as we commonly say, consumed. On the appearance of acetylene gas, inventors at once sought to apply the principle of the Bunsen burner with such modifications as would produce this result. In doing so, they found it best to use duplex burners,—that is burners the outlets of which were inclined toward each other so that the meeting of the two streams of gas formed a flat flame, and to let in less air.

In this state of things, Dolan filed his application on February 18, 1897. The objection was

said to be “to provide a burner the use of which will result in perfect combustion of the gas, and the production of a flame which will afford the greatest *possible degree of light from a given amount of gas consumed. A duplex burner on the Bunsen plan was described, but with no indication of any patentable device. The drawings were merely diagrams, and, with reference to what is to follow, we may mention that two of them show two sets of air holes, one above the other, and that the specification even now expressly allows “two or more” sets. The claims were rejected on April 6, 1897, and in the same month Dolan changed his attorney. On May 20 a new specification and new claims were filed by the new attorney, but not sworn to by Dolan, and on these, with no material change, the patent was granted. In this specification, as in the former, though in different words, it is said that, “in order to prevent the deposit of carbon with the burner or at the burner top, and thereby insure a perfect combustion and a smokeless flame at the point where the same is formed, I provide a series of inclined air passages, *a, a*, which lead into the enlarged passage, *E*, above the point at which the contracted opening, *C*, is provided.”† The inclined air passages are the holes in the sides of the Bunsen burner, *E* is the cylinder, or tube, and the contracted opening, *C*, is the point at which the gas enters the tube. This device, and nothing else, is pointed out as the means for preventing the clogging of the tips. A preference is stated for a burner in duplex form.

In the new specification, however, it was said that the operation “seems to be” that the gas draws in on all sides an envelop of air through the openings *a*, etc., so far stating the Bunsen principle, but adding that “the result of this arrangement seems to be to so cool the outside of the flame as to prevent any deposit of carbon at the point of egress.” And another paragraph was as follows: “The structure of my burner is such that, if all of the burner were cut off in a horizontal plane immediately above the outlet *C* [the point where the gas enters the upper chamber], the general shape and condition of the flame would not be modified, but, in this case, an immediate combustion would occur at the outlet. Under the conditions of this burner the point where the gas reaches its kindling temperature is carried upward, but the general shape of the escaping gas body is not materially modified.” It was stated earlier that “the result here accomplished would not be accomplished in an ordinary air-mixing

†See following page for Figures 1 and 2.

burner, in which the air was mingled generally with the body of the gas," and that "in my burner an absolutely unobstructed passage is provided for the escape of the original jet of gas forced by the constricted opening C. By reason of this fact it is substantially necessary to have two jets if a flame of considerable candle power is desired."

The claims allowed and in controversy here are as follows:

"1. The process of burning acetylene gas, which consists in projecting a small cylinder of gas, in surrounding the same with an envelop of air insufficient to cause combustion of all the gas, and in finally supplying the gas with an additional amount of oxygen by allowing the stream of gas to [165] expand *above the burner tip into contact with the air, thereby burning the same, substantially as described.

"2. The process of burning acetylene gas, which consists in projecting toward each other two cylinders of acetylene gas, in surrounding the same with envelops of air insufficient to produce combustion of all the gas, and in finally causing the cylinders of gas to impinge upon each other, and produce a flat flame, substantially as described.

"3. The combination in an acetylene burner of the block A, having the minute opening C, the cylindrical opening E, opening without obstruction to the atmosphere, and the air passages a, substantially as described."

The ground upon which these claims are maintained is the theory indicated in one of the passages that we have quoted, to the

effect that the gas emerges to the air surrounded by a mainly unmixed flow of air carried with it from the cylinder containing the holes a, a, and that this so cools the outside of the flame as to prevent a deposit of carbon. If this theory is not true, and if all there is to the Dolan tip or burner is to provide for a mixture of air with the gas in the cylinder sufficient to secure complete combustion of all that is burned near the point of emergence, but insufficient to burn all the gas, the patent must fail. For this latter contrivance was well known, and if the shortness of the Dolan tip, which we are about to mention, has no other effect than to diminish the amount of air received, it does nothing new. Moreover, unless the theory of the cooling envelop so dominates the specification as to explain what is doubtful and ambiguous in it, the claim would not be for what now is said to be the characteristic of the Dolan tip. The characteristic of the Dolan tip now is said to lie in the fact that the cylinder is very short, as, it is said, it must be for it to be true that the shape of the flame would not be modified by cutting it off. The shortness of the cylinder is supposed to prevent the mixing of the air, and to produce the result desired.

But this theory of cooling not only is disputed in the testimony *and treated [166 as speculative and highly doubtful by the courts below, but is discredited by the patent itself. The fourth claim is for a combination in an acetylene burner of two "air-mixing" burners. The theory was not that upon which Dolan was working, or in which he even now believes. He was a witness in the

The following are copies of Dolan's Fig. 1 and Fig. 2.

Fig. 1.

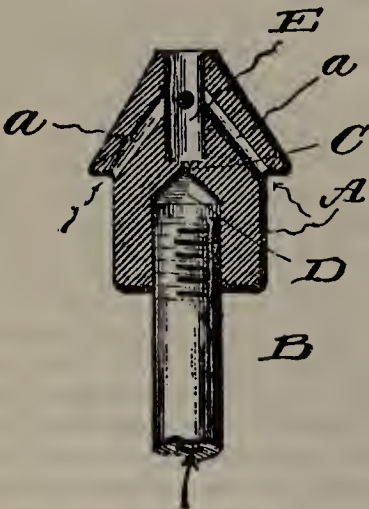
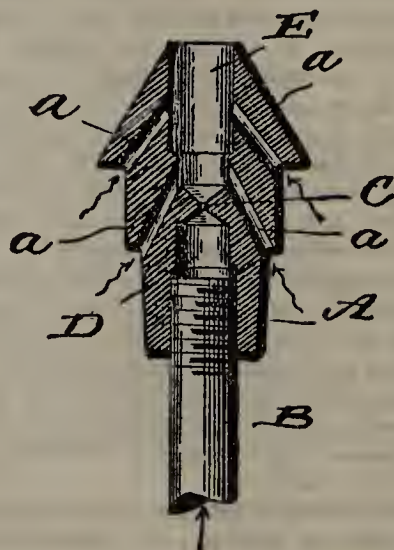


Fig. 2.



case, and testified that it was his lawyer's contrivance, and while, of course, a mechanical device may be patentable although the true theory of it is not understood, here the words relied upon to show that the cylinder was to have this characteristic shortness also were the insertion of the lawyer, and would have had little importance apart from that newly adopted point of view. We should regret to be compelled to decide a case by the acceptance or rejection of a theoretic explanation upon which it still is possible that authorities in science disagree. But the uncertainty indicated even by the language of the patent is important in determining whether it describes a new invention in terms sufficiently precise to be upheld.

As we have said, the only passage indicating, even by indirection, the length of the cylinder, if that does, is the paragraph stating that, if the burner were cut off, the general shape and condition of the flame would be the same, which is thought to reproduce more exactly a suggestion in Dolan's specification as to a funnel-shaped flame, said by him to result from the issue of gas with pressure through a small opening. But, if the relative shortness of the cylinder had been understood to be an essential thing, the patent naturally would have said so. It is suggested that the shortness is implied by the word "tip" in the patent, but the patent equally is said to relate to an improvement in burners, and the length of burners depends on the principle involved. In fact, all that directly bears upon length is the statement, which we have not yet mentioned, that the contracted opening for the gas into the cylinder is at or near the longitudinal center of the block constituting the tip. As the block may be longer or shorter, with no limits fixed, while the cylinder extends from the longitudinal [167] center to the outlet *where the gas is burned, obviously, the length of the cylinder, or one half the block, may be greater or less, so far as we are informed by this portion of the patent. And when this is taken with the language as to mixing, in the fourth claim, with the allowance of two or more sets of air holes, one above another, with the uncertain statement of the theory ("the operation seems to be," "the result seems to be"), and with the statement of the air holes alone as the feature that prevents the deposit, it seems to us impossible to say that sufficient instructions are given on the supposed vital point. Again, no proportions are indicated; the number, size, and position of the air holes, except that they enter the cylinder above the gas, are left at large; and, if the plaintiffs' theory is the true one, the public are told little more than to try experiments

until they find a burner that works. The plaintiffs say that a burner with a distance of four fifths of an inch or over between gas and discharge orifice is a Bunsen burner, and that, for the burner to be effective for illuminating purposes, the distance should be only a few millimeters. But, if experiment had proved the contrary, we cannot doubt that they equally would have claimed the successful burner as the one Dolan had contrived.

If, as now is said, a rat-tail flame is the mark of Dolan's burner, the words "funnel-shaped," in the original application, were not apt to describe it, and did not purport to indicate a test. They were used merely to show how the perfect combustion was achieved which is the declared object throughout. The cause assigned was not peculiar to Dolan's tip. The amendment in the passage as to the unaltered shape of the flame when the burner is cut off goes on to say that "of course" the shape, though cylindrical as it issues from the round hole, increases in diameter, "approximating in some degree to the form of an inverted cone." This of itself almost excludes the notion that the rat-tail shape is the test, and no reader would draw that or any similar notion from the specification as a whole.

*We appreciate the difficulties that [168] would beset an attempt to make the directions more precise, but it certainly was possible to indicate with greater clearness the specific object to be attained, and that, in any ordinary burner, the tip must be very short. Vacillation in theory led to uncertainty of phrase. If, however, we are wrong, then it appears to us plain that Dolan's attorney introduced not merely the theory, but the mode of applying it, for the first time, in the amended specification; or, in other words, then for the first time pointed to an invention, the essence of which was to have so short a chamber or cylinder as to prevent the mixing of the air taken into it, and to emit the current of gas surrounded by the greater part of such air as an envelop or film. Of course, Dolan desired to produce the result which the patented article is said to produce, but, beyond that desire, his specification did not give a hint of the means by which it now is said to be achieved. It spoke, it is true, as we have said, of producing a hollow-shaped funnel flame by reason of the gas being forced through contracted openings at very great pressure. But this did not disclose the invention, and was dropped in the amendment. He made no claim for a process and disclosed no invention of a device. This being so, the amendment required an oath that Dolan might have found it difficult to take, and for want of it the patent is void. Rev.

Stat. § 4892, U. S. Comp. Stat. 1901, p. 3384; *Chicago & N. W. R. Co. v. Sayles*, 97 U. S. 554, 24 L. ed. 1053; *Eagleton Mfg. Co. v. West B. & C. Mfg. Co.* 111 U. S. 490, 28 L. ed. 493, 4 Sup. Ct. Rep. 593; *Kennedy v. Hazelton*, 128 U. S. 667, 32 L. ed. 576, 9 Sup. Ct. Rep. 202; *De La Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U. S. 209, 229, 37 L. ed. 138, 145, 13 Sup. Ct. Rep. 285.

The patent was held void below on the further ground that it had been anticipated. We turn to this last because the question is complicated with the theory that we have mentioned. If the Dolan patent had unreservedly committed itself to the notion of a cooling envelop with a contrivance made very short for the purpose of securing that result, the argument in defense of it would be that the leading earlier patents proceeded upon the opposite theory of mixture, and [169] admitted, if *they did not contemplate, a longer tube, however similar otherwise they might be. They, at least, exhibit the state of the art at the date of the supposed invention, and show within what narrow and precise limits Dolan had to move if he was to produce anything new. So much may be said to be undisputed, and we have mentioned some of the facts that cannot be denied. But, on the view that we have taken of Dolan's specification, they anticipate all that he can be said to have disclosed to the public. We think it unnecessary to go over much of the disputed ground, and shall mention but two of the patents put in evidence. The most important of these is one issued in France to Bullier. This also was for a tip (*bec*) for acetylene gas. This tip was structurally similar to Dolan's, admitting the gas through a very small orifice, and having the same slanting air passages entering the cylinder above and around the gas, and, in one drawing at least, entering it very near its upper end. Bullier definitely adopted the theory of mixture and stated the proportions,—40 per cent of air to 60 per cent of gas,—and, after stating his preference for a duplex burner, he added that, in this manner, the illuminating portion of the flames is relatively far from the orifice by reason of the air introduced, and that, for the same reason, the combustion of the carbon is complete between the orifice and the point where the flame flattens, the flame as it issues from the orifices being blue and not illuminating. In this way, he said, he avoided any deposit of carbon. The degree of mixture is affected by the length of the cylinder or tube, and, when mixture is desired, naturally a longer tube would be employed than when it is to be prevented. The drawings, which are admitted to be

only diagrams, indicate a longer cylinder than Dolan's, and although Bullier does not state the length, it will be perceived, without more, that, if the plaintiffs' theory and construction of their patent were adopted, the distinction insisted upon by them might be held to exist. Otherwise the anticipation is complete. It is significant that some of the plaintiffs manufacture under a Bullier license in France.

*The other patent to be mentioned [170] is another French one, to Letang. He also states, as means to prevent clogging, the removal of the outlet opening sufficiently far from the point of ignition, and the cooling of the burner by a current of air. This current was produced by separate plates above the gas nozzle, so arranged that a certain quantity of air would be carried along by the gas. It would seem from the diagram that the distance intended to exist between the nozzle and the flame was very short. We do not dwell upon the earlier patents in more detail, because we believe that we have said enough to show that the plaintiffs' cannot be sustained.

Decrees affirmed.

Mr. Justice McKenna dissents.

STATE OF LOUISIANA EX REL. LOUIS
A. HUBERT, Receiver, Plff. in Err.,

v.

MAYOR AND COUNCIL OF THE CITY OF
NEW ORLEANS.

(See S. C. Reporter's ed. 170-181.)

Taxes — power of municipality — exhausting by one exercise.

1. The levy and collection of taxes by the city of New Orleans to satisfy outstanding indebtedness of the metropolitan police board, contracted on the faith of the exercise of the taxing power for its payment, do not exhaust the city's power in the premises, where the city has applied the taxes to other purposes, and has failed to turn

NOTE.—On municipal taxation—see note to *Magenau v. Fremont*, 9 L.R.A. 786.

As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L.R.A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162; *McCanna v. Citizens' Trust & Surety Co.* 24 C. C. A. 20; and *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

That impairing the remedy impairs the obligation of contract—see notes to *Best v. Baumgardner*, 1 L.R.A. 356; *Louisiana ex rel. Ranger v. New Orleans*, 26 L. ed. U. S. 132; and *Phinney v. Phinney*, 4 L.R.A. 348.

them over, upon demand, to the board or its representative.

[For other cases, see *Taxes*, I. e, in *Digest Sup. Ct.* 1908.]

Constitutional law — impairing contract obligations — restricting municipal taxation.

2. The receiver of the metropolitan police board in the state of Louisiana, as representative of the interested creditors, is unconstitutionally deprived of the right of taxation by the city of New Orleans for the payment of their claims, which right existed before the enactment of La. Acts 1870, No. 5, by the provisions of that act under which the payment of the judgment recovered by such receiver against the city upon outstanding indebtedness of the board, contracted on the faith of the exercise of the city's power to levy taxes for its payment, may be indefinitely postponed until such time as the city is ready and willing to make such payment.

[For other cases, see *Constitutional Law*, 1561-1571, in *Digest Sup. Ct.* 1908.]

[No. 11.]

Argued November 1, 2, 1909. Decided November 29, 1909.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which affirmed a judgment of the Civil District Court of the Parish of Orleans, in that state, dismissing the petition of the receiver of the board of metropolitan police of the metropolitan police district for a writ of mandamus to compel the levy of a tax to pay a judgment recovered by him as receiver against the city of New Orleans upon certain outstanding indebtedness of such board. Reversed and remanded for further proceedings.

See same case below, 119 La. 623, 44 So. 321.

The facts are stated in the opinion.

Mr. Charles Louque argued the cause and filed a brief for plaintiff in error:

When it comes to a question of contract, the Supreme Court of the United States will examine that question for itself, and will not be bound by the opinion of the state court.

Sullivan v. Texas, 207 U. S. 416, 52 L. ed. 274, 28 Sup. Ct. Rep. 215; *McCullough v. Virginia*, 172 U. S. 102-109, 43 L. ed. 382-385, 19 Sup. Ct. Rep. 134; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66-77, 44 L. ed. 673-680, 20 Sup. Ct. Rep. 545; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142-147, 45 L. ed. 788-791, 21 Sup. Ct. Rep. 575; *Muhlker v. New York & H. R. Co.* 197 U. S. 544-570, 49 L. ed. 872-878, 25 Sup. Ct. Rep. 522.

The act of 1870, No. 5 of the extra session, if applicable to this cause, impairs

the obligations of the contract contained in the act of 1868.

Wolff v. New Orleans, 103 U. S. 361, 367, 26 L. ed. 397, 399; *State ex rel. De Leon v. New Orleans*, 34 La. Ann. 481.

The city's power of taxation during the various years was not exhausted.

State ex rel. Thorn v. New Orleans, 37 La. Ann. 530; *State ex rel. Marchand v. New Orleans*, 37 La. Ann. 17; *United States ex rel. Kilpatrick v. Capdevielle*, 55 C. C. A. 421, 118 Fed. 815; *State ex rel. Brittin v. New Orleans*, 106 La. 469, 31 So. 55, 109 La. 111, 33 So. 102.

The power of taxation existing at the date of the contract is read into the contract and continues to exist, so far as necessary for the enforcement of the obligations of the contract, irrespective of any subsequent legislation or constitutional enactments restricting the power of taxation.

Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403; *Wolff v. New Orleans*, 103 U. S. 358, 26 L. ed. 395; *State ex rel. Moore v. New Orleans*, 32 La. Ann. 726; *State ex rel. De Leon v. New Orleans*, 34 La. Ann. 477; *State ex rel. Carriere v. New Orleans*, 36 La. Ann. 687; *Louisiana ex rel. Nelson v. Police Jury*, 111 U. S. 720, 28 L. ed. 576, 4 Sup. Ct. Rep. 648; *State ex rel. Marchand v. New Orleans*, supra.

Mr. J. D. Rouse also argued the cause, and, with Mr. William Grant, filed a brief for plaintiff in error:

In reviewing the judgments of the courts of a state, the Federal Supreme Court is not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision.

McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134.

The legislature had the right to abolish the metropolitan police board, and remit the police power to the city; but it could not destroy its obligations, or deprive its creditors of the means of enforcing them, because the Constitution forbade it.

Graham v. Folsom, 200 U. S. 248, 50 L. ed. 464, 26 Sup. Ct. Rep. 245.

The remedy subsisting in a state when and where the contract is made and to be performed is a part of its obligations, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void.

Seibert v. Lewis (*Seibert v. United States*) 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190.

Mr. Frank B. Thomas argued the cause and filed a brief for defendant in error.

Mr. Justice Day delivered the opinion of the court:

This case presents the question of the right of the relator, as receiver of the board of metropolitan police of the metropolitan police district, consisting of the parishes of Orleans, Jefferson, and St. Bernard, and including the city of New Orleans, in the state of Louisiana, to compel an assessment, by mandamus, of taxes to pay a certain judgment recovered by the relator in his capacity as receiver against the city of New Orleans in the sum of \$123,475.57, with interest from April 4, 1904.

On September 14, 1868, the general assembly of the state of Louisiana passed an act establishing a metropolitan police district, constituting the same of the parishes of Orleans, Jefferson, and St. Bernard (including the city of New Orleans). Section 29 of that act provides:

"Sec. 29. Be it further enacted, etc., that the common councils of the cities of New Orleans, Jefferson City, and Carrollton, and the police juries of the towns of Algiers and Gretna, and of the parishes of Orleans, Jefferson, and St. Bernard, *are hereby respectively empowered and directed annually to order and cause to be raised and collected by the tax upon the estates, real and personal, subject to taxation according to law, within the said cities and towns, the sums of money as aforesaid, annually estimated and apportioned as the share of such cities or parishes of the said total expenses of the metropolitan police district."

This act was supplemented by various statutes, and its provisions were in force until March 31, 1877, when it and various other acts relating to the metropolitan police district were repealed, and the city of New Orleans was authorized and empowered, through the mayor and board of administrators, to establish, organize, and maintain a proper and sufficient police force.

On January 22, 1900, Louis A. Hubert was duly qualified as receiver of the board of metropolitan police. On April 6, 1904, Hubert, as such receiver, began an action in the civil district court of the parish of Orleans, in which he averred that the city was indebted to him, as such receiver, in the sum of \$411,884.89, with interest from April 3, 1880, and averred that, for various years, from 1869 to 1877, inclusive, the city of New Orleans had received and collected taxes for the maintenance of the board of metropolitan police and the payment of its expenses, which amounts, although collected by the city, were never paid over to the board of metropolitan police or its representatives. The petition averred that the board of metropolitan police owed large amounts of money; that the whole of the indebted-

ness thus due from the city was necessary to pay the same. Upon issue made and trial had, a judgment was rendered in favor of the receiver on May 18, 1905. The record of this judgment was made part of the record herein, and it appears therein that the civil district court took an account of the taxes collected for the years 1869 to 1877, inclusive, and not paid over for account of the board of metropolitan police, and found the same to be the sum of \$136,082.62, for which judgment was rendered *against the [173] city of New Orleans. This judgment was modified by the supreme court of Louisiana on March 12, 1906, and affirmed after deducting the sum of \$12,607.05, leaving a judgment in force for \$123,475.57, with interest. 116 La. 507, 40 So. 853.

On April 23, 1906, a petition for mandamus was filed, in the present case, in the civil district court for the parish of Orleans. In that case the relator set up the recovery of the judgment in the state court; that, under act No. 5 of 1870 (to be noticed hereafter), no writ of fieri facias could be issued; that the city had no money or property liable to seizure, if such a writ could be issued; that the judgment had been registered under said act in the office of the city comptroller on March 26, 1906; that the basis upon which the said judgment was rendered was a contractual and statutory obligation imposed upon the city of New Orleans to levy, collect, and pay to the board of metropolitan police the sums apportioned to it under the act of 1868, creating the board, and the acts amendatory thereto. The petition averred that the maximum rate of taxation for the years 1869-1877, inclusive, had not been levied, and prayed a writ of mandamus requiring the city of New Orleans, through its mayor and council, to levy and pay over to the relator, as receiver, a tax of 1 mill on property within the city of New Orleans, or so much thereof as might be necessary to satisfy the judgment. The city appeared and answered, and claimed the benefit of act No. 5 of the extra session of 1870, and that, under § 29 of the act of 1868, above set forth, the city had levied the tax apportioned to the board of metropolitan police, and that the city's power of taxation in the premises had been fully exercised and exhausted.

On November 12, 1906, the civil district court rendered a judgment dismissing the relator's petition for mandamus. Upon appeal, the supreme court of Louisiana affirmed this judgment. 119 La. 624, 44 So. 321. The present writ of error brings this judgment here for review.

*In the opinion of the supreme court [174] of Louisiana, it appears that the basis of the judgment upon which the relator sued was

held not to be contractual in its nature, and, further, that the state, having abolished the metropolitan police board, the only standing of the relator for the purposes of this suit was as the representative of third persons who may have made contracts with the board which were dependent upon taxes receivable from the city for their fulfilment. The learned court then pointed out an apparent inconsistency between the petition for mandamus in this case and the petition on which the original judgment was awarded, and said:

"In the brief presented on behalf of relator, for the purposes of the present application, his counsel say: 'This is not a proceeding to compel the city of New Orleans to levy a special police tax; the city has actually levied and collected the tax. The tax levy, having been made, in compliance with the statute, and having been collected by the city, gave rise to a cause of action in favor of the receiver to enforce its payment to the board of metropolitan police. This cause of action, therefore, could not have arisen until the city had levied and collected the tax and refused to pay over the proceeds.'

"Assuming that the position that the relator now wishes to occupy is correctly stated in the foregoing excerpt, we take it to be conceded that the city has levied and collected all the taxes authorized or required by the metropolitan police legislation; and, further, assuming that the relator represents the holders of the indebtedness (of the police board) referred to in the petition upon which he obtained his judgment (though it is not so alleged in the application now being considered), the question still remains, Does he disclose and make out a case which entitles him to a writ of mandamus to compel the city to levy and collect an additional tax in order to make good its failure to pay over the tax already levied and collected?"

The court, therefore, treated the petition [175] for mandamus *as one based upon a judgment to recover taxes which the city had collected and not paid over. Considering the case in this aspect, the learned court held that the power to levy taxes for the various years for metropolitan police district purposes had been exhausted, and that there was no power to relevy such tax; and, further, that, as to liabilities incurred after the passage of act No. 5 of 1870, that act was a defense to the action; and the court reached the conclusion that the application for mandamus must fail, as it was an attempt to require the city to exert powers of taxation already exhausted, and which no longer existed.

In order to review in this court the judgment

of a state court because of the provision of the Federal Constitution against state legislation impairing the obligation of a contract, the impairment must be by some subsequent legislation of the state, which has been upheld or given effect in the judgment of the state court sought to be reviewed. *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023. While this is true, this court is not limited to the consideration of the mere language of the opinion, but will examine the substance and effect of the decision. *McCullough v. Virginia*, 172 U. S. 102, 116, 43 L. ed. 382, 387, 19 Sup. Ct. Rep. 134.

It appears from the documents attached to and made part of the record that the indebtedness represented by the receiver in this case was for outstanding debts of the metropolitan police board in the years 1869-1877, inclusive, a considerable part of it being for salaries of policemen, and the supreme court of Louisiana has held that the taxes of several years, from 1869 to 1876, inclusive, constitute one fund out of which the warrants of the defunct metropolitan police board are payable. *State ex rel. Brittin v. New Orleans*, 106 La. 469, 31 So. 55.

A number of decisions in this court have settled the law to be that, where a municipal corporation is authorized to contract, and to exercise the power of local taxation to meet its contractual engagements, this power must continue until the contracts are satisfied; and that it is an impairment of an obligation *of the contract to de- [176]stroy or lessen the means by which it can be enforced. In the case of *Wolff v. New Orleans*, 103 U. S. 358, 26 L. ed. 395, the subject was given full consideration, and the doctrine thus summarized by Mr. Justice Field speaking for the court (p. 365):

"It is true that the power of taxation belongs exclusively to the legislative department, and that the legislature may at any time restrict or revoke, at its pleasure, any of the powers of a municipal corporation, including, among others, that of taxation, subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States, and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly, as a consequence of legitimate measures taken, as will sometimes happen, but directly, by operating upon those means, is prohibited by the Constitution, and must be disregarded—treated as if never enacted—by all courts recognizing the Constitution as the

paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. . . . The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the state, and to those of its agents acting under its authority, as well as to contracts between individuals. And that obligation is impaired, in the sense of the Constitution, when the means by which a contract, at the time of its execution, could be enforced, that is, by which the parties could be obliged to perform it, are rendered less efficacious by legislation operating directly upon those means."

In *Ralls County Ct. v. United States*, 105 177 U. S. 733, 26 L. ed. 1220, it was *held that, after a debt was created upon certain bonds, laws passed depriving the county court of the power to levy the tax which it possessed when the bonds were issued were invalid. In that case the suit was brought upon certain coupons, and it was held that the coupons were merged in the judgment, but nevertheless carried with them into the judgment all the remedies which in law formed a part of their contract obligation, and that those remedies might still be enforced, notwithstanding the changes in the form of the debt.

In dealing with the feature important to be considered in this case, the court, speaking by Mr. Chief Justice Waite, said:

"It follows from this that all laws of the state which have been passed since the bonds in question were issued, purporting to take away from the county courts the power to levy taxes necessary to meet the payments, are invalid, and that, under the well-settled rule of decision in this court, the circuit court had authority by mandamus to require the county court to do all the law, when the bonds were issued, required it to do to raise the means to pay the judgment, or something substantially equivalent. The fact that money has once been raised by taxation to meet the payment, which has been lost, is no defense to this suit. The claim of the bondholders continues until payment is actually made to them. If the funds are lost after collection, and before they are paid over, the loss falls on the county, and not the creditors. The writ as issued was properly in the alternative to pay from the money already raised, or levy a tax to raise more. It will be time enough to consider whether the command of the writ that the court *cause the tax to be col-*

lected is in excess of the requirements of the law, when the justices of the court are called on to show why they have not obeyed the order."

We think the doctrine of the *Ralls County Case*, when applied to the facts in the case at bar, is decisive of this feature of it. The city levied and afterwards collected taxes for the benefit of the metropolitan police board. The police board *had is- [178 sued its outstanding warrants for salaries, etc., upon the faith of the exercise of the taxing power for their payment. The contract creditors of the police board were entitled to rely upon the benefit of the laws imposing taxation to make their obligations effectual. They could not, constitutionally, be deprived of such benefit. While it is true that the police board made the contracts, the only means of keeping them was through the exercise of the power of taxation conferred by law upon the city. The city exerted its power, as required by law, levied and collected the taxes, but applied them to other purposes, and has failed to turn them over upon demand. We think the power to levy these taxes still exists. As to the creditor, deprived thereof by the action of the city, it is as though such power had never been exercised. The city still has the power to levy these taxes for the benefit of the persons for whom they were intended, and who had a contract right to the exertion of the remedies for the satisfaction of their claims by the levy and collection of taxes existing when their debts accrued, which right could not be taken away from them by subsequent legislation. The power of taxation conferred by law entered into the obligation of the contracts, and any subsequent legislation withdrawing or lessening such power, leaving the creditors without adequate means of satisfaction, impaired the obligation of their contracts, within the meaning of the Constitution. *Memphis v. United States*, 97 U. S. 293, 24 L. ed. 920; *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. ed. 403; *Seibert v. Lewis* (*Seibert v. United States*) 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; *Mobile v. Watson*, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. Rep. 398; *Scotland County Ct. v. United States*, 140 U. S. 41, 35 L. ed. 351, 11 Sup. Ct. Rep. 697.

We come now to the question: Can act No. 5 of 1870 be constitutionally applied so as to preclude the remedy sought in behalf of the receiver in this case? This act has been at least twice before this court. In the case of *Louisiana v. New Orleans*, 102 U. S. 203, 205, 26 L. ed. 132, 133, the provisions of the act were summarized by Mr.

Justice Field, speaking for the court, as follows:

"That act divests the courts of the state [179] of authority to *allow any summary process or mandamus against the officers of the city of New Orleans to compel the issue and delivery of any order or warrant for the payment of money, or to enforce the payment of money claimed to be due from it to any person or corporation; and requires proceedings for the recovery of money claimed to be owing by the city to be conducted in the ordinary form of action against the corporation, and not against any department, branch, or officer thereof. The act also provides that no writ of execution or fieri facias shall issue against the city, but that a final judgment against it, which has become executory, shall have the effect of fixing the amount of the plaintiff's demand, and that he may cause a certified copy of it, with his petition and the defendant's answer and the clerk's certificate that it has become executory, to be filed in the office of the comptroller, and that thereupon it shall be the duty of the comptroller or auditing officer to cause the same to be registered, and to issue a warrant upon the treasurer or disbursing officer of the corporation for the amount due thereon, without any specific appropriation therefor, provided there be sufficient money in the treasury specially designated and set apart for that purpose in the annual budget or detailed statement of items of liability and expenditure, pursuant to the existing or a subsequent law.

"The act further provides that, in case the amount of money designated in the annual budget for the payment of judgments against the city of New Orleans shall have been exhausted, the common council shall have power, if they deem it proper, to appropriate from the money set apart in the budget or annual estimate for contingent expenses, a sufficient sum to pay the same; but, if no such appropriation be made, then that all judgments shall be paid in the order in which they shall be filed and registered in the office of the comptroller of the city from the first money next annually set apart for that purpose."

In that case it was held that, in so far as the act requires registration of a judgment, it did not impair existing remedies [180] *for its collection, and must be complied with, Mr. Justice Field saying:

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it

tend to postpone or retard the enforcement of the contract, the obligation of the latter is, to that extent, weakened. The Latin proverb, *Qui cito dat bis dat*,—he who gives quickly gives twice,—has its counterpart in a maxim equally sound,—*Qui serius solvit, minus solvit*,—he who pays too late pays less. Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition. If, therefore, we could see that such would be the effect of the provision of the act of the state, No. 5 of 1870, requiring judgments to be registered with the comptroller before they are paid, we should not hesitate to declare the provision to be invalid. But we are not able to see anything in the requirement which impedes the collection of the relator's judgments, or prevents his resort to other remedies, if their payment be not obtained. The registry is a convenient means of informing the city authorities of the extent of the judgments, and that they have become executory, to the end that proper steps may be taken for their payment. It does not impair existing remedies."

The act was again before this court in the case of *Wolff v. New Orleans*, 103 U. S. 358, 26 L. ed. 395. In that case the act was fully analyzed and it was pointed out that the payment of judgments thereunder was extremely uncertain, and depended entirely upon the discretion of the council, after providing for other municipal purposes and expenses, and was in direct violation of powers of taxation which existed at the time the debt sued for in that case was created, and could not be constitutionally enforced as against such claim.

Applying the principles thus announced to the case at bar, *we think act No. [181] 5 of 1870, postponing indefinitely the payment of relator's judgment, if given effect, would deprive the receiver, as the representative of the interested creditors, of the benefit of the right of taxation for the payment of their claims which existed before the passage of the act of 1870. By § 29 of the act of September 14, 1868, above quoted, the common council of the city of New Orleans and others were empowered and directed annually to order and cause to be raised and collected by a tax upon the estates, real and personal, subject to taxation within said city, the sums of money annually estimated and apportioned as the share of such city for the total expense of the metropolitan police district. This act was followed by other supplementary and amendatory acts to make the purpose more effectual, and was not repealed until the act of March 31, 1877, which abolished the

metropolitan police board. This repeal could not take away the right of the creditors of the metropolitan police board to have taxation for their benefit. Nor could the act of 1870 constitutionally take away the rights created by former legislation for the security of their debts, and postpone indefinitely the payment of their claims until such time as the city was ready and willing to pay them.

We are of opinion that the writ of mandamus should have been awarded in favor of the relator, requiring the city to pay over the taxes for which the judgment was rendered, or to levy and collect a tax therefor for the benefit of the relator as receiver. The judgment of the Supreme Court of Louisiana is reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

182] *ISAAC H. CALIGA, Plff. in Err.,
v.
INTER OCEAN NEWSPAPER COMPANY.

(See S. C. Reporter's ed. 182-190.)

Copyright — of painting — second copyright.

The attempted duplication of an existing copyright in a painting by depositing the same photograph of the same painting under a new title, and with but a slight change in description, is void, and cannot be made the basis of a suit for infringement.

[No. 22.]

Argued November 5, 1909. Decided November 29, 1909.

IN ERROR to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of Illinois, entered upon a directed verdict in favor of the defendant in an action to recover damages for the infringement of a copyright. Affirmed.

See same case below, 84 C. C. A. 634, 157 Fed. 186.

The facts are stated in the opinion.

Mr. Otto Raymond Barnett argued the cause, and, with Mr. Clarence T. Morse, filed a brief for plaintiff in error:

A copyright registration may be abandoned by failure to publish within a reasonable time after such registration. In such event the common-law right never ceases.

Boucicault v. Hart, 13 Blatchf. 47, Fed. 150

Cas. No. 1,692; Carillo v. Shook, Fed. Cas. No. 2,407.

If, therefore, a registration may be abandoned by failure to publish within a reasonable time, why may it not be abandoned by a subsequent re-registration in the absence of any intermediate publication?

Osgood v. A. S. Aloe Instrument Co. 69 Fed. 291.

Common-law copyright and statutory copyright cannot coexist; the first only terminates upon a general publication, the second only begins upon a general publication. Prior to such publication, common-law copyright remains unimpaired, notwithstanding any registration which may have been made with the librarian of Congress for the purpose of obtaining the protection of statutory copyright.

Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 347, 52 L. ed. 1086, 1092, 28 Sup. Ct. Rep. 722; Press Pub. Co. v. Monroe, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; Boucicault v. Hart and Carillo v. Shook, supra.

The variance between the date of copyright registration pleaded under a *videlicet*, and the dates proved, was not fatal, even if the registration of November, 1901, was a nullity.

Greenl. Ev. § 61; Stephen, Pl. 292; Black v. Henry G. Allen Co. 56 Fed. 764; Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177; Salt Lake City v. Smith, 43 C. C. A. 637, 104 Fed. 467; Bouvier's Law Dict. Rawle's Rev. p. 1195; 1 Chitty, Pl. 257, 258; Wheeler v. Reed, 36 Ill. 85; Beaver v. Slanker, 94 Ill. 185; Reinback v. Crabtree, 77 Ill. 188; Long v. Conklin, 75 Ill. 33; United States v. Le Baron, 4 Wall. 648, 18 L. ed. 310; Taylor v. Bank of Alexandria, 5 Leigh, 471; Martin v. Miller, 2 Mo. 135; Henry v. Tilson, 17 Vt. 479.

Mr. James J. Barbour argued the cause, and, with Mr. Clarence A. Knight, filed a brief for defendant in error:

Where two copyrights of the same painting are procured by the painter thereof, the second copyright is void.

Mifflin v. Dutton, 61 L.R.A. 134, 50 C. C. A. 661, 112 Fed. 1004; Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136; Black v. Murray, 9 Sc. Sess. Cas. 3d series 341; Thomas v. Turner, L. R. 33 Ch. Div. 292; Scrutton, Copyright, p. 119; Drone, Copyright, p. 146; Macgillivray, Copyright, p. 27.

A patentee cannot have two patents for the same invention.

22 Am. & Eng. Enc. Law, p. 314; Miller v. Eagle Mfg. Co. 151 U. S. 186, 38 L. ed. 121, 14 Sup. Ct. Rep. 310; Suffolk Mfg.

215 U. S.

Co. v. Hayden, 3 Wall. 315, 18 L. ed. 76; James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Mosler Safe & Lock Co. v. Mosler, B. & Co. 127 U. S. 354, 32 L. ed. 182, 8 Sup. Ct. Rep. 1148; McCreary v. Pennsylvania Canal Co. 141 U. S. 459, 35 L. ed. 817, 12 Sup. Ct. Rep. 40; Underwood v. Gerber, 149 U. S. 224, 37 L. ed. 710, 13 Sup. Ct. Rep. 854.

The reasons are that the power to create a monopoly is exhausted by the first grant. That a new patent for the same invention would operate to extend the monopoly beyond the period allowed by law.

Odiorne v. Amesbury Nail Factory, 2 Mason, 28, Fed. Cas. No. 10,430; Miller v. Eagle Mfg. Co. supra.

Whatever rights are possessed by the proprietor of a copyright are derived from the copyright act, and not from the common law.

White-Smith Music Pub. Co. v. Apollo Co. 209 U. S. 1, 52 L. ed. 655, 28 Sup. Ct. Rep. 319, 77 C. C. A. 368, 147 Fed. 226; Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722, 15 L.R.A.(N.S.) 766, 77 C. C. A. 607, 147 Fed. 15; Globe Newspaper Co. v. Walker, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726; Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055; Stevens v. Gladding, 17 How. 447, 15 L. ed. 155; Banks v. Manchester, 128 U. S. 244, 32 L. ed. 425, 9 Sup. Ct. Rep. 36; Thompson v. Hubbard, 131 U. S. 123, 33 L. ed. 76, 9 Sup. Ct. Rep. 710; Holmes v. Hurst, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606; Palmer v. DeWitt, 47 N. Y. 532, 7 Am. Rep. 480.

Messrs. L. L. Coburn and Josiah McRoberts also filed a brief for the Tribune Company as *amicus curiæ*:

But a single valid copyright can be obtained upon the same painting.

Mifflin v. Dutton, 61 L.R.A. 134, 50 C. A. 661, 112 Fed. 1004, affirmed in 190 U. S. 265, 47 L. ed. 1043, 23 Sup. Ct. Rep. 771.

Subsequent copyrights are valid only when granted for additions to, emendations of, or improvements in, the originally copyrighted work.

Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136; Drone, Copyright, p. 146.

Mr. Justice Day delivered the opinion of the court:

The plaintiff in error, also plaintiff below, brought an action in the circuit court of the United States for the northern district of Illinois to recover damages under § 4965 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3414) because of the publication by the defendant of more
54 L. ed.

than one thousand copies of a newspaper containing a picture of a painting, copyrighted by the plaintiff. The plaintiff alleged that he had in all respects complied with the Revised Statutes of the United States by causing to be deposited, on or about the 5th day of November, 1901, a photograph and a description of the painting, for the purpose of having it copyrighted, which deposit was before *publica- [187 tion of the same in the United States or in any foreign country. By reason of the premises and the compliance with the statutes of the United States, the plaintiff claimed to be entitled to a copyright for the painting for the term of twenty-eight years from and after the recording of the title thereof by the librarian of Congress on November 7, 1901.

There were other allegations, and proofs tending to show a publication of a copy of the photograph in the newspaper of the defendant company. In the course of the trial it appeared that the plaintiff had deposited a description and photograph of the same painting with the librarian of Congress on October 7, 1901, for the purpose of securing a copyright. The trial court charged the jury, as a matter of law, that the plaintiff had brought his suit upon the wrong copyright, and therefore directed a verdict in favor of the defendant. Upon writ of error, the circuit court of appeals for the seventh circuit affirmed this judgment. 84 C. C. A. 634, 157 Fed. 186. The case is now here for review.

The photographs filed upon the two applications for a copyright are identical. Nor is any substantial change in the painting shown; the copyrights undertaken to be secured were, therefore, upon the same painting. The difference is that, in the copyright sued upon, that of November 7, 1901, the title and description are, "The Guardian Angel. Portrait of a young girl sitting, hair arranged smoothly over the ears, hair parted in the middle. Her guardian angel stands behind her, one hand resting on her left shoulder, the other on her right arm." The description accompanying the application for the copyright of October 7, 1901, is, "Maidenhood. A Young Girl seated beside a window; an Angel stands behind her."

The question in this case is: Is the second attempt to copyright valid and effectual, or was the court right in charging in substance that it was void and of no effect?

We have had such recent and frequent occasions to consider the nature and extent of the copyright laws of the United States, as the same were before the recent revision, which took *effect July 1, 1909, that [188 it is unnecessary to enter into any extended discussion of the subject now.

Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722; *White-Smith Music Pub. Co. v. Appollo Co.* 209 U. S. 1, 52 L. ed. 655, 28 Sup. Ct. Rep. 319; *American Tobacco Co. v. Wreckmeister*, 207 U. S. 284, 52 L. ed. 208, 28 Sup. Ct. Rep. 72, 12 A. & E. Ann. Cas. 595; *Bong v. Alfred S. Campbell Art Co.* 214 U. S. 236, 53 L. ed. 979, 29 Sup. Ct. Rep. 628. In these cases the previous cases in this court were cited and reviewed.

As a result of the decisions of this court, certain general propositions may be affirmed. Statutory copyright is not to be confounded with the common-law right. At common law, the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner's common-law right was lost. At common law an author had a property in his manuscript, and might have an action against anyone who undertook to publish it without authority. The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period. This statutory right is obtained in a certain way and by the performance of certain acts which the statute points out. That is, the author, having complied with the statute, and given up his common-law right of exclusive duplication prior to general publication, obtained by the method pointed out in the statute an exclusive right to multiply copies and publish the same for the term of years named in the statute. Congress did not sanction an existing right; it created a new one. *Wheaton v. Peters*, 8 Pet. 591, 661, 8 L. ed. 1055, 1080. Those violating the statutory rights of the author or proprietor are subject to certain penalties, and to the payment of certain damages, as is provided in the statute.

Section 4952 of the Revised Statutes as amended in 1891 [26 Stat. at L. 1107, chap. 565] (U. S. Comp. Stat. 1901, p. 3406), provides that the proprietor of any painting, upon compliance with the provisions of the copyright act, has the sole right of publishing, copying, and vending the same. By § 4953 we find that this right exists for the period of twenty-eight years from the recording of the title of the copyright, with a right to certain extensions after the expiration *of the twenty-eight years, as provided in § 4954. In § 4956 we find that a copyright is secured by depositing, on or before the day of publication, in this or any foreign country, in case of a painting, a photograph of the painting, accompanied by a description thereof. There is absolutely no

provision in the statutes for a second filing of the photograph or description, nor is there any provision as to filing any amendments thereto; and, as the matter is wholly the subject of statutory regulation, we are at a loss to perceive by what authority any second application for the same painting, with a view to securing a copyright thereon, can be sustained. If it could be, we see no reason why the proprietor might not thus extend the limit of copyright fixed in the statute by an indefinite number of new applications and filings with the librarian.

The argument of the plaintiff in error is that, inasmuch as the statutory copyright is not complete before a publication of the subject-matter thereof, and no publication being shown prior to the second application, it was within his power, while his rights were thus inchoate, to make the second application for the copyright,—that of November 7, 1901. Assuming that these premises are correct, and that publication was requisite to complete the right to be secured by the statute, it by no means follows that a second copyright is warranted by the statute. On the other hand, as we have already stated, the statute is barren of any provisions to that end. There is no provision, as there is in the patent law, for an amended application, and, under the patent law, it has been held that there is no authority for double patenting. *Miller v. Eagle Mfg. Co.* 151 U. S. 186, 38 L. ed. 121, 14 Sup. Ct. Rep. 310. This is so because the first patent exhausts the statutory right secured by the act of Congress.

In this case, the plaintiff had complied with all the terms of the statute on October 7, 1901. He then attempts to take out a new copyright under the same statute on November 5, 1901, for the same painting, by depositing a new description of the painting and the same photograph. It is true there is a change *in the title of the painting, [1901] and a slight change in the description, but these matters are immaterial, and cannot enlarge the right of the plaintiff. We think the same principle, in this aspect, controls, as in the case of a patent. The plaintiff had already exhausted his statutory right and the second attempt availed him nothing.

These views render it unnecessary to consider whether the record shows a publication of the painting prior to November 5, 1901. For the reasons stated, we are of opinion that the Circuit Court of Appeals was right in holding that the attempted duplication of the copyright was void and of no effect.

Affirmed.

UNITED STATES, Plff. in Err.,
v.

TILDEN B. STEVENSON and Amede Bellaire, alias Joseph Bellaire.

(See S. C. Reporter's ed. 190-200.)

Appeal—in criminal case—review on behalf of government.

1. A judgment of a Federal district court sustaining a demurrer to an indictment upon two grounds, one of which involves the construction of the Federal statute on which the indictment is founded, and the other the sufficiency of such indictment upon general principles of criminal law, is reviewable in the Federal Supreme Court on writ of error, under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), authorizing such writs of error to review a judgment sustaining a demurrer to an indictment, when such judgment is "based upon the in-

NOTE.—On the right of a state to appeal in a criminal case—see note to *People ex rel. Hodson v. Miner*, 19 L.R.A. 342.

On the importation of contract labor—see note to *United States v. Parsons*, 66 C. C. A. 133.

Review by government in criminal case under the act of March 2, 1907.

The right of the United States to sue out a writ of error in a criminal case, directed to a circuit or district court, is solely derived from the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), by the terms of which such writs of error may be sued out of the Federal Supreme Court to review (1) a decision or judgment quashing, setting aside, or sustaining, a demurrer to any indictment or count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded; (2) a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded; (3) a decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy: Provided, that no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.

Constitutional rights of the accused are not violated by this act, although such statute does not allow the accused to bring up the case in the same way when a demurrer to the indictment or some count thereof has been overruled. *United States v. Bitty*, 208 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396.

Interpretation as well as construction of the statute, conceding an abstract distinction between these two terms, is comprehended by the clause, "when based upon the construction of the statute upon which the

validity or construction of the statute upon which the indictment is founded."

[For other cases, see *Appeal and Error*, I. e. in Digest Sup. Ct. 1908.]

Appeal — by government in criminal case — scope of review.

2. The sufficiency of the indictment upon general principles of criminal law is not open for review in the Federal Supreme Court on the writ of error to a Federal district court authorized on behalf of the government by the act of March 2, 1907, to review judgments or decisions sustaining demurrers to an indictment, when based upon the construction of the Federal statute on which the indictment is founded.

[For other cases, see *Appeal and Error*, I. e. in Digest Sup. Ct. 1908.]

Aliens — contract labor — remedy — criminal prosecution or civil action for penalty.

3. Congress, by providing in the immigration act of February 20, 1907 (34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp.

indictment is founded." *United States v. Keitel*, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; *United States v. Biggs*, 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 181.

The decision of a Federal district court sustaining a demurrer to an indictment for introducing liquor into the Indian country is reviewable in the Federal Supreme Court by writ of error, under the act of March 2, 1907, where the question whether the indictment charges any offense against the United States involves the validity of the act of January 30, 1897, as applied to the facts stated. *United States v. Sutton*, 215 U. S. 291, post, 200, 30 Sup. Ct. Rep. 116.

The construction of a statute is involved, within the meaning of the act of March 2, 1907, governing the right of the government to a review in a criminal case, where an indictment against a national bank officer for making false reports to the Comptroller of the Currency is quashed because such officer is not an agent, within the meaning of the statute defining the crime. *United States v. Corbett*, 215 U. S. 233, post, 173, 30 Sup. Ct. Rep. 81.

The United States may bring error under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), to review a judgment of a Federal circuit court, quashing an indictment for violating the immigration act of March 3, 1903, § 18, by wilfully permitting an alien to land at another place than that designated by the immigration officers, because the indictment disclosed that the alien in question was a seaman. *Taylor v. United States*, 207 U. S. 120, 52 L. ed. 130, 28 Sup. Ct. Rep. 53.

Jurisdiction of the Federal Supreme Court of a writ of error sued out under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), to review a judgment of a Federal district court quashing an indictment for a conspiracy illegally to acquire coal lands from the United States, because of the opin-

1907, p. 389), § 5, a civil action for the recovery of a penalty in case of a violation of § 4 of that act, making it a misdemeanor to assist or encourage the importation of alien contract laborers, did not preclude a prosecution by indictment to enforce such penalty.

[For other cases, see Aliens, VI. c, in Digest Sup. Ct. 1908.]

[No. 292.]

Argued and submitted October 14, 15, 1909.
Decided November 29, 1909.

IN ERROR to the District Court of the United States for the District of Massachusetts to review a judgment sustaining a demurrer to an indictment for unlawfully assisting the importation of alien contract laborers. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Solicitor General Bowers argued the cause and filed a brief for plaintiff in error:

The reason of the rule that where a statute creates a new offense and prescribes a special remedy for prosecuting that offense, such remedy is exclusive, is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies; and the rule, therefore, rests upon a presumed statutory prohibition.

Dollar Sav. Bank v. United States, 19 Wall. 227, 238, 239, 22 L. ed. 80, 82.

ion that the Federal statute did not prohibit the acts complained of, cannot be successfully challenged on the theory that the indictment, and not the statute, was construed. *United States v. Keitel*, supra.

The decision of a Federal circuit court, sustaining a special plea in bar to an indictment, is reviewable in the Supreme Court under the act of March 2, 1907, although the decision may involve the application rather than the invalidity or construction, strictly speaking, of the statute upon which the indictment was founded. *United States v. Celestine*, 215 U. S. 278, post, 195, 30 Sup. Ct. Rep. 93. The paragraph of the statute under which the review was sought differs, the court said, from the two preceding, in that the review authorized by them is limited to cases in which the decision is based upon the invalidity or construction of the statute upon which the indictment is founded, while no such limitation appears in this paragraph. Without determining the full significance of this difference, the court held that the right of review in the case at bar was clear.

The whole case is not open to review on the writ of error authorized by this statute, but the scope of review is limited to the particular decisions enumerated therein. *United States v. Keitel*, supra.

The various grounds of demurrer to the

The wording of § 5 of the immigration act as to an action of debt is merely permissive. It says that the penalty may be sued for and recovered by the United States, or by any informer, in an action of debt. There is here certainly no express prohibition of indictment.

Crofton's Case, 1 Mod. 34.

An intention to limit the government to a particular remedy, and thereby to deny it the ordinary, and, indeed, usual, remedies of indictment or information for prosecution for a penalty, will not readily be interred.

Dollar Sav. Bank v. United States, supra; *United States v. Stocking*, 87 Fed. 857.

When a statute creates an offense punishable by penalty, and prescribes no remedy, or allows some special remedy, not intended to be exclusive, either indictment or information will lie, because they are the ordinary and approved methods of prosecution for an offense not above a misdemeanor.

2 Hawk. P. C. chap. 25, § 4; chap. 26, §§ 1, 2; 1 Chitty, Crim. Law, 1847, Am. ed. 162; Harris, Crim. Law, 1901 ed. pp. 333, 343; *United States v. Chouteau*, 102 U. S. 603, 610, 26 L. ed. 246, 248; 1 Chitty, Crim. Law, pp. 844, 845; *United States v. Buzzo*, 18 Wall. 125, 21 L. ed. 812; *Ex parte Wilson*, 114 U. S. 417, 424, 425, 29 L. ed. 89, 91, 92, 5 Sup. Ct. Rep. 935; *Adams v. Woods*, 2 Cranch, 336, 2 L. ed. 297; 4 Bl. Com. 309, 310.

Most of the cases announcing the rule

indictment cannot be considered on a writ of error sued out by the government in a criminal case, under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), to review a judgment "sustaining a special plea in bar when the defendant has not been put in jeopardy," but the court has jurisdiction to review only the ruling of the court below on the sufficiency of such plea. *United States v. Mason*, 213 U. S. 115, 53 L. ed. 725, 29 Sup. Ct. Rep. 480.

The action of the court below as to the mere construction of the indictment is not open to review on the writ of error authorized by the act of March 2, 1907, on behalf of the government, to review a judgment of a district or circuit court sustaining a demurrer to an indictment on the ground of the construction of the statute upon which the indictment is founded. *United States v. Biggs*, supra.

Every question of the character referred to in the act of March 2, 1907, authorizing a writ of error on behalf of the government from the Federal Supreme Court, to review certain judgments of the Federal district and circuit courts in criminal cases, need not be decided by the Supreme Court when, by the decision of one of such questions, the case is completely disposed of, and the other questions have become irrelevant. *Ibid*.

that a statute creating an offense and prescribing a remedy excludes other remedies than the one prescribed apply to statutes which in terms require, instead of merely permitting, the special remedy.

United States v. Simms, 1 Cranch, 252, 2 L. ed. 98.

Among other leading cases for the rule which is supposed to forbid indictment in this case, many will be found upon inspection to rest upon statutes which, instead of merely permitting the special remedy, disclose an affirmative purpose to exclude other remedies.

Castle's Case, 2 Cro. Jac. 644, 2 Rolle, Abr. 247; R. v. Marriot, 4 Mod. 144; R. v. Pensax, 2 Sess. Cas. 172, 8 Hen. VI., chap. 11, cited in R. v. Marriot, 4 Mod. 144; Stephens v. Watson, 1 Salk. 45; Anonymous, 6 Mod. 86.

Congress more probably meant to make clear the right of the United States to use the civil remedy than to forbid the common remedies for the enforcement of a penalty; *viz.*, indictment or information.

United States v. Boughler, 6 McLean, 277; Fed. Cas. No. 14,627; United States v. Stocking, 87 Fed. 857; United States v. Chouteau, 102 U. S. 603, 26 L. ed. 246.

Such authority as exists favors the allowance of indictment.

Lces v. United States, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; United States v. Stocking, 87 Fed. 857; United States v. Howard, 17 Fed. 638.

Mr. **Herbert Parker** submitted the cause for defendants in error. Messrs. Charles C. Milton and Henry H. Fuller were with him on the brief:

Where a statute prescribes a particular mode of procedure for the enforcement of a penalty for an offense therein created, that mode of procedure must be followed. The word "may" in the statute is applicable to the parties who are permitted to maintain the civil action, any one of whom may so proceed.

1 Wharton, Crim. Law, § 25; United States v. Moore, 11 Fed. 250; United States v. Howard, 17 Fed. 640; United States v. Craft, 43 Fed. 374.

We have, therefore, the case of an act describing a misdemeanor, in which there is no provision whatsoever for punishment except by a penalty to be recovered by civil action. There is no alternative punishment or procedure mentioned in this statute, nor is there any general statute providing for a penalty for misdemeanor. It follows, therefore, that the provisions of § 5 of the immigration act, providing a civil process to enforce the penalties for violation of § 4, are exclusive, and no indictment will lie.

United States v. McElroy, 115 Fed. 253; 54 L. ed.

Moller v. United States, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 495.

Nor are there any common-law offenses against the United States.

United States v. Britton, 108 U. S. 199-206, 27 L. ed. 698-700, 2 Sup. Ct. Rep. 531.

Mr. Justice **Day** delivered the opinion of the court:

This case comes to this court under the provisions of the criminal appeals act of March 2, 1907, providing for writs of error on behalf of the United States in certain criminal cases. 34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209. The defendants in error were indicted for the violation of the immigration act of February 20, 1907 (34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1907, p. 389), and charged with unlawfully assisting certain alien contract laborers to migrate from Canada to the United States, in violation of the statute. The district court, upon demurrer to the indictment, held the second count thereof to be invalid, because the sole remedy for a violation of the statute was in a civil action for the recovery of a penalty under § 5 of the act. The court also held the second count bad because it did not sufficiently specify the acts of assistance constituting the alleged offense. Rulings [195 were made concerning the first count, not involved in this proceeding.

From this statement it is apparent that the court below proceeded upon two grounds, one of which concerned the construction of the statute, the other of which decided the invalidity of the indictment upon general principles of criminal law. We are therefore met at the threshold of the case with the question whether a writ of error will lie in such a case as the one under consideration, under the provisions of the criminal appeals act of 1907.

This statute was before the court in the case of United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123, and is given in full in the margin of the report of that case. In that case it was held that the purpose of the statute being to permit a review in this court of decisions based upon the invalidity or construction of the criminal statutes of the United States, the decisions of the lower courts were intended to be reviewed only upon such questions, and the whole case could not be brought here for review. In the Keitel Case it was insisted that this court should consider the validity of the indictment upon questions of general law not decided in the court below. We are here confronted with a case in which a decision of the court below sustaining a demurrer to an indictment involves not only the construction of a Federal statute, but

another ground upon which the decision was also rested, which involves the sufficiency of the indictment on general principles.

The object of the criminal appeals statute was to permit the United States to have a review of questions of statutory construction in cases where indictments had been quashed, or set aside, or demurrers thereto sustained, with a view to prosecuting offenses under such acts when this court should be of opinion that the statute, properly construed, did in fact embrace an indictable offense. Inasmuch as the United States could not bring such a case here after final judgment, it was intended to permit a review of such decisions as are embraced within the statute, at the instance of the government, [196] in order to have a *final and determinative construction of the act, and to prevent a miscarriage of justice if the construction of the statute in the court below was unwarranted.

In the Keitel Case this court said (211 U. S. 398):

"That act [act of March 2, 1907] we think plainly shows that, in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides, it contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides."

As the question of general law involved in the decision of the court below is not within either of the classes named in the statute giving a right of review in this court, we must decline to consider it upon this writ of error.

We come now to consider the construction of the statute and the validity of the indictment in that respect. Sections 4 and 5 of the immigration act under consideration are given in the margin.†

[197] *A reading of these sections makes it apparent that the act makes it a misdemeanor to assist or encourage the importation of contract laborers, and that violations thereof may be punished with forfeiture and payment of \$1,000

for each offense, which, it is provided, may be sued for and recovered by the United States, or by any person bringing the action, as debts of like amounts are recovered in the courts of the United States; and it is made the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

The contention of the defendants in error is that the action for a penalty is exclusive of all other means of enforcing the act, and that an indictment will not lie as for an alleged offense within the terms of the act. The general principle is invoked that, where a statute creates a right and prescribes a particular remedy, that remedy, and none other, can be resorted to. An illustration of this doctrine is found in *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726, in which it was held that, in the copyright statutes then in force, Congress had provided a system of rights and remedies complete and exclusive in their character. This was held because, after a review of the history of the legislation, such, it was concluded, was the intention of Congress.

The rule which excludes other remedies where a statute creates a right and provides a special remedy for its enforcement rests upon the presumed prohibition of all other remedies. If such prohibition is intended to reach the government in the use of known rights and remedies, the language must be clear and specific to that effect. *Dollar Sav. Bank v. United States*, 19 Wall. 227, 238, 239, 22 L. ed. 80, 82. In the present case, if it could be gathered from the terms of the statute, read in the light of the history of its enactment, that Congress has here provided an exclusive remedy, intended to take from the government the right to proceed by indictment, and leaving to it only an action for the penalty, civil in its nature, then no indictment will lie, and the court below was correct in its conclusion.

*It is undoubtedly true that a penalty of this character, in the absence of statutory provisions to the con-

†Sec. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisions contained in section two of this act.

Sec. 5. That, for every violation of any of the provisions of section four of this act, the persons, partnership, company, or corporation violating the same by knowingly assisting, encouraging, or soliciting the migration or importation of any contract la-

borer into the United States, shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind, as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind, as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

trary, may be enforced by criminal proceedings under an indictment. The doctrine was stated as early as *Adams v. Woods*, 2 Craneh, 336, 341, 2 L. ed. 297, 299, wherein Mr. Chief Justice Marshall said:

"Almost every fine or forfeiture under a penal statute may be recovered by an action of debt as well as by information. . . . In this particular case, the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie."

In *Lees v. United States*, 150 U. S. 476-479, 37 L. ed. 1150, 1151, 14 Sup. Ct. Rep. 163, the doctrine was laid down that a penalty may be recovered by indictment or information in a criminal action, or by a civil action in the form of an action for debt. It is to be noted that this statute (§ 5 of the immigration act) does not in terms undertake to make an action for the penalty an exclusive means of enforcing it, and only provides that it may be thus sued for and recovered. There is nothing in the terms of the act specifically undertaking to restrict the government of this method of enforcing the law. It is not to be presumed, in the absence of language clearly indicating the contrary intention, that it was the purpose of Congress to take from the government the well-recognized method of enforcing such a statute by indictment and criminal proceedings.

When we look to the history of the act, we think it becomes manifest that Congress did not so intend. The immigration act of 1903 (32 Stat. at L. 1213, chap. 1012) was amended by the act of 1907, now under consideration. The original act made it unlawful to assist or encourage the importation or migration of certain aliens into the United States. The amended act declares that such assistance, etc., shall be a misdemeanor. It is not to be presumed that this change is meaningless, and that Congress had no purpose in making it. Nor can we perceive any purpose in making the change except to [199] manifest the intention of Congress *to make it clear that the acts denounced should constitute a crime which would carry with it the right of the government to prosecute as for a crime. This term "misdemeanor" has been generally understood to mean the lower grade of criminal offense as distinguished from a felony. It is true that the term has often been used in the statutes of the United States without strict regard to its common-law meaning, and sometimes to describe offenses of a high grade, which have been declared in the statutes to be misdemeanors. In the statutes of the states, the term has generally been defined as embracing crimes not punishable by death or imprisonment in 54 L. ed.

the penitentiary. And we may note that the new Penal Code of the United States, which will go into effect on January 1, 1910 (§ 335, 35 Stat. at L. 1152, chap. 321), provides that all offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be termed felonies; all other offenses shall be termed misdemeanors. But, at all times, a misdemeanor has been a crime. *Kentucky v. Dennison*, 24 How. 66, 69, 16 L. ed. 717.

Congress having declared the acts in question to constitute a misdemeanor, and having provided that an action for a penalty may be prosecuted, we think there is nothing in the terms of the statute which will cut down the right of the government to prosecute by indictment if it shall choose to resort to that method of seeking to punish an alleged offender against the statute. Nor does this conclusion take away any of the substantial rights of the citizen. He is entitled to the constitutional protection which requires the government to produce the witnesses against him, and no verdict against him can be directed, as might be the case in a civil action for the penalty. *Hepner v. United States*, 213 U. S. 103, 53 L. ed. 720, 29 Sup. Ct. Rep. 474.

We therefore reach the conclusion that the court erred in sustaining the demurrer to the second count of the indictment, so far as that ruling is based upon the construction of the statute in question. The judgment is reversed and the case *re- [200] manded to the District Court of the United States for the District of Massachusetts for further proceedings in conformity with this opinion.

Reversed.

UNITED STATES, Plff. in Err.,
v.

TILDEN B. STEVENSON and Amede Bellaire, alias Joseph Bellaire.

(See S. C. Reporter's ed. 200-203.)

Conspiracy — against United States — assisting immigration of alien contract laborers.

1. Assisting the importation of alien contract laborers is an "offense against the United States," within the meaning of U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, providing for the criminal punishment of persons conspiring to commit such offenses, since Congress, in making it a misdemeanor, by the act of February 20, 1907 (34 Stat. at L. 898, chap. 1134, U. S. Comp.

NOTE.—On the importation of contract labor—see note to *United States v. Parsons*, 66 C. C. A. 133.

Stat. Supp. 1907, p. 389), § 4, to assist the immigration of such persons, has made such action a crime, indictable as such, although, by § 5 of that act, it has provided a remedy in the nature of a civil action for the recovery of a penalty for a violation of the act. [For other cases, see Conspiracy, II., in Digest Sup. Ct. 1908.]

Conspiracy — against United States — assisting immigration of alien contract laborers.

2. No valid objection to construing U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, providing for the criminal punishment of persons conspiring to commit an offense against the United States as embracing assisting the importation of alien contract laborers, in violation of the act of March 2, 1907, § 4, can be founded upon the fact that a greater punishment may thereby be affixed to the conspiracy to commit the offense than is provided for the offense itself.

[For other cases, see Conspiracy, II., in Digest Sup. Ct. 1908.]

[No. 293.]

Argued and submitted October 14, 15, 1909.
Decided November 29, 1909.

IN ERROR to the District Court of the United States for the District of Massachusetts to review a judgment sustaining a demurrer to an indictment charging a conspiracy to commit the offense of assisting alien contract laborers to migrate into the United States, in violation of the Federal statutes. Reversed.

The facts are stated in the opinion.

Solicitor General Bowers argued the cause, and filed a brief for plaintiff in error.

Mr. Herbert Parker submitted the cause for defendants in error. Messrs. Charles C. Milton and Henry H. Fuller were on the brief.

Mr. Justice Day delivered the opinion of the court:

This case was argued and submitted with No. 292, just decided. [215 U. S. 190, ante, 153, 30 Sup. Ct. Rep. 35.] The indictment herein in its second count charges a conspiracy, under § 5440 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3676), to commit the offense of assisting alien contract laborers to migrate into the United States in violation of the statutes of the United States. Inasmuch as the court below had already reached the conclusion, in considering the former case (No. 292, ante), that assisting alien contract laborers was not punishable as a crime by indictment under the immigration act, it held that it followed that to conspire to assist such migration was not an offense

against the United States, within the meaning of § 5440 of the Revised Statutes of the United States. That section provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of *such parties do any act to [203 effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

Inasmuch as we have already held that Congress, in making the assistance of contract laborers into the United States a misdemeanor, has made the same a crime, indictable as such, under the immigration act of 1907 [34 Stat. at L. 898, chap. 1134, U. S. Comp. Stat. Supp. 1907, p. 389], it must necessarily follow that, if two or more persons, as is charged in the indictment under consideration, conspire to assist such importation, they do conspire to commit an offense against the United States, within the terms of § 5440 of the Revised Statutes of the United States. In this view, applying the principles laid down in the opinion in case No. 292, ante, we think that the court below erred in sustaining the demurrer to the second count of the indictment. Nor does it make any difference that Congress has seen fit to affix a greater punishment to the conspiracy to commit the offense than is denounced against the offense itself; that is a matter to be determined by the legislative body having power to regulate the matter. *Clune v. United States*, 159 U. S. 590, 40 L. ed. 269, 16 Sup. Ct. Rep. 125.

Judgment reversed.

GEORGIA L. EVERETT, Plff. in Err.,

v.

EDWARD EVERETT.

(See S. C. Reporter's ed. 203-216.)

Appeal — refusal to credit judgment of sister state — jurisdiction of Supreme Court.

No refusal by the courts of one state to give full faith and credit to the judgment of that of another is shown, so as to give the Supreme Court of the United States jurisdiction to review their final judgment dismissing, because such judgment determined the question of the legality of her marriage against her, a proceeding by a wife to set aside a judgment annulling her marriage,

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamlin v. Western*

where it appears that such other court, being a court of competent jurisdiction, and having jurisdiction of the parties and the subject-matter, dismissed a suit by her for separate maintenance while she was living apart from her husband for alleged justifiable cause, in which the defense was that she never became the wife of defendant, because, at the time of her alleged marriage to him, she had a husband living, which allegation was supported by evidence at the hearing, although the dismissal might have been merely upon the ground that she was not justified in living apart from him, if she made no attempt to prove that it was in fact upon such ground.

[For other cases, see Appeal and Error, 1969-1980; Judgment, 983-987, in Digest Sup. Ct. 1908.]

[No. 1.]

Argued and submitted October 22, 1909.
Decided November 29, 1909.

IN ERROR to the Supreme Court of the State of New York to review a judgment dismissing a complaint filed to set aside a judgment annulling a marriage. Dismissed.

See same case below in court of appeals, 180 N. Y. 452, 73 N. E. 231.

The facts are stated in the opinion.

Mr. Frank H. Stewart submitted the cause for plaintiff in error:

The court of appeals could not determine that the judicial proceedings in Massachusetts were a conclusive obstacle to the plaintiff without determining what their effect was in Massachusetts, and that that effect was to render *res judicata* the issue raised by the present case.

Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411; M'Elmoyle v. Cohen, 13 Pet. 312, 326, 10 L. ed. 177, 184; Crapo v. Kelly, 16 Wall. 610, 619, 21 L. ed. 430, 434.

This court has jurisdiction of a case presenting the question whether or not a judgment rendered in one state has received full faith and credit in the courts of another state.

Huntington v. Attrill, 146 U. S. 657, 684, 36 L. ed. 1123, 1133, 13 Sup. Ct. Rep. 224.

Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

54 L. ed.

And in particular when a state supreme court has decided against the effect which it was claimed proceedings in another state had by the law and usage of that state.

Green v. Van Buskirk, 7 Wall. 145, 19 L. ed. 111. See also Andrews v. Andrews, 188 U. S. 28, 47 L. ed. 368, 23 Sup. Ct. Rep. 237; Crapo v. Kelly, 16 Wall. 621, 21 L. ed. 435; Great Western Teleg. Co. v. Purdy, 162 U. S. 335, 40 L. ed. 990, 16 Sup. Ct. Rep. 810; Huntington v. Attrill, supra; Harding v. Harding, 198 U. S. 325, 49 L. ed. 1070, 25 Sup. Ct. Rep. 679.

That in the present case the New York court has given too great effect to the Massachusetts proceedings, instead of too little, does not render its decision any the less reviewable by this court.

Public Works v. Columbia College, 17 Wall. 521, 529, 21 L. ed. 687, 691; Wood v. Watkinson, 17 Conn. 500, 505, 44 Am. Dec. 562; Suydam v. Barber, 18 N. Y. 468, 75 Am. Dec. 254; Warrington v. Ball, 33 C. C. A. 609, 62 U. S. App. 413, 90 Fed. 464.

The very principle here invoked by the defendant rendered it impossible that the Massachusetts court should decide the question the defendant now claims that it did decide.

Kerr v. Kerr, 41 N. Y. 272.

It cannot be held upon the face of the record that there was identity of issues and resulting *res judicata*.

Umlauf v. Umlauf, 117 Ill. 584, 57 Am. Rep. 880, 6 N. E. 455. See Harding v. Harding, 198 U. S. 337, 338, 49 L. ed. 1075, 1076, 25 Sup. Ct. Rep. 679.

It is clearly the law of Massachusetts, of New York, and the general law, that, when a general result may have been reached by the determination of any undeterminate one of several facts, no particular fact is conclusively determined.

Stannard v. Hubbell, 123 N. Y. 520, 25 N. E. 1084; House v. Lockwood, 137 N. Y. 259, 33 N. E. 595; Stokes v. Foote, 172 N. Y. 342, 65 N. E. 176; Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733; Lea v. Lea, 99 Mass. 493, 96 Am. Dec. 772; Foye v.

As to full faith and credit to be given to state records and judicial proceedings—see notes to Lindley v. O'Reilly, 1 L.R.A. 79; Cummington v. Belchertown, 4 L.R.A. 131; Rand v. Hanson, 12 L.R.A. 574; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; Mills v. Duryee, 3 L. ed. U. S. 411; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; and Huntington v. Attrill, 36 L. ed. U. S. 1123.

On review of decisions of state courts presenting the question of full faith and credit—see note to Allen v. Alleghany Co. 49 L. ed. U. S. 551.

Patch, 132 Mass. 111; Stone v. Addy, 168 Mass. 26, 46 N. E. 431.

The mere fact that the court did not see fit to grant the wife's request that the decree should contain the customary technical words "without prejudice" is not conclusive upon her rights.

Lanphier v. Desmond, 187 Ill. 382, 58 N. E. 343; Haldeman v. United States, 91 U. S. 584, 23 L. ed. 433.

And since the decree purported only to deny to the wife affirmative relief, it did not bar a new application on her part for separate maintenance.

Buckman v. Phelps, 6 Mass. 448; Pettee v. Wilmarth, 5 Allen, 146.

Mr. George Zabriskie argued the cause and filed a brief for defendant in error:

The judgment of the court of appeals proceeded upon two grounds, of which at least one presents no Federal question.

Allen v. Arguimbau, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622; Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635.

A right, privilege, or immunity claimed under the Constitution must, under U. S. Rev. Stat. clause 3 of § 709 (U. S. Comp. Stat. 1901, p. 575) be claimed in the court below by the party seeking the advantage of it.

Johnson v. New York L. Ins. Co. 187 U. S. 491, 495, 47 L. ed. 273, 274, 23 Sup. Ct. Rep. 194; Eastern Bldg. & L. Asso. v. Williamson, 189 U. S. 122, 47 L. ed. 735, 23 Sup. Ct. Rep. 527; Glenn v. Garth, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; Lloyd v. Matthews, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70.

Where the plaintiff in error claims merely that the state court erroneously construed the judgment of a court of another state, without denying that the state court gave to the judgment the effect which such construction warrants, there is no question of faith and credit involved which this court has jurisdiction to review.

Allen v. Alleghany Co. 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. Rep. 311; Finney v. Guy, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558; Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; Banholzer v. New York L. Ins. Co. 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972; Lloyd v. Matthews, and Glenn v. Garth, *supra*.

A final decree of a court of competent jurisdiction upon the merits of the cause is conclusive between the parties upon the material matters thereby necessarily determined.

Embury v. Connor, 3 N. Y. 511, 525, 53 Am. Dec. 325; Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Pray v. Hegeman, 98 N. Y. 351; Griffin v. Long Island R. Co. 102 N. Y. 449, 55 Am. Rep. 824, 7 N. E. 735.

In ascertaining what credit is given to judicial proceedings in the state where they took place, this court is limited to the evidence on that subject before the court whose judgment is under review.

Tilt v. Kelsey, 207 U. S. 43, 57, 52 L. ed. 95, 101, 28 Sup. Ct. Rep. 1.

The conclusiveness of the decree is not impaired by the fact that the cause of action in the suit in which the judgment was rendered is different from the cause of action in the suit at bar,

Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350; Lythgoe v. Lythgoe, 75 Hun, 147, 26 N. Y. Supp. 1063, 145 N. Y. 641, 41 N. E. 89.

In such instances the judgment is conclusive as to those matters in issue upon the determination of which the finding or verdict was actually rendered.

Cromwell v. Sac County, 94 U. S. 351-353, 24 L. ed. 195-198; Southern P. R. Co. v. United States, 168 U. S. 1, 48, 49, 42 L. ed. 355, 376, 377, 18 Sup. Ct. Rep. 18; Bell v. Merrifield, 109 N. Y. 202, 211, 4 Am. St. Rep. 436, 16 N. E. 55.

The form of the proceeding does not affect the conclusiveness of the decree. The efficacy of the judicial determination attaches no less to summary, special, or statutory proceedings than to actions.

Culross v. Gibbons, 130 N. Y. 447, 29 N. E. 839; Reich v. Cochran, 151 N. Y. 122, 56 Am. St. Rep. 607, 37 L.R.A. 805, 45 N. E. 367; Smith v. Zalinski, 94 N. Y. 519; Re Livingston, 34 N. Y. 555.

The sufficiency of the proof upon which the court acted is not open to consideration where the judgment is pleaded as a bar or is relied on as evidence; otherwise the judgment would not be conclusive, and there could be no such thing as *res judicata*.

Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 159, 160, 30 L. ed. 614, 621, 7 Sup. Ct. Rep. 472; Deposit Bank v. Frankfurt, 191 U. S. 499, 510-512, 48 L. ed. 276, 280, 281, 24 Sup. Ct. Rep. 154; Grignon v. Astor, 2 How. 319, 339, 11 L. ed. 283, 291; Comstock v. Crawford, 3 Wall. 396, 406, 18 L. ed. 34, 38.

Mr. Justice Harlan delivered the opinion of the court:

This is a writ of error to review a judgment of the supreme court of New York upon the ground that the final order of that court, entered pursuant to the mandate of the court of appeals of New York

in this case, failed to give full faith and credit to the judicial proceedings in a certain action determined in the probate court of Suffolk county, Massachusetts.

The facts out of which this question arose may be thus summarized:

The present plaintiff in error, Georgia L. Everett, on or about April 1st, 1897, brought this action in the supreme court of Kings county, New York, against the defendant in error, Edward Everett, alleging that she and the defendant were lawfully intermarried in that county before a justice of the peace, on the 30th day of October, 1884; that under the false pretense that that marriage would never be recognized by his family, and that a ceremonial marriage would have to take place before a minister of the Gospel, the defendant, on or about December 17th, 1887, fraudulently instituted an action in the same court to have the above marriage annulled; that the plaintiff had a valid defense to such action, but, in consequence of fraudulent representations to her by the defendant, she made no defense therein, by reason whereof a decree was rendered on or about April 9th, 1888, declaring that the alleged marriage between her and the defendant was null and void; and that they had lived and cohabited together as husband and wife from the date of said marriage down to and including June 1st, 1891.

The specific relief asked in this case, brought in 1897, was a judgment that the decree of April 9th, 1888, in the case brought in 1887, be vacated and set aside, and that it be adjudged that the marriage between the plaintiff and the defendant was binding and in full force and effect.

The defendant, by answer, controverted all [205] the material *facts alleged in this case relating to the obtaining of the above decree of April 9th, 1888. He set forth various grounds of defense, but none of them raised any question of a Federal nature. He made, however, a separate special defense herein, based upon the record of certain proceedings in the probate court of Suffolk county, Massachusetts.

The allegations of the answer as to those proceedings were substantially these: That on or about February 21st, 1895, the present plaintiff, Georgia L. Everett, brought an action against him in the probate court of Suffolk county, Massachusetts, claiming to be, as was the defendant, a resident of Boston, and also claiming to be his lawful wife; that he had failed, without just cause, to furnish suitable support for her and had deserted her; that she was living apart from him for justifiable cause; that she

prayed that such order be made for her support as the court deemed expedient; that process was duly issued out of the said court and served on this defendant, and he duly appeared; that on or about March 21st, 1895, on motion of this defendant, the court ordered the plaintiff to file in that case full specifications as to *how, when, and where she became the lawful wife of the defendant*; that, pursuant to that order, on or about April 1st, 1895, the plaintiff filed in the said probate court her specifications, wherein she stated that she was married to this defendant on or about October 31st, 1884, in Brooklyn, New York, by John Courtney, Esq., justice of the peace, and, further, that a legal marriage according to the laws of the state of New York was entered into in that state between her and this defendant on or about April 15th, 1888, by mutual consent, consummation, acknowledgment, and cohabitation in that state, and that such consent, acknowledgment, and cohabitation continued in New York, and also in Massachusetts, from April 15th, 1888, to May 30th, 1891, at which time, she alleged, this defendant deserted her. She also stated in her petition in the probate court "that her marriage with this defendant was still—to wit, on April 1, 1895—of legal force and effect. Yet defendant deserted her on or *about May 30, 1891, and had con- [206] tributed nothing to her support since that time." "Thereafter," the answer alleged, "this defendant, according to the course and practice of the said court, duly answered the said petition, and admitted that he and the said petitioner were married on or about October 30, 1884, in Brooklyn, by John Courtney, Esq., justice of the peace, and alleged that the said marriage had been duly adjudged to be null and void by this court by its judgment rendered April 9th, 1888, in the suit brought by this defendant against the plaintiff herein for the purpose of having the said marriage annulled, which is the same judgment hereinbefore in this answer, and also in the amended complaint herein, referred to. In respect to the supposed marriage between this defendant and the plaintiff herein,—alleged in the said specifications filed by the plaintiff in her said suit in the probate court to have taken place on or about April 15, 1888,—this defendant answered that, at the time of the said marriage, performed on or about October 30, 1884, by John Courtney, justice of the peace, and both at the time of the alleged marriage, stated in the specifications filed by the said plaintiff to have taken place April 15, 1888, and at all other times subsequent to, as well as long before, Octo-

ber 30, 1884, the said plaintiff was the wife of one William G. Morrison, and that, by reason thereof, the said supposed marriages between this defendant and the said plaintiff, by her alleged, were, and each of them was, null and void. Thereafter such proceedings were duly had that the said cause came on to be heard and was heard by the said probate court upon the issues raised as aforesaid upon this defendant's said answer to the plaintiff's said petition, and the said court found the said issues for this defendant, and thereupon made its decree March 25, 1897, whereby the court found and decided that the prayer of the plaintiff's said petition *should not be granted*, and adjudged that the said petition be *dismissed*; and that the said judgment remains of record, and in full force and effect."

In her reply, the plaintiff, admitting that [207] she had instituted *in the Massachusetts court the action above referred to, alleged that her petition in that case was one "for separate maintenance, and that the issues involved in the present action were in nowise considered in that action.

. . . that said petition was dismissed upon the understanding that, in case the relationship of husband and wife should be established between the plaintiff and the defendant by said supreme court, and upon the proceedings pending therein, the petition for separate support was to be renewed, and said judgment of said probate court, the county of Suffolk, commonwealth of Massachusetts, entered on or about the 25th day of March, 1897, did not determine the questions at issue in the present proceedings and was entered with leave to renew the said proceedings, as hereinbefore set forth."

There was a finding of facts in the present case by the supreme court of New York, one of which was that the plaintiff and the defendant were duly married before the justice of the peace, as above stated, and that, after such marriage, they lived and cohabited together as husband and wife up to June 1st, 1891, and that she was never married to any person other than the present defendant. The court, by its final decree, set aside and vacated the decree of April 9th, 1888, annulling the marriage before the justice of the peace, and adjudged that the contract of marriage thus evidenced was in full force and effect. That decree was affirmed by the appellate division. It is stated in the opinion of the court of appeals that there were several trials and appeals in this case to the appellate division. 48 App. Div. 475, 62 N. Y. Supp. 1042; 75 App. Div. 369, 78 N. Y. Supp. 193; 89 App. Div. 619, 85 N. Y. Supp. 922.

Finally, the case was carried to the court

of appeals of New York [180 N. Y. 452, 73 N. E. 231], where the judgment was reversed February 21st, 1905, but, for reasons stated in the opinion of that court, the reversal was with directions to dismiss her complaint upon the merits. That decree is now here for review.

It appears from its opinion that the court of appeals of *New York adjudged the [208 decision in the probate court of Massachusetts to be conclusive, as between the parties, as to the question whether the plaintiff was the wife of the defendant, entitled to be regarded as holding that relation to him. The court of appeals of New York said: "The Massachusetts judgment was based upon the petition of the wife, and it was founded upon the allegation that she was the defendant's wife; that he had deserted her and failed to contribute to her support. These allegations of fact were put in issue by the defendant, and must have been determined by the court. An exemplification of the judgment record in the action which annulled the marriage was presented to the probate court and admitted in evidence. The court had jurisdiction of the parties and the subject-matter of the controversy, and its judicial power extended to every material question in the proceeding. The determination of the court that the plaintiff was not entitled to the relief demanded in her petition must be deemed to have included the question as to the validity of her marriage. In other words, the court must have determined the question whether the petitioner was in fact the defendant's wife, and this involved an inquiry with respect to the question whether, at the time of her marriage before the justice of the peace in Brooklyn, she had another husband living. There was evidence before the court on that question, since the record of the judgment annulling the marriage in this state was before it. That judgment of a sister state was entitled in the present action to full faith and credit under the Constitution of the United States, any statute, rule, or procedure, or even any constitutional provision in any state to the contrary notwithstanding. The provision of the Federal Constitution with respect to the force and effect to be given to the judgments of other states, and the act of Congress passed in pursuance thereof, is the supreme law of the land, and any statute or rule of practice in this state that would tend to detract or take from such a judgment the force and effect that it is entitled to under the Federal Constitution *and in the [209 state where rendered must be deemed to be inoperative. So we think that that judgment was conclusive upon the parties to this action with respect to all the questions which were involved in

the proceedings and decided by the court; and, clearly, one of those questions was the status of the present plaintiff. She alleged that she was the defendant's wife, and this allegation must be deemed to have been negated by the decision in the proceeding."

The court, in addition, considered and disposed of some questions of a non-Federal nature in respect to which the trial court was held to have erred. But it thus concluded its opinion: "There are many other questions in this case which have been discussed at length upon the argument and are to be found in the briefs of the respective counsel, but it is unnecessary to consider them. We think that the judgment must be reversed; and, as there appears to be at least one conclusive obstacle to the plaintiff's success, a new trial would be useless, and so the complaint should be dismissed upon the merits." The one conclusive obstacle thus found to be in the plaintiff's way was the judgment of the Massachusetts court in the action brought by the plaintiff in error against the defendant in error.

We have no concern about the disposition made by the state court of questions of mere local law, and have only to inquire whether, as required by the Constitution of the United States, it gave full faith and credit to the proceedings had in the probate court in Massachusetts. Const. art. 4, § 1. If it did, the judgment must be affirmed; otherwise, reversed. That the proceedings in the latter court were judicial in their nature, and that the New York court intended to give them full faith and credit, cannot be doubted. The probate court is a court of record, established by the general court of Massachusetts under the authority of the Constitution of the commonwealth. Mass. Const. 1822; Mass. Pub. Stat. 1832, chap. 156. It has jurisdiction when a wife, for justifiable cause, is actually living apart from her husband, to make such order as it deems expedient concerning her support. Ibid. And when it has jurisdiction of the parties and subject-matter, its decree, until reversed or modified, is as conclusive in Massachusetts as the judgments of other courts there. *Watts v. Watts*, 160 Mass. 464, 23 L.R.A. 187, 39 Am. St. Rep. 509, 36 N. E. 479; *Laughton v. Atkins*, 1 Pick. 535; *Dublin v. Chadbourn*, 16 Mass. 433.

215] *In the suit in Massachusetts, the fundamental fact was put in issue as to whether the plaintiff was the wife of the defendant, and entitled, as such, to sue for support while living apart from her alleged husband. The New York court adjudged that, as between the parties, and, so far as the question be-

fore us is concerned, that fact had been determined by the Massachusetts court adversely to the plaintiff; for the latter court ruled, after hearing the parties, that the relief asked from it should not be granted, and dismissed the plaintiff's petition. So reads the record of the Massachusetts court.

It is said, however, that, for aught that appears from the record of the probate court, as produced herein, that court *may* have declined to grant the relief asked by the alleged wife without considering at all the fact of her marriage, but only on the ground that she was living apart from the defendant without justifiable cause. But the answer to this contention is that the question whether the plaintiff was the lawful wife of the defendant, as well as the question whether she was entitled to separate maintenance while living apart from her alleged husband, was in issue in the probate court, and if, in order to prove that the court below gave undue faith and credit to the Massachusetts judgment, the plaintiff was entitled to show by oral testimony that there was really no dispute in the probate court as to the fact of her being the wife of the defendant, and that the only actual dispute at the hearing was whether she had justifiable cause for living apart from him, no such proof appears to have been made by her. No bill of exceptions as to the evidence in the probate court seems to have been taken, and we have before us only a record showing that the plaintiff, claiming to be the wife of the defendant herein, sued for separate maintenance and support, alleging that she was living apart from him for justifiable cause, and that the relief asked was denied and her petition dismissed without any statement of the specific grounds on which the court proceeded, and without any qualifying words indicating that the decree was otherwise than upon the merits *as to the issues made. We [216] concur with the court of appeals of New York in holding that, as the probate court had jurisdiction of the parties and the subject-matter, its judgment, rendered after hearing, that the plaintiff was not entitled to the relief demanded by her, and that her petition be dismissed, it must be taken, upon the record of this case, that the latter court determined against the plaintiff the fact of her being the wife of the defendant at the time she sought separate maintenance and support.

It is doubtful whether the plaintiff, in her pleadings or otherwise, sufficiently asserted any right belonging to her under the Constitution of the United States. But if it were assumed that she did, the result, even upon that hypothesis, is that, upon the present showing by the plaintiff, there is no substan-

tial ground to contend that the court below did not give such faith and credit to the judgment of the probate court of Massachusetts as were required by the Constitution, and therefore this court has no authority to review the final judgment of the New York court. The writ of error must be dismissed.

It is so ordered.

BALTIMORE & OHIO RAILROAD COMPANY

v.

INTERSTATE COMMERCE COMMISSION.

(See S. C. Reporter's ed. 216-225.)

Cases certified—necessity of determination—sending up whole case.

The provisions of the act of February 11, 1903 (32 Stat. at L. 823, chap. 544, U. S. Comp. Stat. Supp. 1907, p. 951), permitting the judges sitting in a suit arising under the acts involving monopolies and interstate commerce, in case of division in opinion, to certify the case to the Supreme Court of the United States for review, does not authorize the sending up of the whole case, and therefore that court will not consider a case where no final judgment, order, or decree determinative of the merits is rendered, but the lower court orders that this case be certified for review to the Supreme Court, and that "a transcript of the record

and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to" that court, "and the same is transmitted accordingly."

[For other cases, see Cases Certified, 16-21; 43-51, in Digest Sup. Ct. 1908.]

[No. 339.]

Argued October 15, 18, 1909. Decided December 6, 1909.

ON A CERTIFICATE from the Circuit Court of the United States for the District of Maryland to secure the opinion of the Supreme Court upon a bill in equity to secure the annulment of an order of the Interstate Commerce Commission. Cause remanded.

Statement by Mr. Chief Justice Fuller:

This was a bill in equity filed by the Baltimore & Ohio Railroad Company in the circuit court of the United States for the district of Maryland against the Interstate Commerce Commission, July 20, 1908, which prayed for a preliminary injunction and a final decree enjoining, annulling, and suspending a certain order of the Commission served June 24, 1908, in a proceeding before the Commission, entitled, "Rail & River Coal Company v. Baltimore & Ohio Railroad Company."

On July 27, 1908, the attorney general,

NOTE.—On cases certified in the Federal courts—see note to Webster v. Cooper, 13 L. ed. U. S. 325.

As to the definiteness of questions to be certified—see note to Waco Water & Light Co. v. Waco, 31 L.R.A. 392.

Sending up whole case to Federal Supreme Court by certificate.

In cases in which the judgments of the circuit courts of appeals are made final, those courts may, under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 6, certify to the Federal Supreme Court any question or proposition of law concerning which they desire the instruction of that court for the proper decision of the case.

The intention of Congress as to the certification provided in this section is to be arrived at in the light of the rules theretofore prevailing in relation to certificates of division of opinion in the circuit court. Graver v. Faurot, 162 U. S. 435, 40 L. ed. 1030, 16 Sup. Ct. Rep. 799.

Nothing was better settled than that the whole case could not be sent up to the Federal Supreme Court upon certificate of a division of opinion. United States v. Bailey, 9 Pet. 267, 9 L. ed. 124; Saunders v. Gould, 4 Pet. 392, 7 L. ed. 897; White v. Turk, 12 Pet. 238, 9 L. ed. 1069; Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253;

Harris v. Elliott, 10 Pet. 25, 9 L. ed. 333; United States v. Giles, 9 Cranch, 212, 3 L. ed. 708; United States v. Briggs, 5 How. 208, 12 L. ed. 119; Mason v. Haile, 12 Wheat. 370, 6 L. ed. 660; Williamsport Nat. Bank v. Knapp, 119 U. S. 357, 30 L. ed. 446, 7 Sup. Ct. Rep. 274; State Nat. Bank v. St. Louis Rail Fastening Co. 122 U. S. 21, 30 L. ed. 1121, 7 Sup. Ct. Rep. 1054; Webster v. Cooper, 10 How. 54, 13 L. ed. 325; Jewell v. Knight, 123 U. S. 432, 31 L. ed. 192, 8 Sup. Ct. Rep. 193; Weeth v. New England Mortg. Co. 106 U. S. 605, 27 L. ed. 99, 1 Sup. Ct. Rep. 91; California Artificial Stone Paving Co. v. Molitor, 113 U. S. 609, 28 L. ed. 1106, 5 Sup. Ct. Rep. 618.

And the whole case could not be broken up into points and sent up on division of opinion. Nesmith v. Sheldon, 6 How. 41, 12 L. ed. 335; Luther v. Borden, 7 How. 1, 12 L. ed. 581; Webster v. Cooper, 10 How. 54, 13 L. ed. 325; Dennistoun v. Stewart, 18 How. 565, 15 L. ed. 489; Jewell v. Knight, supra; Dublin Twp. v. Milford Sav. Inst. 128 U. S. 510, 32 L. ed. 533, 9 Sup. Ct. Rep. 148; United States v. Hall, 131 U. S. 51, 33 L. ed. 97, 9 Sup. Ct. Rep. 663; United States v. Reilly, 131 U. S. 58, 33 L. ed. 75, 9 Sup. Ct. Rep. 664.

The submission of the case in distinct points which in fact cover the whole case was not sufficient to cause the Supreme Court to take jurisdiction if by doing so it

in compliance with § 5 of the act to regulate commerce, as amended by the act of June 29, 1906 [34 Stat. at L. 592, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 905], filed in the court the certificate of general public importance under the expedition act of February 11, 1903 [32 Stat. at L. 823, chap. 544, U. S. Comp. Stat. Supp. 1907, p. 951]. In accordance with the provisions of the act of February 11, 1903, the two circuit judges, by order filed August 26, 1908, designated the Honorable Thomas J. Morris, district judge for the district of Maryland, to sit with them on the hearing and disposition of the case.

The application for the preliminary injunction was set for hearing September 22, 1908. Defendant's answer was filed September 19, 1908. By order entered September 23, 1908, the application for the preliminary injunction was denied.

Replication was filed and testimony taken, and, there being no substantial dispute as to the facts, Mr. Arthur Hale, complainant's general superintendent of transportation, and also chairman of the car efficiency committee of the American Railway Association, was able to testify as to all matters **218]** *that counsel deemed necessary to bring to the court's attention, and was the only witness.

December 14, 1908, the cause came on for

final hearing, and was argued before the two circuit judges and the district judge designated by them. No final decree or judgment was entered, but the presiding judge entered the following order:

"This cause came on this day to be further heard, and was argued by counsel, and the court having fully considered the bill, answer, deposition, and other papers filed herein, the judges sitting finding themselves divided in opinion as to the decree that should be entered herein,

"It is now ordered, that, in accordance with the act of Congress applicable hereto, that this case be certified for review to the Supreme Court of the United States.

"December 14, 1908."

The cause was docketed in this court and the transcript of record filed January 25, 1909, as "on a certificate from the circuit court of the United States for the district of Maryland."

The act of Congress of February 11, 1903 (32 Stat. at L. 823, chap. 544, U. S. Comp. Stat. Supp. 1907, p. 951), contains two sections, as follows:

(1) "That in any suit in equity pending or hereafter brought in any circuit court of the United States under the act entitled, 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies,' approved July second, eighteen hun-

would exercise original rather than appellate jurisdiction. *White v. Turk*, supra.

The principle involved in the objection to acting on several points which dispose of the whole case was not that the whole case might not properly be disposed of by a decision on what is certified, but that the division must not be in substance on several questions arising in various stages of the case, and some of them anticipated and presented so as to cover the whole case. *United States v. Chicago*, 7 How. 185, 12 L. ed. 660.

The provision for certificates of division in opinion was meant to meet a case where, two judges sitting, a clear and distinct proposition of law, material to the case, arises, on which, differing in opinion, they might make such a certificate as would enable the Supreme Court to decide the question. If in reality more than one question occurred, they might be embraced in the certificate; but where it was apparent that the whole case was presented to the Supreme Court for decision, with all its propositions of law and fact, the case would be dismissed. *Waterville v. Van Slyke*, 116 U. S. 699, 29 L. ed. 772, 6 Sup. Ct. Rep. 622.

But the fact that the questions were several in number and involved the whole case would not defeat the jurisdiction if they arose at one time, at one stage in the cause, and involved little beyond one point. *United States v. Chicago*, supra.

54 L. ed.

Guided by these rules, it has been repeatedly held that under the guise of certified questions to the Federal Supreme Court, the whole case cannot be sent up to that court by a circuit court of appeals for consideration. *Warner v. New Orleans*, 167 U. S. 467, 42 L. ed. 239, 17 Sup. Ct. Rep. 892; *Cross v. Evans*, 167 U. S. 60, 42 L. ed. 77, 17 Sup. Ct. Rep. 733; *Emsheimer v. New Orleans*, 186 U. S. 33, 46 L. ed. 1042, 22 Sup. Ct. Rep. 770; *The Fulmina*, 212 U. S. 354, 53 L. ed. 546, 29 Sup. Ct. Rep. 363, 15 A. & E. Ann. Cas. 748; *Chicago, B. & Q. R. Co. v. Williams*, 214 U. S. 492, 53 L. ed. 1058, 29 Sup. Ct. Rep. 514; *German Ins. Co. v. Hearne*, 55 C. C. A. 84, 118 Fed. 134.

A question which asks the court to decide whether, upon all the evidence, the defendant was entitled to a verdict, requires the court to decide the whole case. *Fire Ins. Asso. v. Wickham*, 128 U. S. 434, 32 L. ed. 506, 9 Sup. Ct. Rep. 113.

Questions whether or not, upon the facts as stated and proved, the action can be maintained, and whether the jury should be instructed that, under the facts as proved, the plaintiff cannot recover, are objectionable as bringing the entire case before the Supreme Court, and will not be answered. *Daniels v. Chicago & R. I. R. Co.* 3 Wall. 250, 18 L. ed. 224.

The question whether plaintiff or defendant is entitled to judgment on a special verdict is too general to be answered, be-

dred and ninety [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154], or any other acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon

such case shall be given precedence over others, and in every way expedited, *and [219 be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or more; and, if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.

"Sec. 2. That in every suit in equity pending or hereafter brought in any circuit court

cause it refers the whole case to the decision of the court. *Hosford v. Germania F. Ins. Co.* 127 U. S. 399, 32 L. ed. 196, 8 Sup. Ct. Rep. 1199.

The question whether the evidence in a criminal case is sufficient to establish the offense denounced by the statute under which the prosecution is had brings up the whole case, and is not proper for certification. *United States v. Bailey*, 9 Pet. 267, 9 L. ed. 124.

Mixed questions of law and fact which require the construction of various acts of Congress, and the determination, in the light of all the testimony in a criminal case, of the question whether or not the accused can be held guilty of any offense legally punishable by the United States, cannot be certified to the Federal Supreme Court by a circuit court of appeals, since this amounts in effect to asking the Supreme Court what, upon the whole case, as sent up, should have been the verdict and judgment in the trial court. *Hallowell v. United States*, 209 U. S. 101, 52 L. ed. 702, 28 Sup. Ct. Rep. 498.

A question of mixed law and fact, upon the decision of which the case turns, and which in effect asks the court to indicate what, under all the facts stated, should be the final judgment, cannot be certified by a circuit court of appeals to the Federal Supreme Court for determination. *Chicago, B. & Q. R. Co. v. Williams*, 205 U. S. 444, 51 L. ed. 875, 27 Sup. Ct. Rep. 559.

The questions whether the United States can recover from a railway company or its receivers the whole or any part of moneys paid by the United States to Indians for improvements upon lands sold to a railroad company, or for moneys paid to individual Indians on account of a right of way through the lands of their tribe, cannot be certified to the Federal Supreme Court by a circuit court of appeals, since they bring up the whole case for consideration and disposition, and involve the construction of various Indian treaties and the Pacific Railroad acts and the consolidation of railroad companies. *United States v. Union P. R. Co.* 163 U. S. 505, 42 L. ed. 559, 18 Sup. Ct. Rep. 167.

The question whether the master's report should in all things be sustained is

objectionable as presenting the whole case for adjudication. *Weeth v. New England Mortg. Secur. Co.* 106 U. S. 605, 27 L. ed. 99, 1 Sup. Ct. Rep. 91.

The question whether or not a demurrer shall be sustained cannot be certified, as it does not show any well-defined point of law in regard to which the judges are opposed in opinion, but merely presents the whole case for decision. *United States v. Minor*, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836.

The question whether false swearing and perjury in answers upon which the dismissal of a bill is obtained for want of equity will or will not constitute a ground for setting aside the decree, assuming that the bill for such relief is otherwise sufficient, is not one which a circuit court of appeals can certify to the Federal Supreme Court because of doubt arising from an alleged irreconcilable conflict between two decisions of the Supreme Court, where the entire record is transmitted as part of the certificate, and the answer to the question propounded contemplates an examination of the whole case, and a decision of the question whether the demurrer in the case at bar was properly sustained or not. *Graver v. Faurot*, 162 U. S. 435, 40 L. ed. 1030, 16 Sup. Ct. Rep. 799.

It never was designed that, because a case is a troublesome or a new one, or because the judges trying the case may not be perfectly satisfied as regards all the points raised in the course of the trial, the whole matter should be referred to the Supreme Court for its decision in advance of a regular trial, by certifying the question whether the indictment presents facts sufficient to constitute an offense under the statute on which it is based. *United States v. Perrin*, 131 U. S. 55, 33 L. ed. 88, 9 Sup. Ct. Rep. 681.

A question certified to the Federal Supreme Court by a circuit court of appeals, which puts the facts of one case over against the facts of another, and asks the Supreme Court to search the record in each to say whether the one case operates to bar the other, is objectionable as practically submitting the whole case. *Warner v. New Orleans*, *supra*.

of the United States under any of said acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court, and must be taken within sixty days from the entry thereof: Provided, That in any case where an appeal may have been taken from the final decree of a circuit court to the circuit court of appeals before this act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law."

Section 5 of the Hepburn act, so called, of June 29, 1906 (34 Stat. at L. 584, 592, chap. 3591, U. S. Comp. Stat. Supp. 1907, pp. 892, 904), provides:

"The venue of suits brought in any of the circuit courts of the United States against the Commission, to enjoin, set aside, annul, or suspend any order or requirement of the Commission, shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated.

"The provisions of 'An Act to Expedite the Hearing and Determination of Suits in Equity,' and so forth, approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in **220**] equity to *enforce any order or requirement of the Commission, or any of the provisions of the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney General in every such case to file the certificate provided for in said expediting act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal, as therein authorized, to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes. . . . An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: Provided further, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes."

Messrs. **W. Irvine Cross** and **Hugh L. Bond, Jr.**, argued the cause, and, with Mr. **W. Ainsworth Parker**, filed a brief for the Baltimore & Ohio Railroad Company.

Assistant to the Attorney General **Ellis** argued the cause, and, with Messrs. **Luther M. Walter** and **Orla E. Harrison**, filed a brief for the Interstate Commerce Commission.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By the judiciary act of March 3, 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488], a review by certificate is limited to the certificate or its equivalent by the circuit courts, made after final judgment, of the question, when raised, of their jurisdiction as courts of the United States, *and to the certificate by the circuit **[221]** courts of appeal of questions of law in relation to which the advice of this court is sought as therein provided, which certificates are governed by the same rules as were formerly applied to certificates of division. *United States v. Rider*, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983; *The Habana*, 175 U. S. 677, 684, 44 L. ed. 320, 322, 20 Sup. Ct. Rep. 290; *Chicago, B. & Q. R. Co. v. Williams*, 205 U. S. 444, 51 L. ed. 875, 27 Sup. Ct. Rep. 559. And it has been established by repeated decisions that questions certified to this court upon a division of opinion must be distinct points of law, clearly stated, so that they can be distinctly answered without regard to other issues of law or of fact; and not questions of fact or of mixed law and fact, involving inferences of fact from particular facts stated in the certificates; nor yet the whole case, even if divided into several points. *Jewell v. Knight*, 123 U. S. 426, 433, 31 L. ed. 190, 192, 8 Sup. Ct. Rep. 193.

And finally, it has been settled that the whole case, even when its decision turns upon matter of law only, cannot be sent here by certificate of division.

In *White v. Turk*, 12 Pet. 238, 9 L. ed. 1069, it was said: "The certificate of the judges, in this case, leaves no doubt that the whole cause was submitted to the circuit court by the motion to set aside the judgment on the bond. And, had the court agreed in opinion, and rendered a judgment upon the points submitted, it would have been conclusive of the whole matter in controversy between the parties. This certificate, therefore, brings the whole cause before this court; and, if we were to decide the questions presented, it would, in effect, be the exercise of original, rather than appellate, jurisdiction." This practice was de-

clared irregular by Chief Justice Taney in *Webster v. Cooper*, 10 How. 54, 13 L. ed. 325, and the chief justice added that it "would, if sanctioned, convert this court into one of original jurisdiction in questions of law, instead of being, as the Constitution intended it to be, an appellate court to revise the decisions of inferior tribunals." So Mr. Justice Miller, in *United States v. Perrin*, 131 U. S. 55, 58, 33 L. ed. 88, 89, 9 Sup. Ct. Rep. 681, 682, said:

"But it never was designed that, because a 222] case is a troublesome *one, or is a new one, and because the judges trying the case may not be perfectly satisfied as regards all the points raised in the course of the trial, the whole matter shall be referred to this court for its decision in advance of a regular trial, or that in any event the whole case shall be thus brought before this court. Such a system converts the Supreme Court into a *nisi prius* trial court; whereas, even in cases which come here for review in the ordinary course of judicial proceeding, we are always and only an appellate court, except in the limited class of cases where the court has original jurisdiction."

Without discussing the evolution of the use of certificates, reference to the legislation given below may be profitable.†

223] *In the present case no final judgment or decree or order determinative of the merits was rendered, but the court ordered "that this case be certified for review to the Supreme Court of the United States," and that "a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme Court of the United States; and the same is transmitted accordingly."

The act of Congress of February 11, 1903,

†Section 6 of the "Act to Amend the Judicial System of the United States," April 29, 1802 (2 Stat. at L. 159, chap. 31), provided:

"That whenever any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall, during the same term, upon the request of either party, or their counsel, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court, at their next session to be held thereafter; and shall, by the said court, be finally decided. And the decision of the Supreme Court, and their order in the premises, shall be remitted to the circuit court, and be there entered of record, and shall have effect according to the nature of the said judgment and order: Provided, That nothing herein contained shall prevent the cause from proceeding if, in the opinion

provided in its 1st section that, on the certificate of the Attorney General, the case should be assigned for hearing before not less than *three judges, and that, "in [224 the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal, as hereinafter provided." The order of the circuit court pursues the language of this provision, and attempts to send up the whole case to be determined by this court. This invokes the exercise of original jurisdiction, and cannot be sustained.

In a note to *United States v. Ferreira*, 13 How. on page 52, 14 L. ed. on page 47, note, which was inserted by order of the court, the chief justice states the substance of the case of the *United States v. Todd*, which was decided in February, 1794, but not printed, as there was at that time no official reporter. This note thus concludes:

"In the early days of the government, the right of Congress to give original jurisdiction to the Supreme Court in cases not enumerated in the Constitution was maintained by many jurists, and seems to have been entertained by the learned judges who decided *Todd's* case. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the Constitution, and that Congress cannot enlarge it. In all other cases its power must be appellate."

Such is the settled rule, and it is inadmissible to suppose that it was the intention of Congress to run counter to it.

Ordinarily in the Federal courts, in the absence of express statutory authority, no

of the court, farther proceedings can be had without prejudice to the merits. . . ."

This act was superseded by that of June 1, 1872 (17 Stat. at L. 196, chap. 255, U. S. Comp. Stat. 1901, p. 527), which provided:

"That whenever, in any suit or proceeding in a circuit court of the United States, being held by a justice of the Supreme Court and the circuit judge or a district judge, or by the circuit judge and a district judge, there shall occur any difference of opinion between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or the presiding judge shall prevail, and be considered the opinion of the court for the time being; but when a final judgment, decree, or order in such suit or proceeding shall be entered, if said judges shall certify, as it shall be their duty to do if such be the fact, that they differed in opinion as to any question which, under the act of Congress

appeal can be taken or writ of error brought except from a final decree or to a final judgment. *McLish v. Roff*, 141 U. S. 661, 665, 35 L. ed. 893, 894, 12 Sup. Ct. Rep. 118; *Forgay v. Conrad*, 6 How. 201, 205, 12 L. ed. 404, 406. There is no final judgment or decree in this case, nor any judicial determination from which an appeal would lie. *The Alicia*, 7 Wall. 571, 19 L. ed. 84, is in point. In that case it appeared that, on the 9th day of January, 1863, a decree 225] of *condemnation had been entered in the district court against the *Alicia* and her cargo for violation of the blockade. From this decree an appeal was allowed and taken to the circuit court; and on the 18th of May, 1867, an order was made in that court on the application of the parties in interest—there being at this time, in the circuit court, no order, judgment, or decree in the case—for the transfer of the cause to this court under the 13th section of the act of June 30, 1864 [13 Stat. at L. 311, chap. 174], which enacted that prize causes depending in the circuit court might be so transferred. This court held that the cause was removed to the circuit court by the appeal from the decree of the district court, and that that decree was vacated by the appeal, and that the circuit court acquired full jurisdiction of the cause, and was fully authorized to proceed to final hearing and decree. And Chief Justice Chase said: "Nor can it be doubted that, under the Constitution, this court can exercise, in prize causes, appellate jurisdiction only. An appellate jurisdiction necessarily implies some judicial determination,—some judgment, decree, or order of an inferior tribunal, from which an appeal has been taken. But in this case there had been no such order, judgment, or decree in the circuit court; and there was no subsisting decree in the

district court, from which an appeal could be taken. We are obliged to conclude that, in the provision for transfer, an attempt was inadvertently made to give to this court a jurisdiction withheld by the Constitution, and, consequently, that the order of transfer was without effect. The cause is still depending in the circuit court."

The result is that the order must be set aside and the case remanded to the Circuit Court, with directions to proceed in conformity with law.

Ordered accordingly.

226] *SOUTHERN PACIFIC COMPANY
and Oregon & California Railroad Company

v.

INTERSTATE COMMERCE COMMISSION.

(See S. C. Reporter's ed. 226, 227.)

This case is governed by the decision in *Baltimore & O. R. Co. v. Interstate Commerce Commission*, ante, 164.

[No. 275.]

Argued October 12, 13, 1909. Decided December 6, 1909.

ON A CERTIFICATE of the Judges of the Circuit Court of the United States for the Northern District of California to present to the Supreme Court of the United States questions arising in a suit brought to rescind an order of the Interstate Commerce Commission. Cause remanded.

The facts are stated in the opinion.

Mr. Maxwell Evarts argued the cause and filed a brief for the Southern Pacific Company et al.

of April twenty-ninth, eighteen hundred and two, might have been reviewed by the Supreme Court on certificate of difference of opinion, then either party may remove said final judgment, decree, or order to the Supreme Court, on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error or appeals in regard to bail and supersedeas."

That was carried forward in 1874, by §§ 650, 652, 654, 693, and 697 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 527, 528). Section 6 of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), provided:

"Sec. 6. . . . Excepting that, in every such subject within its appellate jurisdiction, the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the 54 L. ed.

instruction of that court for its proper decision.

"And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

"And excepting also that, in any such case as is hereinbefore made final in the circuit court of appeals, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

Messrs. R. S. Lovett, F. C. Willard, W. W. Cotton, and P. F. Dunne also filed a brief for the Southern Pacific Company et al.

Assistant to the Attorney General Ellis argued the cause, and, with Messrs Luther M. Walter and Edwin P. Grosvenor, filed a brief for the Interstate Commerce Commission.

Mr. Chief Justice Fuller delivered the opinion of the court:

This case comes here upon a certificate of the three judges of the circuit court for the northern district of California, under § 1 of the expediting act of February 11, 1903 (32 Stat. at L. 823, chap. 544, U. S. Comp. Stat. Supp. 1907, p. 951), as construed by them.

The suit was brought by the railroad companies in the circuit court, to restrain the enforcement of an order of the Interstate Commerce Commission, which established a maximum rate for the transportation of rough green fir lumber from points in the Willamette valley, Oregon, to San Francisco. The case came on for argument before the three circuit judges upon the demurrer of the Commission to the amended bill of complaint, to which was attached the opinion and order of the Commission.

The circuit judges certified the whole case, and it comes here without opinion, decision, or assignment of errors.

Upon the grounds stated in No. 339, Baltimore & O. R. Co. v. Interstate Commerce Commission [215 U. S. 216, ante, 164, 30 Sup. Ct. Rep. 86], the certificate is dismissed and the case remanded to the Circuit Court, with directions to proceed therein in conformity with law.

Ordered accordingly.

PABLO YORDI, Appt.,
v.

EUGENE NOLTE, United States Marshal
of the Western District of Texas.

(See S. C. Reporter's ed. 227-233.)

Extradition — complaint — foreign record — incorporation.

1. To give jurisdiction to a United States commissioner of a proceeding to extradite a fugitive from the justice of a foreign

NOTE.—On the sufficiency of the papers in extradition proceedings—see note to *Ex parte Hart*, 28 L.R.A. 801.

On practice and procedure in extradition proceedings—see notes to *Cook v. Hart*, 36 L. ed. U. S. 934, and *Whitten v. Tomlinson*, 40 L. ed. U. S. 406.

state, the record of proceedings before the foreign court, and the depositions of witnesses therein contained, upon which the extradition proceeding is based, need not be attached to the complaint, if they are in the custody and keeping of the one making the complaint, and the commissioner is possessed of the information which they contain, which is sufficient to satisfy him that the proceeding is based upon real grounds.

[For other cases, see *Extradition*, 36-43, in Digest Sup. Ct. 1908.]

Extradition — irregularity in complaint — curing at hearing.

2. The irregularity, if any, in making a complaint in extradition proceedings on information and belief, without attaching thereto the record of the foreign court which is the basis of the proceeding, is cured by the production at the hearing of such record, which is sufficient to justify the detention of the accused.

[For other cases, see *Extradition*, 36-43, in Digest Sup. Ct. 1908.]

[No. 382.]

Submitted October 22, 1909. Decided December 6, 1909.

APPEAL by petitioner from an order of the District Court of the United States for the Western District of Texas, discharging a writ of habeas corpus to secure the release of petitioner, who was held in custody under an extradition proceeding. Affirmed.

See same case below, 166 Fed. 921.

Statement by Mr. Chief Justice Fuller:

*Pablo Yordi, being detained in custody by the United States marshal of the western district of Texas, obtained from the district court for that district a writ of habeas corpus to secure his release. He was charged in the Republic of Mexico with the crime of "fraud and forgery of documents," and a warrant for his arrest was duly issued by the criminal judge of the city of Guadalajara. He avoided arrest in Mexico and fled to El Paso, Texas, where he was detained in prison, under an order of the United States commissioner, awaiting the issue by the proper authorities of an order for his extradition.

At the hearing on the habeas corpus, it was stipulated that the crimes in the complaint made before the United States commissioner were extraditable offenses under the existing treaty between the United States and Mexico; that at the time of the hearing before the commissioner the complaint in the case, made by A. V. Lomeli, consul of Mexico, was solely upon information and belief; that he had no actual or personal knowledge of the commission of any offense, but, at the time of making the complaint, the said Mexican consul had be-

fore him the record and depositions of the witnesses of the Republic of Mexico in the proceedings before the criminal judge of Guadalajara.

There were three complaints made against Yordi. The first, made by the assistant United States attorney, was dismissed. The second and third were made by the Mexican consul.

Upon the hearing under the first complaint the record and evidence contained in the proceedings in Mexico were introduced in evidence before the commissioner, as they were also on the hearing on the second complaint. The commissioner found that there was probable cause to believe Yordi guilty of the offense of uttering a forged instrument in the state of Jalisco, United States of Mexico, on or about the 26th day of May, 1908, and that there was also probable cause to believe Yordi had committed the offense 229] *of obtaining money by means of false device in the Mexican state mentioned. The commissioner therefore ordered Yordi to be held for extradition to the Republic of Mexico on the charges alleged in the third and fourth counts of the complaint, and that he be committed to the county jail of El Paso county, Texas, to await the action of the proper authorities in the city of Washington, upon demand for his extradition to the Republic of Mexico.

The case was heard before Maxey, District Judge, who discharged the writ of habeas corpus, and required the marshal to hold the petitioner in custody until a warrant of extradition was duly issued. From this final order this appeal was taken. Judge Maxey's opinion is reported in 166 Fed. 921.

Mr. Waters Davis submitted the cause for appellant:

The complaint under U. S. Rev. Stat. § 5270, U. S. Comp. Stat. 1901, p. 3591, in order to confer jurisdiction upon the commissioner, must be under oath; and, if made upon information and belief, must disclose upon its face the sources and details of affiant's information, or the grounds for supposing the defendant to be guilty.

Rice v. Ames, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406; Ex parte Lane, 6 Fed. 38; Re Robb, 9 Sawy. 568, 19 Fed. 31; United States v. Tureaud, 20 Fed. 621; Ex parte McCabe, 12 L.R.A. 589, 46 Fed. 368; Ex parte Hart, 28 L.R.A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249.

Assistant to the Attorney General Russell submitted the cause for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court:

The contention of appellant's counsel is 54 L. ed.

that, although the Mexican consul had possession of the record from Mexico and the depositions of the witnesses therein contained, which embodied the proceedings had before the judge at Guadalajara, Mexico, including the testimony of witnesses, which appeared to the judge amply sufficient to justify an order for the apprehension of the accused, nevertheless there was still necessary, in order for the commissioner to take jurisdiction to hear the application, that either the record from Mexico should be attached to the complaint, or that the complaint should disclose upon its face the sources of the consul's information. This record from Mexico was not only before the Mexican consul when he made the complaint against Yordi, now under consideration, but the commissioner was *thoroughly [230 familiar with it, as it had been introduced in evidence before him upon the hearing of the first complaint.

Judge Maxey was of opinion that, as depositions from a foreign country were admissible in evidence upon the hearing before the commissioner, they were also to be admitted for the purpose of vesting jurisdiction in the commissioner to issue the warrant; and as, in this case, the depositions were in themselves sufficient to satisfy the commissioner that the prosecution against the accused was based upon real grounds, and not upon mere suspicion of guilt, it was not indispensable to the jurisdiction of the commissioner that the record and depositions from Mexico should be actually fastened to the complaint when they were in the custody and keeping of the consul, and the commissioner was already in possession of the information which they contained. We concur in these views.

The general doctrine in respect of extradition complaints is well stated by Judge Coxe in Ex parte Sternaman, 77 Fed. 596, 597, as follows:

"The complaint should set forth clearly and briefly the offense charged. It need not be drawn with the formal precision of an indictment. If it be sufficiently explicit to inform the accused person of the precise nature of the charge against him, it is sufficient. The extreme technicality with which these proceedings were formerly conducted has given place to a more liberal practice, the object being to reach a correct decision upon the main question,—Is there reasonable cause to believe that a crime has been committed? The complaint may, in some instances, be upon information and belief. The exigencies may be such that the criminal may escape punishment unless he is promptly apprehended by the representatives of the country whose law he has violated. From the very nature of the case

it may often happen that such representative can have no personal knowledge of the crime. If the offense be one of the treaty crimes, and if it be stated clearly and explicitly, so that the accused knows *exactly what the charge is, the complaint is sufficient to authorize the commissioner to act. The foregoing propositions are, it is thought, sustained by the following authorities: *Re Farez*, 7 Blatchf. 345, Fed. Cas. No. 4,645; *Re Roth*, 15 Fed. 506; *Re Henrich*, 5 Blatchf. 414, Fed. Cas. No. 6,369; *Ex parte Van Hoven*, 4 Dill. 415, Fed. Cas. No. 16,859; *Re Breen*, 73 Fed. 458; *Ex parte Lane*, 6 Fed. 34; *Re Herres*, 33 Fed. 165; *Castro v. De Uriarte*, 16 Fed. 93; *Re Macdonnell*, 11 Blatchf. 79, Fed. Cas. No. 8,771."

It was argued that this court had held otherwise, particularly in *Rice v. Ames*, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406, where Mr. Justice Brown, delivering the opinion, declared that several counts of the complaint were obviously insufficient, "since the charges were made solely upon information and belief, and no attempt was made even to set forth the sources of information, or the grounds of affiant's belief." But Mr. Justice Brown further said (pp. 375, 376):

"We do not wish, however, to be understood as holding that, in extradition proceedings, the complaint must be sworn to by persons having actual knowledge of the offense charged. This would defeat the whole object of the treaty, as we are bound to assume that no foreign government possesses greater power than our own to order its citizens to go to another country to institute legal proceedings. This is obviously impossible. The ordinary course is to send an officer or agent of the government for that purpose, and Rev. Stat. § 5271, U. S. Comp. Stat. 1901, p. 3593, makes special provisions that 'in every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other papers offered in evidence, shall be admitted and received for the purpose of such hearing, if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, [232] *warrants, or other papers shall, if authenticated according to the law of such foreign country, be in like manner received as evidence,' of which authentication the certificate of the diplomatic or consular officer of the United

States shall be sufficient. This obviates the necessity which might otherwise exist of confronting the accused with the witnesses against him. Now, it would obviously be inconsistent to hold that depositions, which are admissible upon the hearing, should not also be admitted for the purpose of vesting jurisdiction in the commissioner to issue the warrant. Indeed, the words of the statute, 'in every case of complaint,' seem to contemplate this very use of them. If the officer of the foreign government has no personal knowledge of the facts, he may, with entire propriety, make the complaint upon information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding which may have been found in the foreign country, or a copy of the depositions of witnesses having actual knowledge of the facts, taken under the treaty and act of Congress. This will afford ample authority to the commissioner for issuing the warrant."

The same learned judge said in *Grin v. Shine*, 187 U. S. 193, 47 L. ed. 137, 23 Sup. Ct. Rep. 103:

"All that is required by § 5270 is that a complaint shall be made under oath. It may be made by any person acting under the authority of the foreign government, having knowledge of the facts, or, in the absence of such person, by the official representative of the foreign government, based upon depositions in his possession."

We think the evidence produced at the hearing justified the detention of the accused and corrected any irregularity in the complaint. As this court said in *Nishimura Ekiu v. United States*, 142 U. S. 662, 35 L. ed. 1150, 12 Sup. Ct. Rep. 336:

"A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object *is [233] to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment. *Ex parte Bollman*, 4 Cranch, 75, 114, 125, 2 L. ed. 554, 567, 570; *Coleman v. Tennessee*, 97 U. S. 509, 519, 24 L. ed. 1118, 1123; *United States v. McBratney*, 104 U. S. 621, 624, 26 L. ed. 869, 870; *Kelley v. Thomas*, 15 Gray, 192; *R. v. Marks*, 3 East, 157; *Re Shuttleworth*, 9 Q. B. 651."

The District Judge was right, and his final order discharging the writ of habeas corpus is affirmed.

UNITED STATES, Plff. in Err.,

v.

JOHN A. CORBETT, Gideon E. Newman,
and Leroy E. McGill.

(See S. C. Reporter's ed. 233-246.)

Appeal — criminal case — construction of statute.

1. The construction of a statute is involved so as to give the Supreme Court of the United States jurisdiction of a writ of error to the United States district court in behalf of the government in a criminal case, under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), where an indictment against a national bank officer for making false reports to the Comptroller of the Currency is quashed because such officer is not an agent within the meaning of the statute defining the crime.

[For other cases, see Appeal and Error, 314-316, in Digest Sup. Ct. 1908.]

Criminal law — false bank report — Comptroller as "agent."

2. The Comptroller of the Currency is an agent within the provisions of U. S. Rev. Stat. § 5209, U. S. Comp. Stat. 1901, p. 3497, that every officer of a national bank who makes any false entry in a report to any agent appointed to examine the affairs of such association shall be guilty of a misdemeanor, and it is immaterial that U. S. Rev. Stat. § 5240, U. S. Comp. Stat. 1901, p. 3516, confers power upon him to appoint suitable agents to examine the affairs of such banks.

Statutes — strict construction of penal laws.

3. The rule of strict construction of criminal statutes does not require that the narrowest technical meaning be given to the words employed, in disregard of their context, and in frustration of the obvious legislative intent.

[For other cases, see Statutes, 434-454, in Digest Sup. Ct. 1908.]

Banks — false report — intent to defraud.

4. Intent to injure a bank by a false report to the Comptroller of the Currency is not negatived as matter of law by the fact that the report showed the bank to be in better condition than it really was.

[No. 236.]

Argued October 14, 1909. Decided December 6, 1909.

IN ERROR to the District Court of the United States for the Western District of Wisconsin to review orders quashing certain portions of an indictment, and sustaining a demurrer to the remainder, which charged defendants with making false en-

tries in a report, to deceive the Comptroller of the Currency of the United States. Reversed.

See same case below, 162 Fed. 687.

The facts are stated in the opinion.

Assistant Attorney General Fowler argued the cause and filed a brief for plaintiff in error.

Mr. T. J. Connor argued the cause and filed a brief for defendants in error.

Mr. Justice White delivered the opinion of the court:

The trial court quashed portions of each count of the indictment and sustained a demurrer to the remainder. This direct review is sought because of the contention that the rulings in question were based on a construction of Rev. Stat. § 5209, U. S. Comp. Stat. 1901, p. 3497.

Each of the six counts charged Corbett, one of the defendants, who was cashier of the Bank of Ladysmith, a national banking association, with making a false entry as to the condition of the bank in a report made to the Comptroller of the Currency. The charge was that the false entry was made with the intent to injure and defraud said association, and to deceive an agent appointed to examine the affairs of such association, to wit, the Comptroller of the Currency of the United States. Newman and McGill, the other defendants, who were directors and respectively president and vice president of the bank, were charged in each count with having with like intent aided, abetted, etc., Corbett in the making of the false entry. The motion to quash was directed against that portion of each count which charged that the alleged acts were done with intent to deceive an agent appointed to *examine, etc. The de- [237] murrer challenged generally the sufficiency of the averments of each count.

It is insisted that there is no jurisdiction to review, because the decision below was not based upon the invalidity or construction of any statute. We think that, within the ruling in *United States v. Keitel*, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123, the construction of Rev. Stat. § 5209 was involved. The suggestion of want of jurisdiction is therefore without merit.

In disposing of the merits, we shall consider separately the rulings on the motion to quash and upon the demurrer.

1. The motion to quash.

The motion was sustained upon the theory that no offense was stated by the charge of making a false entry in the report to the Comptroller of the Currency, with the intent to deceive an agent appointed to examine the affairs of the bank, viz., the

NOTE.—On construction of penal statutes—see note to *United States v. Wiltberger*, 5 L. ed. U. S. 37.

54 L. ed.

Comptroller of the Currency, because that official was not such an agent. While this was the only question actually decided, nevertheless the reasoning which led the court to the conclusion by it applied went further, and caused the court to declare that the statute, in the particular mentioned, was in effect inoperative. This because not alone was the intent to deceive the Comptroller of the Currency not embraced, but also the intent to deceive an agent appointed to examine was excluded so far as a report made to the Comptroller was concerned, as such agent would be required to examine the books and papers of the bank, and not a report made to the Comptroller.

We are thus called upon to construe Rev. Stat. § 5209. The material portion of that section is as follows:

"Every president, director, cashier, teller, clerk, or agent of any association . . . who makes any false entry in any book, report, or statement of the association, with intent . . . to injure or defraud the association, . . . or to deceive . . . any agent appointed to examine the affairs of any such association, and every person who with like intent aids or abets any officer, clerk, or 238] agent in any *violation of this section, shall be deemed guilty of a misdemeanor . . ."

Before analyzing its text, we briefly refer to authorities relied upon on one side or the other as affirming or denying the correctness of the construction affixed to the section by the court below.

In *United States v. Bartow*, 20 Blatchf. 349, 10 Fed. 874, Benedict, District Judge, sustained a motion to quash certain counts of an indictment, which charged the making of a false entry in a report to the Comptroller of the Currency, with the intent to deceive that officer, and held in a brief opinion that the Comptroller was not an agent appointed to examine the affairs of a national banking association, within the meaning of the statute.

In *Cochran v. United States*, 157 U. S. 286, 39 L. ed. 704, 15 Sup. Ct. Rep. 628, which involved a review of convictions under indictments for making false entries in reports made to the Comptroller of the Currency, in violation of Rev. Stat. § 5209, passing on the objection that no one except he who verified reports made to the Comptroller could be convicted under the indictments, the court, among other things, said (p. 294):

"If the statements of Thomas be taken as true, he, although verifying the reports as cashier, could not be held criminally liable for their falsity, since he took and believed the statements of Cochran and Sayre as to the truth and correctness of such reports.

If this be true, there was lacking on his part that intent to defraud the association, or to deceive the Comptroller of the Currency, which is made, by § 5209, a material element of the offense."

On page 298 the court considered a refusal to give an instruction which, in the course of defining a false entry, said:

"The intention to deceive is essential to constitute a violation of the statute, and you must be satisfied beyond a reasonable doubt from the evidence, first, that the defendants or one of them made a false entry in said report; and, second, that it was made with the intention of misleading or deceiving *the Comptroller of the Currency, or [239 some other person or persons alleged in the said indictment."

It was held that the refused instruction was substantially embodied in the charge as given, wherein, among other things, the trial court said:

"The intent must have been, as laid in the indictment, to mislead and deceive one of these parties, either some of the officers of the bank or the officer of the government appointed to examine into the affairs of the bank. . . . So that you must find not only the fact that there was an omission to make the proper entry, but that with it was an intent to conceal the fact from somebody who was concerned in the bank, or concerned in overseeing it, and supervising its operations and the conduct of its business."

Since the decision of the *Cochran* Case, and without citing that case on that subject, in *Clement v. United States*, 149 Fed. 305 (79 C. C. A. 243), the circuit court of appeals for the eighth circuit, considering an objection that an allegation in a count was immaterial which charged that a false entry was made in a report to the Comptroller of the Currency, with intent to deceive that official and any agent who might be appointed to examine the affairs of a bank, said (p. 316):

"That is quite correct so far as the allegation concerning the intent to deceive the Comptroller is concerned. Such intent is not one of those requisite under § 5209 to constitute an offense. But the contention is not correct in so far as the allegation relates to the intent to deceive an agent who might be appointed to examine the affairs of the bank."

Irrespective of the direct conflict between the statement just quoted and the reasoning of the court below in the case at bar, it is apparent that neither the *Bartow* nor the *Clement* Case, in view of the *Cochran* Case, can be considered as persuasive. The *Cochran* Case, however, it is urged should not be treated as authority, because it does not appear that any question was raised

concerning the construction of the statute in the particular now controverted, but that **240]** the meaning *of the statute was taken for granted, and hence the mere assumption which was indulged in deciding the Cochran Case should not now prevent a determination of the significance of the language of the statute. As the report of the Cochran Case indicates that the premise relied on is true, we come to consider the meaning of the section as an original question.

The report to the Comptroller, in which the entries were charged to have been false, and to have been made with the intent to deceive that officer as an agent appointed to examine, etc., was clearly one made under the provisions of Rev. Stat. § 5211, U. S. Comp. Stat. 1901, p. 3498, which reads as follows:

"Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit in detail and under appropriate heads the resources and liabilities of the [associations] [association] at the close of business of any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him."

The authority conferred by this section upon the Comptroller is but one among the comprehensive powers with which he is endowed by the statute for the purpose of examining and supervising the operations of national banks, preventing and detecting violations of law on their part, appointing receivers in case of necessity, etc. From the nature of these powers it would seem clear that the Comptroller is an officer or agent of the United States, expressly as well as impliedly clothed with authority to examine into the affairs of national banking associations, and therefore a false entry made in a report to him is directly embraced in the provision of Rev. Stat. § 5209. But it is argued while this may be abstractly true, it is not so when the provision of Rev. Stat. § 5240, U. S. Comp. Stat. 1901, p. 3516, is considered, conferring power up-
241] on the *Comptroller, with the approval of the Secretary of the Treasury, to appoint suitable agents to make an examination of the affairs of every national banking association. Because of this power, the contention is that the words, "any agent appointed to examine the affairs of any such bank," should be construed as embracing only the subordinate agents whom the Comptroller is authorized to appoint.
54 L. ed.

But to so hold, we think, would do violence to the text of § 5209, and conflict with its context, and would, besides, frustrate the plain purpose which the section as a whole was intended to accomplish, especially if it be considered in the light of cognate provisions of the statute. We say the first, because the particular words of the text relied upon, "any agent appointed to examine," etc., are all-embracing, and cannot reasonably be held to exclude the Comptroller, the principal agent endowed by the statute with the power to examine national banks. Indeed, the words "any agent" would seem to have been used in the broadest sense for the express purpose of excluding the possibility of the contention now made. Nor does the fact that the section of the Revised Statutes empowering the Comptroller to call for reports from national banks is contained in a section subsequent to the one which embodies the provision authorizing the Comptroller to appoint agents to examine give force to the contention that the Comptroller cannot be embraced by the words "any agent." The provision in question was originally contained in the act of 1864, which, moreover, forbade certain acts in the transaction of the affairs of national banks, empowered the Comptroller of the Currency to exercise supervisory power, to call for reports from the associations, and to bring into play other authority substantially as found in the law as now existing. This was followed by the provision giving to the Comptroller the right to appoint subordinate examiners, the whole being concluded by a section containing provisions which are now substantially embodied in Rev. Stat. § 5209. It is apparent that such provisions embraced acts *forbidden **[242]** and matters regulated by previous sections, including the reports to be made by the associations to the Comptroller, and the examination of books and papers by the agents appointed by the Comptroller. The intention cannot be reasonably imputed of punishing an intent to deceive a subordinate of the Comptroller by means of false entries in a report required to be made directly to the Comptroller, and for his information and guidance, and yet, at the same time, not to punish the intent to deceive the very officer to whom the report was to be made. Including the reports to be made to the Comptroller in the comprehensive grouping of the section excludes the conception that such officer was not considered as embraced in the words "any officer appointed," etc. But the argument is that, however cogent may be the considerations just stated, they are here inapplicable, because the statute is a criminal one, requiring to be strictly construed. The principle is elementary, but the

application here sought to be made is a mistaken one. The rule of strict construction does not require that the narrowest technical meaning be given to the words employed in a criminal statute, in disregard of their context, and in frustration of the obvious legislative intent. *United States v. Hartwell*, 6 Wall. 385, 18 L. ed. 830. In that case, answering the contention that penal laws are to be construed strictly, the court said (p. 395):

"The object in construing penal as well as other statutes is to ascertain the legislative intent. . . . The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. . . . The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

243] *It is to be observed that the rule thus stated affords us ground for extending a penal statute beyond its plain meaning. But it inculcates that a meaning which is within the text and within its clear intent is not to be departed from because, by resorting to a narrow and technical interpretation of particular words, the plain meaning may be distorted and the obvious purpose of the law be frustrated. *Bolles v. Outing Co.* 175 U. S. 262, 265, 44 L. ed. 156, 157, 20 Sup. Ct. Rep. 94, and especially *United States v. Union Supply Co.*, decided this term. [215 U. S. 50, ante, 87, 30 Sup. Ct. Rep. 15.]

Indeed, the aptness of the application of the principle just stated to the case in hand is well illustrated by the following considerations: If, by distorting the rule of strict construction, we were to construe the words of the statute, "any agent appointed to examine," so as to exclude the Comptroller of the Currency, the principal agent appointed for such purpose, by the same method we should be compelled to adopt the reasoning of the court below, and to narrow the statute so as to exclude the intent to deceive by false entries in the report, an agent to whom the report was not to be made, and who might not be called upon to examine the same; thus, in effect, as to intent to deceive any agent, destroying the statute. And this impossible conclusion at once serves to point out the correctness of

the interpretation of the statute assumed in the *Cochran Case*, that the intent to deceive, for which the statute provides, is an intent to deceive the official agents concerned in overseeing the bank and supervising its operation and the conduct of its business, including, of necessity, the Comptroller of the Currency and the subordinate agents or examiners whom the statute authorized him to appoint.

2. *The demurrer.*

Where intent is an essential ingredient of a crime, it is settled that such intent may be charged in general terms, and that the existence of the intent becomes, therefore, a question to be determined by the jury upon a consideration of all the facts and circumstances of the case. *Evans v. United States*, 153 U. S. 594, 38 L. ed. [244 834, 14 Sup. Ct. Rep. 934. It is, of course, to be conceded that where the facts charged to have been done with criminal intent are of such a nature that, on the face of the indictment, it must result as a matter of law that the criminal intent could not, under any possible circumstances, have existed, the charge of such intent, in general terms, would raise no issue of fact proper to go to a jury. It was upon the conception that the facts alleged in the indictment under consideration excluded the possibility, under any circumstances, of the existence of the particular criminal intent charged, that the court below was led to sustain the demurrer. The court said:

"The indictment also charges that the entries were made with intent to injure and defraud the bank itself; but how this could be does not appear. It is barely possible that some harm might indirectly have come to the bank by the publication of the false report in the vicinity of the place where the bank was located, but this possibility is not sufficient to show the definite intent shown by the statute. The report must have been made with the purpose on the part of those signing it to injure and defraud the bank. The report could not possibly change the actual condition of the bank, and a false report showing a better condition than in fact existed might as readily be a benefit to the bank as a detriment. At all events, the detriment would be merely speculative, insufficient to afford proof of a positive intent to injure and defraud the bank." [162 Fed. 688.]

But to these views we cannot give our assent. Because the false entries in the report showed the bank to be in a more favorable condition than it was in truth did not justify the conclusion that the entries in the report could, under no circumstances,

have been made with the intent to injure the bank, unless it be true to say that it must follow, as a matter of law, that to falsely state in an official report a bank to be in a better condition than it really is, under every and all circumstances, is to benefit, and not to injure, the bank. But 245] *this view would do violence to the statute, which exacts truthful reports, upon the conception that the knowledge by the officials of the government of the true condition of the bank is conclusive to the safeguarding of its interests and its protection from injury and wrong. It was undoubtedly within the power of the Comptroller of the Currency, if the bank was out of line, or if its affairs were in a disordered or precarious condition, or if its officers had embarked in transactions calculated to injuriously affect the financial condition of the bank, to apply a corrective, and thus save the bank from injury and future loss. Certainly, as a matter of law, it cannot be held, although such transactions were concealed in a report made to the Comptroller by false statements exhibiting a more favorable condition of the bank than would have appeared if the truth had been stated, that no intent to injure the bank could possibly be imputed, even although the necessary effect of the false statement was to prevent the Comptroller from exerting the powers conferred upon him by law for the protection of the bank from injury. And these considerations also effectually dispose of the theory that the acts charged to have been falsely reported, in and of themselves, were of such a character as to exclude the possibility of a criminal intent to injure the bank. The counts charged false entries as to the amount of bad debts due the bank, as to the suspended paper held by the bank, as to the amount due the bank by its president as indorser, guarantor, or otherwise, and as to the assets of the bank, by reporting that it owned various pieces of real estate which it really only held as security. We are of opinion that the alleged false statements did not so exclude the possibility of an intention to injure the bank as to justify so declaring as a matter of law, and that the case should have been submitted to a jury to determine the question of intent in the light of all the facts and circumstances existing at the time of the making of the alleged false entries.

Reversed.

246] *Mr. Justice McKenna and Mr. Justice Day do not think the Comptroller is within the words "any agent," and dissent from that ruling. In other respects they concur.

54 L. ed.

LATHROP, SHEA, & HENWOOD COMPANY, Plff. in Err.,

v.

INTERIOR CONSTRUCTION & IMPROVEMENT COMPANY.

(See S. C. Reporter's ed. 246-251.)

Removal of causes — codefendants — dismissal as to resident — effect.

The dismissal, against the contention of plaintiff, after the expiration of the time prescribed by statute for the removal of causes from the state to the Federal court, of an action which was brought against a resident and a nonresident, so far as it affects the former, does not deprive the state court of jurisdiction to proceed with the cause against the latter, or entitle him to remove the cause to the Federal court.

[For other cases, see Removal of Causes, 243-246, in Digest Sup. Ct. 1908.]

[No. 2.]

Argued October 22, 1909. Decided December 6, 1909.

IN ERROR to the Circuit Court of the United States for the Western District of New York to review an order setting aside the service of summons and dismissing an action brought to recover the amount alleged to be due on a construction contract, which had been removed to it from a state court. Reversed.

See same case below, 150 Fed. 666.

The facts are stated in the opinion.

Mr. Clarence M. Bushnell argued the cause and filed a brief for plaintiff in error.

Mr. C. Walter Artz argued the cause and filed a brief for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

The parties were respectively plaintiff and defendant in the court below, and we shall so designate them.

The plaintiff brought suit against the defendant and the Pittsburg, Shawmont, & Northern Railroad Company in the supreme court of Erie county, New York, for the sum *of \$43,038.88, upon a contract entered [247 into between the defendant, the Interior Construction & Improvement Company, and the plaintiff, by which the construction company agreed to construct certain portions in Pennsylvania and New York of the line of the railroad company, and for materials and the use of certain articles by the railroad. It is alleged in the petition of the plaintiff that the railroad company was organized by the consolidation of other rail-

NOTE.—On removal of causes where separable controversy exists—see note to Miller v. Clifford, 5 L.R.A. (N.S.) 49.

road companies, and, for the purpose of carrying out the plans of such consolidation, undertook the construction of a railroad from certain points in Pennsylvania to the village of Angelica, in the state of New York. That in pursuance of this purpose the railroad company entered into a contract with the construction company, and in payment for the construction of the railroad agreed to issue and did issue to the company its stock and bonds, which were largely in excess of cost of construction. That the construction company was organized solely for the purpose of building the railroad, and to secure to the promoters and organizers thereof the profits to be made by the construction of the railroad and the manipulation of securities. That the officers, directors, and owners of the majority of the capital stock of the railroad had like relation to the construction company, and the management of the latter was controlled by them. And it is averred that the construction company was the agent and representative of the railroad company, and that the latter became and is responsible and liable for the acts and obligations of the construction company. Due performance by plaintiff of its contract is alleged.

It is further alleged that the railroad company is a New York corporation and the construction company is a New Jersey corporation.

There was personal service of the summons on the railroad company on the 24th of October, 1904. That company appeared and answered. The service upon the construction company was made on the 16th of November, 1904, by serving the summons [248] on the secretary of state of the state of New York. The construction company made a motion to set aside the service of summons on the ground that it was irregular and void. The company made no other appearance. The motion was denied, and appeal was taken to the appellate division of the court. That court affirmed the ruling, and denied leave to appeal to the court of appeals. The construction company's time to answer was extended to February 6, 1905, and, upon motion of the company, the case was removed to the United States circuit court on the ground of a separable controversy, but was subsequently remanded upon motion of the plaintiff. The motion to set aside the service of summons was denied. 135 Fed. 619. Upon the return of the case to the state court, a motion was made by the construction company to extend its time to appear and answer in the action until twenty days after the determination of the motion then pending, made in behalf of the railroad com-

pany, to compel the plaintiff to elect which defendant it would proceed against, to the exclusion of the other. The motion was denied, also that made by the railroad company. The referee to whom the issues raised by the railroad company had been referred, to hear and determine, reported dismissing the complaint as to that company, and judgment thereon was entered on the 26th of October, 1905. The judgment was affirmed by the appellate division of the supreme court. But, pending the appeal, upon motion of the construction company the case was removed to the circuit court, but that court remanded the case, saying that, "until the determination of the appeal by the codefendant, in the absence of fraud or improper joinder of defendants for the purpose of interfering with or obstructing the construction company's right of removal, it is not thought that a separable controversy exists." 143 Fed. 687.

On the 23d of September, 1905, an affidavit of the default of the construction company having been filed, an order was made in the supreme court, reciting the fact and the facts showing such default, and appointing a referee "to take proofs of the cause of action set forth in the plaintiff's complaint." The referee reported that there was due plaintiff the sum of \$47,323.91. The report was confirmed and judgment entered for that amount.

Subsequently, the appellate division having sustained the judgment dismissing the action as to the railroad company, the case was again, on the motion of the company, removed to the circuit court, and a motion made in that court to set aside the service of summons on the construction company, and to vacate the judgment. Concurrently with that motion, plaintiff moved to remand the case to the state court. The motion of the construction company was granted, and the action dismissed for want of jurisdiction over the company. 150 Fed. 666.

The motion was granted on the ground that the facts showed that the company had ceased to do business in the state and held no property therein.

It will be seen that a question of jurisdiction alone is presented, the circuit court certifying "that no evidence was introduced upon the hearing of the motion, the issue being:

"1. Whether this court had obtained jurisdiction over this defendant by the service of a summons upon the secretary of state of the state of New York, as provided by § 16 of the general corporation law of said state of New York.

"2. Whether the proceedings in and the decisions of the courts of the state of New

York, construing said corporation law, were controlling upon this court.

"3. Whether the proceedings taken by said defendant in said state court are *res judicata* upon defendant."

But there is a question of jurisdiction paramount to that passed on by the circuit court. It will be observed that the action against the railroad company was not dismissed by *plaintiff, but, against its contention, by the supreme court of the state, whose judgment was affirmed, also against its contention, by the appellate division of that court. This did not take jurisdiction from the state court to proceed against the construction company, nor make the judgment against it invalid.

It was held in *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264, that a case may become removable after the time prescribed by statute, upon the ground of a separate controversy, upon the subsequent discontinuance of the action by the plaintiff against the defendants, citizens of the same state with the plaintiff. In *Whitcomb v. Smithson*, 175 U. S. at 637, 44 L. ed. at 304, 20 Sup. Ct. Rep. at 249, the *Powers Case* was commented on, and a different effect was ascribed to a ruling of the court dismissing the action as to one of the defendants than to a discontinuance by the voluntary act of the plaintiff. The action was against *Whitcomb* and another, who were receivers of the Wisconsin Central Company, and the Chicago Great Western Railway Company, for personal injuries received by *Smithson* while serving the Chicago Great Western Railway Company as a locomotive fireman in a collision between the locomotive on which he was at work and another locomotive operated by the receivers appointed by United States circuit court. The case came to trial, and, at the close of the testimony, counsel for the Chicago Great Western Railway Company moved that the jury be "instructed to return a verdict in behalf of that defendant," which motion the court granted. An application was then made by the receivers to remove the case to the circuit court of the United States, which was denied. The court instructed the jury to return a verdict for the railway company, which was done, and thereupon the case went to the jury, who returned a verdict against the receivers, upon which judgment was entered. The judgment was affirmed by the supreme court of Minnesota [71 Minn. 216, 73 N. W. 853], to which a writ of error was issued from this court. Passing on motions to dismiss or affirm, and answering the contention of the receivers that 251] they *acquired the right of removal as though they were the sole defendants, when 54 L. ed.

the court directed a verdict in favor of the railway company, this court said by the chief justice: "This might have been so if, when the cause was called for trial in the state court, plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all of the defendants. *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264. But that is not this case. The joint liability was insisted on here to the close of the trial, and the nonliability of the railway company was ruled *in invitum*. . . . This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable, and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them."

The *Whitcomb Case* and the *Powers Case* are commented on and impliedly approved in *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 137, 138, 45 L. ed. 124, 125, 21 Sup. Ct. Rep. 67, and again in *Kansas City Suburban Belt R. Co. v. Herman*, 187 U. S. 63, 47 L. ed. 76, 23 Sup. Ct. Rep. 24; *Fritzen v. Boatmen's Bank*, 212 U. S. 372, 53 L. ed. 557, 29 Sup. Ct. Rep. 366. See also *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147.

It follows from these views that the order of the Circuit Court setting aside the service of the summons on the construction company, and vacating the judgment against it, and dismissing the action, must be reversed and the cause remanded, with directions to grant the motion of plaintiff to remand the case to the Supreme Court of the state of New York.

So ordered.

252] *VIRGINIA-CAROLINA CHEMICAL COMPANY, Plff. in Err.,
v.

J. P. KIRVEN.

(See S. C. Reporter's ed. 252-260.)

Appeal — specifications of error — certainty.

1. An assignment of error in a state court which has refused to give effect to a judg-

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re*

ment of a circuit court of the United States in deciding a controversy before it, which states the refusal of the trial court to give proper and full credit to the judgment of the circuit court, thereby denying to the complaining party "a right arising under the authority of the United States," does not lack certainty of specification, so as to prevent the Supreme Court of the United States from taking jurisdiction of the cause. [For other cases, see Appeal and Error, 1233-1239, in Digest Sup. Ct. 1908.]

Judgment — conclusiveness — questions not presented.

2. A judgment upon a promissory note given for the price of fertilizers in an action in which injury to defendant's crops because of their bad quality was not set up as a defense does not preclude a separate suit to recover such damages.

[For other cases, see Judgment, III. j, in Digest Sup. Ct. 1908.]

Judgment — excluded defense — estoppel.

3. A plaintiff is estopped to urge that a defense which was excluded upon his objection was involved in the action and concluded by the judgment.

[For other cases, see Judgment, III. j, in Digest Sup. Ct. 1908.]

Courts — state decision — effect on Federal courts.

4. The decision of the highest court of a state upon the question whether or not the state statutes require claims for damages because of poor quality of material for the purchase price of which a note was given to be set up in an action on the note, so as to be concluded by the judgment, is binding on the Federal courts.

[For other cases, see Courts, 1744-1785, in Digest Sup. Ct. 1908.]

[No. 18.]

Argued November 2, 1909. Decided December 6, 1909.

Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On review of decisions of state courts presenting the question of full faith and credit—see note to Allen v. Alleghany Co. 49 L. ed. U. S. 551.

On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment affirming a judgment of the Common Pleas Circuit Court for Darlington County, in favor of plaintiff in an action brought to recover damages for injuries to plaintiff's crops through the bad quality of fertilizer purchased from defendant. Affirmed.

See same case below, 77 S. C. 493, 58 S. E. 424.

The facts are stated in the opinion.

Mr. P. A. Willcox argued the cause, and, with Messrs. F. L. Willcox and Henry E. Davis, filed a brief for plaintiff in error:

The present cause of action clearly was connected with the subject of the suit brought in the Federal circuit court, if it did not arise directly out of the contract there sued on, and hence must be held to have been a proper counterclaim.

Haygood v. Boney, 43 S. C. 63, 20 S. E. 803.

There may be, and are, counterclaims that do not possess any characteristics of a defense; and as to these the general rule is that they may be the subject of a second action. But such is not the case when the counterclaim must rest on a state of facts that constituted a proper defense to the first action, the reason being that there would be a possibility of conflicting findings as to the same facts in the two cases.

1 Van Fleet, Former Adjudication, §§ 168, 171, 172; 23 Cyc. Law & Proc. p. 1202; Black, Judgm. § 767.

Where the same issues are being litigated between the same parties at the same time, in two courts of concurrent jurisdiction, the first final judgment will render the issues *res judicata* in the other court.

Boatmen's Bank v. Fritzlew, 68 C. C. A. 288, 135 Fed. 650; 24 Am. & Eng. Enc. Law,

308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

As to conclusiveness and effect of judgments as between Federal and state courts—see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478, and Union & Planters' Bank v. Memphis, 49 C. C. A. 468.

As to state decisions and laws as rules of decision in Federal courts—see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; Griffin v. Overman Wheel Co. 9 C. C. A. 548; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Mitchell v. Burlington, 18 L. ed. U. S. 351.

2d ed. p. 833; 17 Enc. Pl. & Pr. p. 265 and notes.

In determining the question of *res judicata* raised by the assignment of error, this court will be governed by its own decisions, and not by those of the supreme court of South Carolina.

Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252; Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; Deposit Bank v. Frankfort, 191 U. S. 499, 515, 517, 48 L. ed. 276, 282, 283, 24 Sup. Ct. Rep. 154; Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co. 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238; Dowell v. Applegate, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; Werlein v. New Orleans, 177 U. S. 390, 44 L. ed. 817, 20 Sup. Ct. Rep. 682; National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111.

The bar of a judgment in another action for the same claim or demand between the same parties extends in the Federal courts not only to every ground of recovery or defense actually presented in the action, but to every ground which might have been presented.

Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Davis v. Brown, 94 U. S. 423, 24 L. ed. 204; Russell v. Place, 94 U. S. 606, 24 L. ed. 214; Parrish v. Ferris, 2 Black, 606, 17 L. ed. 317; Randall v. Howard, 2 Black, 585, 17 L. ed. 269; Smith v. Kernochen, 7 How. 198, 12 L. ed. 666; Thompson v. Roberts, 24 How. 233, 16 L. ed. 648; Aurora v. West, 7 Wall. 82, 19 L. ed. 42; Bryan v. Kennett, 113 U. S. 179, 28 L. ed. 908, 5 Sup. Ct. Rep. 407; Dimock v. Revere Copper Co. 117 U. S. 559, 29 L. ed. 994, 6 Sup. Ct. Rep. 855; Wilson v. Deen (Milne v. Deen) 121 U. S. 525, 30 L. ed. 980, 7 Sup. Ct. Rep. 1004; Johnson Steel Street Rail Co. v. Wharton, 152 U. S. 252, 38 L. ed. 429, 14 Sup. Ct. Rep. 608; Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; Hubbell v. United States, 171 U. S. 203, 43 L. ed. 136, 18 Sup. Ct. Rep. 828; Hopkins v. Lee, 6 Wheat. 109, 5 L. ed. 218; Bank of United States v. Beverly, 1 How. 134, 11 L. ed. 75; Lyon v. Perin & G. Mfg. Co. 125 U. S. 698, 31 L. ed. 839, 8 Sup. Ct. Rep. 1024; Campbell v. Rankin, 99 U. S. 261, 25 L. ed. 435; Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665; Stout v. Lye, 103 U. S. 66, 26 L. ed. 428.

On no possible theory can Kirven recover without denying what that judgment affirms to be true. That judgment solemnly

declares there was no failure of consideration, and it is utterly impossible for Kirven to have a verdict in this case without showing there was a failure of consideration.

2 Black, Judgm. § 767; 23 Cyc. Law & Proc. p. 1202; New Orleans v. Citizens' Bank, 167 U. S. 371, 396, 42 L. ed. 202, 210, 17 Sup. Ct. Rep. 905; Werlein v. New Orleans, 177 U. S. 397, 44 L. ed. 820, 20 Sup. Ct. Rep. 682; Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 217, 46 L. ed. 1132, 1134, 22 Sup. Ct. Rep. 820; Deposit Bank v. Frankfort, 191 U. S. 499, 514, 48 L. ed. 276, 282, 24 Sup. Ct. Rep. 154; Fayerweather v. Ritch, 195 U. S. 276, 301, 49 L. ed. 193, 211, 25 Sup. Ct. Rep. 58; Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 290, 50 L. ed. 477, 486, 26 Sup. Ct. Rep. 252; United States v. California & O. Land Co. 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266; Northern P. R. Co. v. Slaght, 205 U. S. 122, 51 L. ed. 738, 27 Sup. Ct. Rep. 442; Stockton v. Ford, 18 How. 418, 15 L. ed. 395; National Foundry & Pipe Works Co. v. Oconto Water Supply Co. 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111; Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; Dowell v. Applegate, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; Eastern Bldg. & L. Asso. v. Welling, 116 Fed. 100; Price v. Dewey, 6 Sawy. 493, 11 Fed. 104; Nemetty v. Naylor, 100 N. Y. 562, 3 N. E. 497; Reichert v. Krass, 13 Ind. App. 348, 40 N. E. 706, 41 N. E. 835; Blair v. Bartlett, 75 N. Y. 150, 31 Am. Rep. 455; Dunham v. Bower, 77 N. Y. 76, 33 Am. Rep. 570; Gilson v. Bingham, 43 Vt. 410, 5 Am. Rep. 289; Rew v. Independent School Dist. 125 Iowa, 28, 106 Am. St. Rep. 284, 98 N. W. 802; Willoughby v. Northeastern R. Co. 52 S. C. 175, 29 S. E. 629; Ryan v. Southern Bldg. & L. Asso. 50 S. C. 188, 62 Am. St. Rep. 831, 27 S. E. 618.

Mr. Frederic D. McKenney also argued the cause, and, with Messrs. P. A. Willcox, F. L. Willcox, and Henry E. Davis, filed a brief for plaintiff in error:

If, under the law of South Carolina, as it either was or ought to have been administered in the suit in the Federal court, the alleged worthlessness of the fertilizers could have been availed of by Kirven as defendant there, on the ground that such worthlessness constituted a total failure of any consideration for which the note sued on was given, the fact that he elected not to set up such defense, or, having set it up as he did, the fact that he thereafter elected to withdraw, and not rely upon it, cannot, in the case at bar, prevent the judgment of the Federal court on said note against Kirven from operating as a bar to any action which Kir-

ven either has brought or may bring in any other court wherein the alleged right of recovery depends upon any alleged inferiority in the fertilizers.

Deposit Bank v. Frankfort, 191 U. S. 499, 510, 48 L. ed. 276, 280, 24 Sup. Ct. Rep. 154; Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252; United States v. California & C. Land Co. 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266; Fayerweather v. Ritch. 195 U. S. 276, 300, 49 L. ed. 193, 210, 25 Sup. Ct. Rep. 58; Merchants' Heat & Light Co. v. J. B. Clow & Sons, 204 U. S. 286, 51 L. ed. 488, 27 Sup. Ct. Rep. 285.

The right of set-off or counterclaim, except as it is enforced in equity, is a matter of local legislation, and the Federal courts sitting in the various states, when dealing with the subject, will follow the rules established by the legislature or tribunals of the state in question.

Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696; Charnley v. Sibley, 20 C. C. A. 157, 34 U. S. App. 705, 73 Fed. 982.

The seller, without any express warranty or representation as to value, is held to warrant the article sold to be of value for the purpose to which it is ordinarily applied.

Walker, E. & C. Co. v. Ayer, 80 S. C. 297, 61 S. E. 557; Dushane v. Benedict, *supra*.

There is no very clear distinction to be drawn between want of consideration and failure of it, for failure itself creates a want, and proof that an article for which a promissory note was given turned out to be valueless will sustain a plea either of failure of consideration or of no consideration.

Mooklar v. Lewis, 40 Ind. 1.

In an action on a promissory note given for the price of goods sold with a warranty, it is always a good defense that the goods turned out to be worthless.

Shepherd v. Temple, 3 N. H. 455.

A purchaser of goods is not bound to return them in order to entitle him to damages for the breach of the warranty, but may keep them, and in an action against him for the price (may) show such inferiority in reduction of damages. Recoupment may be pleaded and enforced in an action for the price.

Street v. Blay, 2 Barn. & Ad. 456; Miller v. Smith, 1 Mason, 437, Fed. Cas. No. 9,590; Butler v. Northumberland, 50 N. H. 33; Warren v. Van Pelt, 4 E. D. Smith, 202; Muller v. Eno, 14 N. Y. 597.

Where the subject-matter of the party defendant's cross claim or demand consti-

tutes a defense to the plaintiff's action, it must be set up, or all benefit of it will be lost, for the reason that the judgment on the plaintiff's demand precludes and bars forever all defenses that could have been offered against it, whether they were set up or not.

Merchants' Heat & Light Co. v. J. B. Clow & Sons, 204 U. S. 286, 51 L. ed. 488, 27 Sup. Ct. Rep. 285; Black, Judgm. § 767; 23 Cyc. Law & Proc. p. 1202; Reichert v. Krass, 13 Ind. App. 352, 40 N. E. 706, 41 N. E. 835; Blair v. Bartlett, 75 N. Y. 150, 31 Am. Rep. 455; Dunham v. Bower, 77 N. Y. 76, 33 Am. Rep. 570.

The precise question, in so far as the principle of *res judicata* or estoppel by judgment under the South Carolina law above cited is concerned, has again come before the supreme court of South Carolina, and by a unanimous court has been adjudged in accord with the foregoing contentions.

Greenwood Drug Co. v. Bromonia Co. 81 S. C. 516, 128 Am. St. Rep. 929, 62 S. E. 840.

Mr. Charles A. Douglas argued the cause, and Messrs. W. F. Stevenson and E. O. Woods filed a brief for defendant in error:

A decision which does not deny the validity of a judgment of the circuit court of the United States, but simply decides what was the true cause of action therein, is certainly deciding merely a question of general law, and such action does not amount to a decision against the full faith and credit claimed for such judgment.

Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; Eastern Bldg. & L. Asso. v. Williamson, 189 U. S. 126, 47 L. ed. 739, 23 Sup. Ct. Rep. 527; San Francisco v. Itsell, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241.

The decision by a state court of a Federal question adverse to plaintiff in error will not sustain the jurisdiction of the Supreme Court of the United States if another question, not Federal, sufficient to sustain a judgment, was also raised and decided against him.

Hammond v. Connecticut Mnt. L. Ins. Co. 150 U. S. 633, 37 L. ed. 1206, 14 Sup. Ct. Rep. 236; Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; Hale v. Akers, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; Haley v. Breeze, 144 U. S. 130, 36 L. ed. 373, 12 Sup. Ct. Rep. 836; Connecticut ex rel. New York & N. E. R. Co. v. Woodruff, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. Rep. 976; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; Chemical Nat. Bank v.

City Bank, 160 U. S. 646, 40 L. ed. 568, 16 Sup. Ct. Rep. 417; *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131.

Where a Federal question is raised and the state court has rested its decision upon other grounds not involving Federal rights, the United States Supreme Court will not take jurisdiction, although it may deem such other grounds unsound.

Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635; *DeSaussure v. Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; *Johnson v. Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111.

And this principle is carried out and applied even where the judgment of the state court rests on two grounds, and it does not appear on which of the two grounds the judgment was based, if the non-Federal ground is sufficient to sustain the judgment.

Allen v. Arguimbau, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622.

The state court having allowed that the judgment of the circuit court of the United States was a valid judgment in all respects, and only held that it was not conclusive of the issues in the damage suit, has decided the case solely upon the question of general law, not affecting any Federal right whatsoever.

Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238; *Dupasseur v. Rochereau*, 21 Wall. 130, 22 L. ed. 588; *Deposit Bank v. Frankfort*, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154.

It was very clearly established by the overwhelming weight of authority that a recovery upon a contract, express or implied, will not bar an action by defendant for damages caused by negligence in its performance or by its nonperformance. The law is also plain that the rule requiring a party to assert all his defenses does not apply to demands against the plaintiff which are properly available by way of set-off or counterclaim. In such a case, defendant has his election either to use such demand as a counterclaim, or reserve it as a basis of another action.

I Van Fleet, Former Adjudication, § 168. See also *Black*, Judgm. § 768; *Davis v. Hedges*, L. R. 6 Q. B. 687; *Kennedy v. Davisson*, 46 W. Va. 433, 33 S. E. 292; *Riley v. Hale*, 158 Mass. 240, 33 N. E. 491; *O'Connor v. Varney*, 10 Gray, 231; *Merriam v. Woodcock*, 104 Mass. 326; *Gilmore v. Williams*, 162 Mass. 351; 38 N. E. 976; 54 L. ed.

19 Enc. Pl. & Pr. p. 731; 24 Am. & Eng. Law, p. 785.

Neither the failure of consideration nor any question touching damages to the crop of Kirven was involved or passed upon in that suit. There can be no doubt that plaintiff had a right to withdraw the plea of failure of consideration. He could even have withdrawn a counterclaim for damages.

19 Enc. Pl. & Pr. p. 796; *Kennedy v. Davisson*, supra.

Mr. Justice McKenna delivered the opinion of the court:

This case involves the question as to whether the state courts gave due force and effect to a judgment of the circuit court of the United States for the district of South Carolina in an action brought by plaintiff in error against the defendant in error.

The action in the case at bar was brought by defendant in error, whom we shall call Kirven, against plaintiff in error, whom we shall call the Chemical Company, for damages resulting from the defective manufacture of certain fertilizers bought by Kirven of the Chemical Company, through one McCall, to whom he gave his note for \$2,228. The allegation of complainant is:

"That the said fertilizers, to wit, acid phosphate and dissolved bone, had been manufactured with such gross negligence and want of skill that, instead of being of advantage to the crops to which they were applied, they destroyed the same in large part, and were not only worthless to the plaintiff, but, by destroying his crops, damaged him very heavily, and by the injury which was inflicted on his crop of cotton and corn by fertilizers which were manufactured and sold for use upon them, he was damaged in the sum of \$1,995."

The Chemical Company, in its answer, set up, among other defenses, the judgment of the circuit court of the United States. The plea was not sustained, and judgment was entered for Kirven for the amount sued for, which was affirmed by the supreme court of the state. 77 S. C. 493, 58 S. E. 424.

The facts, so far as necessary to be stated, are as follows: The Chemical Company, being a New Jersey corporation, brought action against Kirven in the circuit court of the United States for the district of South Carolina on the note before mentioned. Kirven, among other defenses, set up *that [256 the note was given for fertilizers, "for which he agreed to pay a sound price, which is set forth in the note sued upon, and were purchased for the use of the defendant himself and his tenants and customers in making a crop for the year in which the said note was given, but the said fertilizers were

so unskillfully manipulated and manufactured and prepared, and were of such inferior quality, that instead of being a benefit to the crops of defendant and his tenants and customers, to whom he furnished the same, they were deleterious and destructive to the crops, and destroyed the same in large part, and there was an entire failure of consideration to the defendant for said note."

Kirven subsequently filed a supplementary answer, in which he omitted, the Chemical Company not objecting, the defense above set out, but pleaded as a counterclaim certain proceedings instituted by the Chemical Company in North Carolina, in which it attached certain cotton belonging to Kirven, sold the same, and "applied and appropriated the proceeds to its own use and benefit." The value of the cotton and the amount "so seized and appropriated" were alleged to be twenty-four hundred and fifty dollars (\$2,450).

Kirven, when testifying as to the purchase of the fertilizers, said: "I did not know anything until later on, there was a complete destruction of my crop." Counsel for the company objected "to the latter clause, on the ground that that whole question is taken out of the complaint." The objection was sustained and the answer stricken out. The Chemical Company recovered judgment for nine hundred eleven dollars and seven cents (\$911.07).

A motion is made to dismiss the writ of error, on the grounds (1) that the assignment of errors in the supreme court of the state lacked certainty of specification, as it only stated that the refusal by the trial court to give proper and full credit to the judgment of the circuit court "thereby denied to the defendant [the Chemical Company] a right arising under the authority 257] of the United States." This, it is contended, is not sufficient to raise a Federal right, and the following cases are cited: *Chicago & N. W. R. Co. v. Chicago*, 164 U. S. 454, 41 L. ed. 511, 17 Sup. Ct. Rep. 129; *Clarke v. McDade*, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284; *Miller v. Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Harding v. Illinois*, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; *Thomas v. Iowa*, 209 U. S. 258, 52 L. ed. 782, 28 Sup. Ct. Rep. 487.

The cases are not applicable. In neither of them was the contention under the Constitution of the United States identified or passed upon. In the case at bar there is a definite right arising under the authority of the United States. and the decision of the court was in effect against it. The case falls within *Creseent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 184

472; *Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co.* 172 U. S. 494, 43 L. ed. 528, 19 Sup. Ct. Rep. 238; *Deposit Bank v. Frankfort*, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154.

The question on the merits is a narrow one. Its solution depends upon the application of well-known principles,—too well known to need much more than statement. It is established that the bar of a judgment in another action for the same claim or demand between the same parties extends to not only what was pleaded or litigated in the first action, but what might have been pleaded or litigated. If the second action is upon a different claim or demand, the bar of the judgment is limited to that which was actually litigated and determined. *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Northern P. R. Co. v. Slaght*, 205 U. S. 122, 51 L. ed. 738, 27 Sup. Ct. Rep. 442. Of course, as contended by the Chemical Company, there are some defenses which are necessarily negatived by the judgment,—are presumed never to have existed. These are such as go to the validity of the plaintiff's demand in its inception or show its performance, such as is said in *Cromwell v. Sac County*, supra, as forgery, want of consideration, or payment. But this court has pointed out a distinction between such defenses and those which, though arising out of the transaction constituting plaintiff's claim, may cut it down or give rise to an antagonistic demand. Of such defenses we said, speaking through Mr. Justice Holmes in *Merehants' Heat & Light Co. v. J. B. Clow & Sons*, 204 U. S. 286, 51 L. ed. 488, 27 Sup. Ct. Rep. 285, that the right to "plead them as a defense" is of modern growth and is merely a convenience that saves bringing another suit, not a necessity of the defense." And showing how essentially they were independent of the plaintiff's demand, although they might be a defense to it, it was said that when the defendant set them up he became a plaintiff in his turn, and subject to a jurisdiction that he otherwise might have denied and resisted. The principle was applied to recoupment as well as to set-off proper. Even at common law, it was said, "since the doctrine has been developed, a demand in recoupment is recognized as a cross demand, as distinguished from a defense. Therefore, although there has been a difference of opinion as to whether a defendant by pleading it is concluded by the judgment from bringing a subsequent suit for the residue of his claim, a judgment in his favor being impossible at common law, the authorities agree that he is not concluded by the judgment if he does not plead his cross demand, and that whether he shall do so or not is left wholly to his choice." This doctrine is at-
215 U. S.

tempted to be avoided by insisting that Kirven's plea in the circuit court and his cause of action in the case at bar is an assertion of a want of consideration for the note, and, it is urged, brings the case under one of the defenses mentioned in *Cromwell v. Sac County*, supra, which would have defeated recovery on the note, and that the judgment obtained necessarily negatives the facts upon which Kirven now bases his cause of action. "Call it what he may please," the Chemical Company says, "the basis of Kirven's claim in this suit is an alleged failure of consideration of such great degree that it amounted to positive viciousness, which would have been a perfect defense to the suit in the United States court." It may be, indeed, that such "viciousness" could have been set up in the action in the circuit court, but it would be to confound distinctions that have always been recognized, and the effect of which are pointed out in *Merchants' Heat & Light Co. v. J. B. Clow & Sons*, supra, to conclude that the judgment recovered [259] *negatives the existence of that "viciousness," or the damages which were consequent to it. This was the view taken by the supreme court of the state, that court deciding that the cause of action in the circuit court and that in the case at bar were upon different claims or demands,—“one being upon a promissory note, and the other for unliquidated damages” arising from the destruction of Kirven's crops. And the supreme court also decided that Kirven withdrew the defense based on the damages to him. It was omitted, as we have seen, from the supplementary answer. Testimony in regard to it was excluded upon the objection of the Chemical Company, and there is support for the contention that the company is estopped to urge that a defense which was excluded upon its objection was involved in the action and concluded by the judgment.

It is, however, contended by the Chemical Company that whether new matter constitutes a defense or counterclaim under §§ 170 and 171 of the Code of Procedure of South Carolina (inserted in the margin †), it must be set up by a defendant in his answer, and cannot be, if not set up, used as an independent cause of action.

†Sec. 170. The answer of the defendant must contain:

"1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

"2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition."

Sec. 171. The counterclaim mentioned in the last section must be one existing in
54 L. ed.

It is also contended that this being the practice in the state courts, by virtue of the *provisions of § 914 of the Revised [260 Statutes of the United States (U. S. Comp. Stat. 1901, p. 684)], it becomes the practice in causes in the courts of the United States held in South Carolina. That section requires "the practice, pleadings, forms, and modes of proceedings" in the Federal courts to "conform as near as may be" to the practice in the state courts. An answer to this contention is that the supreme court of the state did not so construe the Code of Procedure. On the effect of the judgment of the circuit court of the United States as *res judicata* the court divided, but three members of the court must have entertained opinions adverse to the contention of the Chemical Company. Mr. Justice Gary discussed the effect of the judgment, and was of opinion that it was not *res judicata*,—a conclusion at which he could not have arrived if the Code of the state required Kirven to set up his demand for damages in the answer. Mr. Justice Woods, in his concurring opinion, expressed the view that, under the Code, the demand could have been, but was not required to be, pleaded in defense. Mr. Justice Pope dissented from that construction, and also from the effect of the judgment as *res judicata*. Mr. Justice Jones concurred with the chief justice only as to the effect of the judgment.

Finally, it is urged that, in the case of *Greenwood Drug Co. v. Bromonia Co.* 81 S. C. 516, 62 S. E. 840, decided since the case at bar, the supreme court of the state of South Carolina is in accord with the contention of the Chemical Company as to the effect of judgments as *res judicata*, and has modified the views expressed by that court in the case at bar. It may well be contended that we are not concerned to consider to what extent that learned court has modified its views, as we have taken jurisdiction of this case because of our right to decide the weight and effect to be given to the judgment of the circuit court. It is enough, however, to say that the supreme court of South Carolina did not question the correctness of its decision in the case at bar.

Judgment affirmed.

favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

"1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

"2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

261] *ROBERT M. SNYDER, Junior, and Sybil M. Snyder, as Executors of the Last Will and Testament of R. M. Snyder, Deceased, et al., Plffs. in Err.,

v.

J. ROSENBAUM.

(See S. C. Reporter's ed. 261-266.)

Sale — deficiency — action for purchase money — defense.

1. A purchaser of cattle and feed cannot defeat a recovery of all of the purchase money because of a deficiency in the stated amount of feed, where all the cattle are delivered, and the recited amount of feed is not guaranteed, and he acts on his own inspection.

Pleading — amendment after trial — surprise.

2. Allowing amendment after full trial of a declaration seeking recovery of the entire amount due on a contract for purchase of cattle and feed, so as to claim recovery for the portion shown to have been delivered, should not be denied on the ground of surprise.

[For other cases, see Pleading, I. n, in Digest Sup. Ct. 1908.]

Sale — lien on property — satisfaction — effect.

3. Recovery on a contract for the purchase of cattle cannot be defeated because liens existed on those not stated to be subject to liens, where the possibility of such liens was contemplated by the contract, and they were satisfied out of the purchase money.

Sale — time as essence.

4. Failure to deliver cattle within the time specified by the contract will not defeat a recovery of the purchase money, where, by statute, time is not of the essence of the contract unless by its terms expressly so provided, and the cattle were accepted without objection on that ground.

[For other cases, see Sale, 134-137, in Digest Sup. Ct. 1908.]

Trial — instructions — assumption of disputed facts.

5. Instructions should not be given as-

NOTE.—On the right to rescind or abandon a contract because of failure or inability of the other party to perform within the time designated, when time is not of the essence of the contract—see note to *Holt v. United Security Life Ins. & T. Co.* 21 L.R.A. (N.S.) 691.

As to state decisions and laws as rules of decision in Federal courts—see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553; *Griffin v. Overman Wheel Co.* 9 C. C. A. 548; *Elmendorf v. Taylor*, 6 L. ed. U. S. 290; *Jackson ex dem. St. John v. Chew*, 6 L. ed. U. S. 584; *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490; *Clark v. Graham*, 5 L. ed. U. S. 335; *Forepaugh v. Delaware, L. & W. R. Co.* 5 L.R.A. 508; and *Mitchell v. Burlington*, 18 L. ed. U. S. 351.

suming that a contract is in force, if its validity has been denied and its execution is claimed to have been abandoned.

[For other cases, see Trial, 768-789b, in Digest Sup. Ct. 1908.]

Trial — instructions — definition — non-prejudicial error.

6. A defendant setting up another contract in defense of an action to enforce payment for property sold and delivered, which plaintiff alleges to be void for duress, is not prejudiced by an instruction limiting a definition of duress to a kind as to which there is no pretense that it exists in the case.

[For other cases, see Trial, VII. b, in Digest Sup. Ct. 1908.]

Pleading — instructions — specific allegations.

7. That undue influence was not expressly pleaded in defense of a contract does not preclude instructions defining it, if facts are pleaded and found which amount to it.

[For other cases, see Pleading, 715a-731; Trial, VII. b, in Digest Sup. Ct. 1908.]

Courts — undue influence — state statute — assumption by Federal court.

8. The Supreme Court of the United States will assume that a refusal by a purchaser in possession of personal property to pay for it, to satisfy a mortgage lien on it, or release it, unless the seller will execute another contract to his detriment, which, if persisted in, both parties understand will lead to an immediate foreclosure and the ruin of the seller, amounts to undue influence within the meaning of a state statute permitting a contract to be set aside for such cause, until the supreme court of the state says otherwise.

[For other cases, see Courts, 1775-1785, in Digest Sup. Ct. 1908.]

Duress — forcing execution of contract — ruinous conduct.

9. Refusal by a purchaser in possession of personal property to pay for it, to satisfy a mortgage lien on it, or release it, unless the seller will execute a contract which, if persisted in, both parties understand will lead to an immediate foreclosure and the ruin of the seller, amounts to duress which will avoid the contract.

[For other cases, see Duress, in Digest Sup. Ct. 1908.]

[No. 25.]

Argued November 8, 9, 1909. Decided December 6, 1909.

IN ERROR to the Supreme Court of the Territory of Oklahoma to review a judgment in favor of plaintiff in an action brought to enforce payment of the consideration alleged to be due on a contract for the sale of cattle and fodder. Affirmed.

See same case below, 18 Okla. 168, 89 Pac. 222.

The facts are stated in the opinion.

Messrs. Gardiner Lathrop and Armwell L. Cooper argued the cause, and,

with Messrs. John E. Wilson and John S. Wright, filed a brief for plaintiffs in error:

It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts of which no evidence has been offered.

Blackburn v. Crawford, 3 Wall. 175, 194, 18 L. ed. 186, 194; *Michigan Ins. Bank v. Eldred*, 9 Wall. 544, 553, 19 L. ed. 763, 767; *United States v. Breitling*, 20 How. 252, 254, 15 L. ed. 900, 902; *Beaver v. Taylor*, 1 Wall. 637, 644, 17 L. ed. 601, 603; *Chaffee v. Boston Belting Co.* 22 How. 217, 224, 16 L. ed. 240, 242.

The claim of duress was a mere sham, condemned by all the facts and circumstances, and unsupported by any evidence.

French v. Shoemaker, 14 Wall. 314, 332, 20 L. ed. 852, 856; *Silliman v. United States*, 101 U. S. 465, 470, 25 L. ed. 987, 988; *Hackley v. Headley*, 45 Mich. 573, 8 N. W. 511; *Mason v. United States*, 17 Wall. 67, 73, 21 L. ed. 564, 565; *Goebel v. Linn*, 47 Mich. 493, 41 Am. Rep. 723, 11 N. W. 284; *United States v. Child*, 12 Wall. 232, 244, 20 L. ed. 360, 363; *Burnes v. Burnes*, 132 Fed. 493; *Morton v. Morris*, 18 C. C. A. 611, 36 U. S. App. 550, 72 Fed. 398; *Radich v. Hutchins*, 95 U. S. 210, 213, 24 L. ed. 409, 410.

If, as *Stribling* contends, the contract of October 1, 1900, was induced by duress (which is earnestly denied), his subsequent conduct ratified the contract, and eliminated the charges of duress from the case.

9 Cyc. Law & Proc. p. 443; 10 Am. & Eng. Enc. Law, p. 337; *Carver v. United States*, 111 U. S. 609, 612, 28 L. ed. 540, 541, 4 Sup. Ct. Rep. 561; *Grymes v. Sanders*, 93 U. S. 55, 62, 23 L. ed. 798, 801; *McLean v. Clapp*, 141 U. S. 429, 432, 35 L. ed. 804, 806, 12 Sup. Ct. Rep. 29; *Andrews v. Connolly*, 145 Fed. 43.

Messrs. **C. J. Wrightsman** and **J. J. Darlington** argued the cause, and, with Messrs. Carl Meyer and L. W. Lee, filed a brief for defendant in error:

A contract obtained by so pressing a person by threats regarding his personal safety or liberty, or that of his property, or of a member of his family, as to deprive him of the full exercise of his will, and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress, whether the operation causing the incompetency to contract be produced by what was deemed duress formerly, and relievable at law as such, or wrongful compulsion, remediable by an appeal to a court of equity.

Brown v. Pierce, 7 Wall. 214-216, 19 L. ed. 134-137; *Galusha v. Sherman*, 105 Wis. 263, 47 L.R.A. 417, 81 N. W. 495; *Dunham* 54 L. ed.

v. Griswold, 100 N. Y. 224, 3 N. E. 76; *Cribbs v. Sowle*, 87 Mich. 340, 24 Am. St. Rep. 166, 49 N. W. 587; *Overstreet v. Dunlap*, 56 Ill. App. 495; *Rossiter v. Loeber*, 18 Mont. 384, 45 Pac. 560; *Wilkerson v. Bishop*, 7 Coldw. 30; *Parmentier v. Pater*, 13 Or. 125, 9 Pac. 59; *Langley v. Andrews*, 142 Ala. 671, 38 So. 238; *Footte v. DePoy*, 126 Iowa, 372, 68 L.R.A. 302, 106 Am. St. Rep. 365, 102 N. W. 112; *Lumaghi v. Abt*, 126 Mo. App. 221, 103 S. W. 104; *Loneragan v. Buford*, 148 U. S. 581-590, 37 L. ed. 569-572, 13 Sup. Ct. Rep. 684; *Robertson v. Frank Bros. Co.* 132 U. S. 17, 33 L. ed. 236, 10 Sup. Ct. Rep. 5; *Swift & C. & B. Co. v. United States*, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Tandy v. Elmore-Cooper Live Stock Commission Co.* 113 Mo. App. 420, 87 S. W. 614; *First Nat. Bank v. Sargeant*, 65 Neb. 594, 59 L.R.A. 296, 91 N. W. 595.

In what may be designated as an intermediate stage of the development of the doctrine of duress, between that of the common law, at which actual menace of bodily harm or imprisonment was required, and the later stage, as illustrated by the preceding citations, it was held in many cases that the detention of another's property, so that he could gain possession of it only by the payment of money demanded or other act, constituted duress.

Harmony v. Bingham, 12 N. Y. 117, 62 Am. Dec. 142; *Tutt v. Ide*, 3 Blatchf. 249, Fed. Cas. No. 14,275b; *Adams v. Schiffer*, 11 Colo. 30, 7 Am. St. Rep. 202, 17 Pac. 21; *Shaw v. Woodecock*, 7 Barn. & C. 85; *Atlee v. Backhouse*, 3 Mees. & W. 650.

This application of the doctrine is subject, perhaps, to the limitation that the question is one of mixed law and fact, requiring determination by the jury whether the wrongful act in fact coerced the will, the real question for determination being the fact of coercion, not merely the means used to produce it, so that the principle of these cases cannot in reason depend upon, or the application be limited to, the mere ease of the detention of goods, as is recognized by many authorities.

Van Dyke v. Wood, 60 App. Div. 208, 70 N. Y. Supp. 327; *Braydon v. Goulman*, 1 T. B. Mon. 115; *Dwinel v. Barnard*, 28 Me. 554, 48 Am. Dec. 507; *American Brewing Co. v. St. Louis*, 187 Mo. 367, 86 S. W. 129, 2 A. & E. Ann. Cas. 821; *Prickett v. Madison County*, 14 Ill. App. 454; *Chicago v. Sperbeck*, 69 Ill. App. 562; *New Orleans & N. E. R. Co. v. Louisiana Constr. & Improv. Co.* 109 La. 13, 94 Am. St. Rep. 393, 33 So. 51; *Lehigh Coal & Nav. Co. v. Brown*, 100 Pa. 346; *Guetzkow Bros. Co. v. Breese*, 96 Wis. 591, 65 Am. St. Rep. 83,

72 N. W. 45; Vyne v. Glenn, 41 Mich. 112, 1 N. W. 997; Scholey v. Mumford, 60 N. Y. 498; Cobb v. Charter, 32 Conn. 358, 87 Am. Dec. 178; Buford v. Louisville & N. R. Co. 82 Ky. 286; Stenton v. Jerome, 54 N. Y. 480; First Nat. Bank v. Sargeant, 65 Neb. 594, 59 L.R.A. 296, 91 N. W. 595; Joannin v. Ogilvie, 49 Minn. 564, 16 L.R.A. 376, 32 Am. St. Rep. 581, 52 N. W. 217; Fraser v. Pendlebury, 31 L. J. C. P. N. S. 1; Pemberton v. Williams, 87 Ill. 16; Close v. Phipps, 7 Mann. & G. 586; White v. Heylman, 34 Pa. 142; State ex rel. McCardy v. Nelson, 41 Minn. 25, 4 L.R.A. 300, 42 N. W. 548; Love v. State, 78 Ga. 66, 6 Am. St. Rep. 234, 3 S. E. 893; Secor v. Clark, 117 N. Y. 350, 22 N. E. 754, 24 Jones & S. 162, 1 N. Y. Supp. 515; Schoellhamer v. Rometsch, 26 Or. 394, 38 Pac. 344; Maxwell v. Griswold, 10 How. 242, 13 L. ed. 405; Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373; Baldwin v. Sullivan Timber Co. 48 N. Y. S. R. 296, 20 N. Y. Supp. 496; New Orleans Gaslight & Bkg. Co. v. Paulding, 12 Rob. (La.) 378; Westlake v. St. Louis, 77 Mo. 47, 46 Am. Rep. 4; Niedermeyer v. University of Missouri, 61 Mo. App. 654.

There is no one of the above-cited cases in which the party claiming duress, either in the payment of money or making of a contract, could not have maintained an action in the courts of law for the recovery of the property withheld or the enforcement of the rights controverted.

Mr. Justice Holmes delivered the opinion of the court:

This is a writ of error brought by the executors of Robert M. Snyder to reverse a judgment upon a written contract in favor of one Stribling, assigned by him to the defendant in error, Rosenbaum. 18 Okla. 168, 89 Pac. 222. The contract was dated September 1, 1900, and purported to be a sale by Stribling of 12,700 head of steer cattle, then in pasture near Gray Horse, Oklahoma, **262**] of which 12,500 were *to be counted out to the purchaser; with particulars as to age. Also, of from 3,200 to 3,500 acres of corn, 1,400 acres of cane, and about 5,000 acres of hay, all near the same place. Also, of certain horses, mules, wagons, and ranch outfit, employed by Stribling about the said cattle. By a later clause, the farms where the fodder was were specified, and it was added that the exact acreage was not guaranteed. The agreed price was \$500,000, to be paid, first, by the transfer to Stribling of a ranch in Arizona, with the herd and outfit thereon, at the valuation of \$150,000; next, by the assumption of an encumbrance of \$240,000 on 10,500 of the cattle sold; "the balance . . . to be paid . . . or accounted for satis-

factorily to said Stribling within . . . days of the signing of this instrument." It was agreed that 10,500 of the cattle were free from encumbrances except the \$240,000 just mentioned, and that, if there was any encumbrance of the remaining 2,000, such encumbrance should be deducted from the purchase price. "Said cattle to be counted within fifteen days." Both parties to the contract were experienced men.

Stribling alleged performance of the contract on his part and a breach by Snyder in not conveying his Arizona ranch, and in not accounting for a cash balance of \$5,200. The answer set up a document of October 1, 1900, signed by Snyder and Stribling, and addressed to a third party, as a supplemental contract; denied performance of this or the original agreement by Stribling, stating various details of failure, and alleged fraud. The replication averred that, to secure an extension of time for the payment of the mortgage on the cattle, referred to in the original contract, Stribling and Snyder, on September 5, made an agreement with the holder, by one part of which Snyder agreed to market enough of the cattle to pay the notes that were overdue, and by which he also bound himself to pay the other mortgage notes as they fell due. The replication continued that, on October 1, 1900, Stribling had delivered the cattle and other property, and *that Snyder, being in possession **[263** of them, told Stribling that, unless he signed the document set up in the answer, he would not pay for the cattle or pay the mortgage debt or release the cattle; that both parties understood that this threat, if carried out, would lead to an immediate foreclosure and Stribling's ruin, and that, in those circumstances, characterized as duress, Stribling signed.

There was a trial and the jury found for the plaintiff. It made in addition a very great number of special findings, establishing, subject to any question of law that may have been reserved, much more than was necessary to support the verdict. It found the following facts among others: In pursuance of the September contract, 12,391 head of cattle were counted out to the purchaser, and the counting of the rest of the 12,500 was stopped by the purchaser's agent, he being satisfied, and there being enough cattle in sight to make up the total. After the count, on or about September 26, 1900, the purchaser took possession, and Stribling then ceased to exercise control over the property. This included 12,500 head of cattle, the horses, mules, wagons, harness, pastures, camp outfit, and such feed as was there. Stribling asked Snyder for a settlement, and Snyder made no objection to the correctness of the count or to the representations as to

the acreage of feed, or to Stribling's performance otherwise, but nevertheless refused to do his part. He sold the cattle again by a transaction which it is not necessary to trace, and the negotiations concerning which were not known to Stribling at the time of Snyder's threats mentioned in the replication, and of the signing of the document of October 1. The threats alleged are found to have been made and to have induced Stribling to sign, without other consideration. At this time the value of the cattle was going down, and that of the Arizona property was going up,—facts that may partly account for Snyder's conduct. It is found that he wanted to avoid the September contract, and to get the cattle by merely discharging the liens. But the par- [264] ties did not carry out the *provisions of the October document, and upon this finding and the finding as to the pressure under which it was executed, it is unnecessary to state its provisions. They were more onerous to Stribling in several respects, requiring a further count, and forfeiting the Arizona property if the full number was not turned over and payment made for any deficiency within five days of the count. All fraud on Stribling's part is negatived, and the upshot of the whole matter is that he performed his contract in every respect except that there was not so much fodder as was supposed, and for that the jury made an allowance of \$9,000.

The argument for the plaintiffs in error discusses the evidence at great length. But we shall deal only and very briefly with the rulings that seem to us to require notice. It is enough to say at the outset that there was some evidence to support the special findings that we have mentioned. But it is urged that, this being a suit upon the contract, if it was not performed to the letter, the plaintiff cannot recover. The judge instructed the jury that a contract of this kind, for the delivery of a certain number of cattle, is severable, and that, if the whole number of cattle, or the full number of acres of feed, were not delivered, still the plaintiff could recover the contract price, less an allowance for the damage occasioned by the failure. This is assigned as error. It is unnecessary to consider whether the construction of the contract was too liberal in favor of the plaintiff, or whether it embodied the understanding upon which such dealings take place. The jury found that all the cattle were delivered. As to the deficiency in the acreage of fodder, the contract stated that the precise amount was not guaranteed, and the jury found that Snyder was acting on his own inspection. The deficiency did not go to the root of the
54 L. ed.

contract. Furthermore, if, after the parties have had a full trial, and after such specific findings as were made, any amendment were necessary, which we are far from intimating, no doubt it would be allowed. The defendant suffered no possible *sur- [265] prise. See also Wilson's Rev. & Anno. Stat. (Okla.) 1903, § 4344.

It is objected further that the other cattle, above the 10,500 mentioned in the contract as mortgaged, and the fodder, were subject to liens for about \$110,000. But this possibility was contemplated by the contract, the liens were satisfied out of the purchase price, and no harm was done. Finally, it is said that the delivery was not made within fifteen days. But, by statute, time is not of the essence of a contract, "unless by its terms expressly so provided." Wilson's Rev. & Anno. Stat. (Okla.) 1903, § 809. The delay was not the fault of Stribling, but was due to Snyder and his agents. The cattle were accepted without objection on that ground, and, if the delay could have been complained of under the circumstances, performance *ad diem* was waived.

The other principal defense and the ground of counterclaim relied upon was the alleged contract of October 1. As the validity of this contract was denied and the execution of it said to have been abandoned, of course the judge was right in refusing instructions that assumed it to be in force. But complaint is made of an instruction to the jury in the language of the statutes as to duress and undue influence. Probably through a mechanical slip, only a part of the statute as to duress was recited, so that fraudulent confinement of the person seemed to be stated as an exhaustive definition. But this did not hurt the defendant, if, for no other reason, because there was no pretense of duress in that sense. The judge then went on to quote the definition of one form of undue influence, as "taking a grossly oppressive and unfair advantage of another's necessities or distress." Wilson's Rev. & Anno. Stat. (Okla.) 1903, § 746. It is objected that undue influence was not pleaded. But the facts were pleaded and were found by the jury in like form. We should assume that those facts amounted to undue influence within the meaning of the Oklahoma statutes until the supreme court of the state says otherwise. But it is said that they do not amount to duress, *and there- [266] fore an instruction should have been given, as asked, that there was no evidence of duress. We see no reason for not following the opinion of the territorial court, that the facts also constituted duress within the meaning of the statute. See *Silsbee v. Webber*, 171 Mass. 378, 50 N. E. 555. But it does not seem

to matter what they are called if they are found to have existed. Furthermore, we see no ground on which we can go behind the finding that neither side carried out the alleged October contract. There was some evidence to that effect, and we are not concerned with its weight. We do not think it necessary to mention all the points that we have examined. Upon the whole case, we are of opinion that no error of law is disclosed that entitles the plaintiffs in error to a new trial.

Judgment affirmed.

RIO GRANDE DAM & IRRIGATION COMPANY and the Rio Grande Irrigation & Land Company, Limited, Appts.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 266-278.)

Pleading — supplemental bill.

1. Permitting the filing of a supplemental bill after the case has been remanded by an appellate court for the production of further evidence cannot be deemed an abuse of the trial court's discretion, where the facts set forth in such bill grew out of and were connected with the same transaction out of which the litigation arose, and were germane to the object of the suit, and where all the grounds of relief, even if not existing when the original bill was filed, were alleged to exist when the supplemental bill was tendered,—especially in view of the provisions of N. M. Code Civ. Proc. subsec. 87, that a party may be allowed, on motion, to make a supplemental complaint, answer, or reply alleging facts material to the cause, or praying for any other or different relief, order, or judgment.

[For other cases, see Pleading, I. o, in Digest Sup. Ct. 1908.]

Pleading — supplemental bill — notice.

2. Defendants are chargeable with notice of an application to file a supplemental bill, where such bill was tendered when the court was open, leave to file was given in open court, and defendants' attorney was served with a copy on the day it was tendered and filed.

[For other cases, see Pleading, I. o, in Digest Sup. Ct. 1908.]

Judgment — by default — failure to answer supplemental bill.

3. A supplemental bill filed in open court and served on defendants' attorney on the same day on which it was filed may be taken for confessed in the absence of any appearance or pleading by defendants for more than the twenty days within which, under N. M. Comp. Laws 1897, title 33, every

pleading must be filed and served after service of the pleading to which it is an answer, demurrer, or reply.

[For other cases, see Judgment, I. e, in Digest Sup. Ct. 1908.]

Estoppel — of government — by inconsistent acts.

4. The Federal government is not estopped to rely upon the five years' limitation prescribed by the act of March 3, 1891 (26 Stat. at L. 1095-1102, chap. 561, U. S. Comp. Stat. 1901, pp. 1535, 1571), for constructing an irrigation canal or reservoir, by obtaining an injunction interfering with such construction, where, between the dissolution of the preliminary injunction and the granting of the perpetual injunction, more than five years elapsed, during which the construction was not impeded or hindered.

[For other cases, see Estoppel, III. c, in Digest Sup. Ct. 1908.]

[No. 49.]

Argued December 3, 1909. Decided December 13, 1909.

APPEAL from the Supreme Court of the Territory of New Mexico to review a decree which affirmed a decree of the District Court for the Third Judicial District, enjoining the construction of an irrigation dam and reservoir. Affirmed.

See same case below, 13 N. M. 386, 85 Pac. 393.

The facts are stated in the opinion.

Messrs. William W. Bride and Frederick S. Tyler argued the cause, and, with Mr. Charles A. Douglas, filed a brief for appellants:

When the case was referred with a specific direction, the court erred in allowing the filing of a bill which was outside that direction, and in contravention to it.

Southard v. Russell, 16 How. 547, 14 L. ed. 1052; Ex parte Dubuque & P. R. Co. 1 Wall. 69, 17 L. ed. 514; Armes v. Kimberly, 136 U. S. 629, 34 L. ed. 557, 10 Sup. Ct. Rep. 1064; Re Gamewell Fire-Alarm Teleg. Co. 20 C. C. A. 111, 33 U. S. App. 452, 73 Fed. 908; Mason v. Harper's Ferry Bridge Co. 20 W. Va. 223; Boggs v. Willard, 70 Ill. 315, 22 Am. Rep. 77; Rees v. McDaniel, 131 Mo. 681, 33 S. W. 178; Gage v. Bailey, 119 Ill. 539, 9 N. E. 199; Chouteau v. Allen, 74 Mo. 56; Mackall v. Richards, 116 U. S. 47, 29 L. ed. 558, 6 Sup. Ct. Rep. 234; Re Sanford Fork & Tool Co. 160 U. S. 255, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; Sibbald v. United States, 12 Pet. 488, 489, 9 L. ed. 1167, 1168; Texas & P. R. Co. v. Anderson, 149 U. S. 237, 37 L. ed. 717, 13 Sup. Ct. Rep. 843.

A new, independent cause of action was set forth by the supplemental bill from

NOTE.—On supplemental bills—see note to Miller v. Cook, 10 L.R.A. 298.

On estoppel against state or United States—see note to Michigan v. Jackson, L. & S. R. Co. 16 C. C. A. 353.

those made in the original and amended bills. This is not permissible.

Electrical Accumulator Co. v. Brush Electric Co. 44 Fed. 607; 2 Street, Fed. Eq. Pr. §§ 1170, 1171; 1 Foster, Fed. Pr. 4th ed. 631; New York Secur. & T. Co. v. Lincoln Street R. Co. 74 Fed. 67; Stafford v. Howlett, 1 Paige, 200; Van Zile, Eq. Pl. & Pr. § 263; Milner v. Milner, 2 Edw. Ch. 114; Higginson v. Chicago, B. & Q. R. Co. 42 C. C. A. 254, 102 Fed. 200; Fletcher, Eq. Pl. & Pr. 892; Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co. 6 Wall. 742, 18 L. ed. 856; Story, Eq. Pl. 339; Hughes v. Carne, 135 Ill. 519, 26 N. E. 517; Putney v. Whitmire, 66 Fed. 388; Maynard v. Green, 30 Fed. 643; Prouty v. Lake Shore & M. S. R. Co. 85 N. Y. 275; Snead v. McCoull, 12 How. 407, 13 L. ed. 1043.

Solicitor General **Bowers** argued the cause and filed a brief for appellee:

The proceedings had in this case since the decision of the second appeal to this court are in no way inconsistent with this court's mandate.

Marine Ins. Co. v. Hodgson, 6 Cranch, 206, 3 L. ed. 200; Neale v. Neale, 9 Wall. 1, 19 L. ed. 590; Ex parte French, 91 U. S. 423, 23 L. ed. 249; Hinckley v. Morton, 103 U. S. 764, 26 L. ed. 458; Mason v. Pewabic Min. Co. 153 U. S. 361, 38 L. ed. 745, 14 Sup. Ct. Rep. 847; Re Sanford Fork & Tool Co. 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291.

Allowance of the filing of a supplemental bill is within the fair discretion of the trial court.

Berliner Gramophone Co. v. Seaman, 51 C. C. A. 440, 113 Fed. 754; Jacob v. Lorenz, 98 Cal. 337, 33 Pac. 119; Farmers' Loan & T. Co. v. Bankers' & M. Teleg. Co. 109 N. Y. 342, 16 N. E. 539.

And, in general, granting or refusing leave to file a new plea or to amend a pleading is discretionary, and is not reviewable on appeal except for gross abuse of discretion.

Mandeville v. Wilson, 5 Cranch, 15, 17, 3 L. ed. 23, 24; Gormley v. Bunyan, 138 U. S. 623, 34 L. ed. 1086, 11 Sup. Ct. Rep. 453; Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426; Walden v. Craig, 9 Wheat. 576, 6 L. ed. 164; Chirac v. Reinicker, 11 Wheat. 280, 6 L. ed. 474; Ex parte Bradstreet, 7 Pet. 634, 8 L. ed. 810.

Notice of an application for leave to file a supplemental bill is not in all cases necessary. It is a matter of discretion with the court whether to require such notice.

Eager v. Price, 2 Paige, 335; Lawrence v. Bolton, 3 Paige, 235; Barrielo v. Trenton Mut. L. & F. Ins. Co. 13 N. J. Eq. 155; 54 L. ed.

Winn v. Albert, 2 Md. Ch. 42; Taylor v. Taylor, 1 Macn. & G. 397.

The only reason for requiring leave of court at all for the filing of a supplemental bill is to prevent delays and vexatious proceedings.

Buckingham v. Corning, 29 N. J. Eq. 240; Eager v. Price, supra.

The proper method of objecting to a supplemental bill on the ground that it does not contain supplemental matter is by demurrer.

2 Dan. Ch. Pl. & Pr. 6th Am. ed. *1535; Bowyer v. Bright, 13 Price, 316; Stafford v. Howlett, 1 Paige, 200.

There is, of course, nothing in the claim that the supplemental bill is objectionable because it sets forth matter occurring after the suit was begun. Such is the chief, though not the sole, office of a supplemental bill; and, indeed, matter occurring after commencement of the suit cannot be introduced into the original bill by amendment, but must be set forth by supplemental bill.

Story, Eq. Pl. 10th ed. § 332; 2 Dan. Ch. Pl. & Pr. 6th Am. ed. *1515, note 1.

Matter may be introduced by supplemental bill which could have been added to the original bill if then available.

Winn v. Albert, 2 Md. Ch. 48; Hardin v. Boyd, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771; Jones v. Jones, 3 Atk. 110; Eager v. Price, 2 Paige, 333; Saunders v. Frost, 5 Pick. 275; Fisher v. Holden, 84 Mich. 494, 47 N. W. 1063; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119; Hasbrouck v. Shuster, 4 Barb. 285; Candler v. Pettit, 1 Paige, 168, 19 Am. Dec. 399; Mutter v. Chauvel, 5 Russ. Ch. 42; Reeve v. North Carolina Land & Timber Co. 72 C. C. A. 287, 141 Fed. 821; Jenkins v. International Bank, 127 U. S. 484, 32 L. ed. 189, 8 Sup. Ct. Rep. 1196.

The rule that a bad title set up in the original bill cannot be aided by supplemental bill setting up a new and distinct title obtains only when complainant's original title is wholly bad and his case is entirely defective; it does not prevent the assertion of a new title by supplemental bill when the new title adds to or supplements the first title, instead of contradicting it.

Winn v. Albert, supra; Tonkin v. Lethbridge, G. Cooper, 43; Jaques v. Hall, 3 Gray, 194; Candler v. Pettit, supra; Edgar v. Clevenger, 3 N. J. Eq. 258; Lowry v. Harris, 12 Minn. 266, Gil. 166; Reeve v. North Carolina Land & Timber Co. 72 C. C. A. 287, 141 Fed. 834.

Mr. Justice **Harlan** delivered the opinion of the court:

The general object of this suit—which was brought by the United States in one of

the courts of New Mexico on the 24th day of May, 1897—was to obtain an injunction to prevent the Rio Grande Dam & Irrigation Company from constructing and maintaining a dam across, and a reservoir over and near, the Rio Grande river at a certain point in that territory. In the court of original jurisdiction the suit was dismissed, and the dismissal was affirmed by the supreme court of the territory; but that judgment was reversed by this court, with instructions to set aside the decree of dismissal, and to inquire whether the intended acts of the defendants in the construction of a dam and appropriating the waters of the Rio Grande would substantially diminish the navigability of that stream within the limits of present navigability; and, if so, to enter a decree restraining those acts to the extent that they would so diminish. *United States v. Rio Grande Dam & Irrig. Co.* 174 U. S. 690, 708, 710, 43 L. ed. 1136, 1143, 1144, 19 Sup. Ct. Rep. 770. The mandate of this court to that effect was executed by the supreme court of the territory, and the cause went back to the court of original jurisdiction with directions to proceed in accordance with that mandate.

The cause was again heard in the court of original jurisdiction, that court denying a motion, in behalf of the United States, for a continuance in order that it might more fully prepare its case. The suit, on final hearing, was again dismissed, and that judgment was sustained by the supreme court of the territory. But this court reversed the decree of the latter court, and remanded the cause, with instructions to reverse the decree of the court of original jurisdiction, and with directions "to grant leave to both sides to adduce further evidence." *United States v. Rio Grande Dam & Irrig. Co.* 184 U. S. 416, 424, 425, 46 L. ed. 619, 622, 623, 22 Sup. Ct. Rep. 428. The mandate of this court to the above effect was executed, and the case was again placed on the docket of the court of original jurisdiction.

For a full statement of the issues and facts up to this point in the litigation, reference is made to the opinions of this court as reported in 174 U. S. 690, and 184 U. S. 416.

The record shows that on the 7th day of April, 1903,—after the last decision in this court,—the United States, by leave of the court of original jurisdiction, filed a *supplemental* complaint, which set forth the then status of the case. That complaint referred to the defendant's plea, stating that it had complied with the requirements of the act of Congress approved March 3d, 1891, repealing timber culture laws and for other purposes (26 Stat. at L. 1095-1102,

chap. 561, §§ 20, 21, U. S. Comp. Stat. 1901, pp. 1535, 1571), and "had acquired a right to construct said dam and direct said water by reason of compliance with the terms of said act." It then proceeded: "2. Plaintiff further alleges that defendant's plea above referred to, claiming a right to construct said dam under the said act of Congress approved March 3d, 1891, chap. 561, was filed on June 26, A. D. 1897, and that its articles of incorporation and proof of its incorporation, and the map and survey of its reservoir, had been filed and approved by the Secretary of the Interior long prior to the filing of said plea, as appears from an inspection of said plea itself. 3. Plaintiff further alleges that in and [269 by § 20 of the said act of March 3d, 1891, above referred to, it was provided 'that if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture;' and that although five years since the filing and approval of said articles of incorporation, proofs of organization, maps, and surveys have long since elapsed, defendant has not complied with the requirements of said act, but has failed to construct or complete within the period of five years after the location of said canal and reservoir any part or section of the same, and the same has, by reason thereof, become forfeited. 4. Plaintiff further alleges that during all of said time, except from May 24th, 1897, to ——— 1897, the date when the temporary injunction was dissolved, the said defendants have been in no wise hindered, restrained, or prevented from complying with the provisions of said act by any judicial order or process whatsoever. 5. Wherefore, plaintiff prays to be permitted to file this supplemental bill of complaint, and that the same be considered upon the hearing of this cause, and that the defendants be decreed to have forfeited all the rights they may have had or claimed under and by virtue of said act of March 3d, 1891, not hereby admitting, however, that the defendants ever acquired any rights under and by virtue of said act. Plaintiff further prays that the injunction, and all other relief prayed for in and by said amended bill of complaint, be granted, and that said injunction be made perpetual, and that it have and recover its costs expended in this cause, and thus plaintiff will ever pray."

A copy of this supplemental complaint was served on the attorney of the defendants on the day (April 7th, 1903) it was

filed. More than forty days thereafter, on the 21st day of May, 1903, a decree was entered finding the allegations of the supplemental complaint—no demurrer, answer, 270] or other *pleading having been filed thereto—"are confessed and are true." The court further found "that the articles of incorporation and the map, survey of the reservoir of the defendant corporation, the Rio Grande Dam & Irrigation Company, were filed with the Secretary of the Interior prior to the 26th day of June, A. D. 1897, and were, prior to said date, approved by the Secretary of the Interior; and it further finds that the said defendants have not completed its said reservoir or said ditch, or any section thereof, within five years after the location of the said reservoir and its said ditch line, or within five years after the approval of the same by the Secretary of the Interior; and the court further finds that five years since the filing and approval of the said articles of incorporation, proof of organization, maps, and surveys of the said reservoir and ditch line of the defendants had long since elapsed prior to the filing of the said supplemental bill, and that the defendants had not complied with the requirements of the act of Congress approved March 3, 1901, under which the same were filed, but has failed to construct or complete, within the period of five years after the location of the said canal and reservoir, any part or section of the same." And it was adjudged "that the rights of the said defendants, or either of them, to so construct and complete the said reservoir and said ditch, or any part thereof, under and by virtue of the said act of Congress of March 3, 1901, be and the same are hereby declared to be forfeited. It is further ordered, adjudged, and decreed by the court, by reason of the premises, that an injunction be, and the same is hereby, granted against the said defendants, enjoining them from constructing or attempting to construct the said reservoir, or any part thereof, and that the same be made perpetual." (By an amended decree filed October 5th, 1903, and entered *nunc pro tunc* as of May 21st, 1903, the date given as March 3d, 1901, in the decree was made to read March 3d, 1891, in order to conform to the actual date of the act of Congress intended to be referred to both by the United States and by the court.)

271] *A statute of New Mexico, in force at the time and before the above decree was rendered, provided: "Every pleading subsequent to the complaint shall be filed and served within twenty days after service of the pleading to which it is an answer, demurrer, or reply." N. M. Comp. Laws 1897, 54 L. ed.

title 33; Code Civ. Proc. chap. 1, art. 4, subsec. 46.

On the 31st of October, 1903, the defendants moved the court to vacate the order allowing the supplemental bill to be filed, and that they be permitted to come in and answer the supplemental bill. This motion was denied, and, upon appeal to the supreme court of the territory, the action of the trial court on this point was sustained. The former court, at the same time, March 2d, 1906, adjudged that the right of the defendants, or either of them, to construct and complete its reservoir and ditch, or any part thereof, within the time required by the act of Congress of March 3d, 1891, was forfeited. It was also adjudged that the defendants be enjoined from constructing, or attempting to construct, the said reservoir or any part thereof. The injunction was made perpetual. From that judgment the present appeal was prosecuted.

We perceive no error in the judgment now under review. *The main conten- [275 tion of the defendants is that it was error to permit the United States to file its supplemental bill. We do not accept this view of the trial court's duty. When the cause was last here, the court expressed the conviction that, if the case was finally disposed of on the record as it then was, great wrong might be done to the United States and to all interested in preserving the navigability of the Rio Grande. Hence, the cause was sent back that each side might adduce further evidence, if they had any to adduce. When the government asked to file its supplemental bill, the suit was, of course, reinstated on the docket of the court of original jurisdiction, for such action as might be proper or necessary. The case having been opened that further evidence might be produced, it was certainly open for an amendment of the original pleadings, or for such additional pleadings as might be appropriate to the issues between the parties. The parties were not limited to the production merely of evidence. The defendants, in the discretion of the court, could have been allowed, upon a proper showing, and before taking further proof, to amend their pleadings, and equally the government, before taking further proof, could have been allowed to file a supplemental complaint. *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206, 218, 3 L. ed. 200, 203. Besides, subsection 87 of the New Mexico Civil Code would seem to be broad enough to cover the question of power. It provides: "A party may be allowed, on motion, to make a supplemental complaint, answer, or reply alleging facts material to the cause, or praying for any other or different relief, order, or judgment." The facts set forth in the

supplemental complaint were manifestly not foreign to the government's original cause of action. In every substantial sense those facts were material. Strictly speaking, they may have constituted new matter, but they did not present a new cause of action. *Jenkins v. International Bank*, 127 U. S. 484, 32 L. ed. 189, 8 Sup. Ct. Rep. 1196. They grew out of and were connected with the same transaction from which this litigation arose, and were germane to the object of the suit. That object was to restrain the defendants *from constructing and maintaining dams, reservoirs, canals, or ditches that would obstruct the navigable portion of the Rio Grande river. If all the grounds of relief set out in the supplemental complaint did not exist when the original complaint was filed, they were alleged to exist when the supplemental complaint was tendered, and, being connected with the original cause of action, it was right to bring them, in proper form, to the attention of the court when determining whether the government was entitled to the relief it asked. So the supreme court of the territory held, and so we hold. There was, plainly, no abuse of discretion or of the established rules of practice in permitting the supplemental complaint to be filed. The allowance of amendments of equity pleadings must, "at every stage of the cause, rest in the discretion of the court, and that discretion must depend largely on the special circumstances of each case." *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771.

Upon the question of the diligence or want of diligence of the parties, it may be said that the supplemental complaint was tendered at a time when the court was open; the leave to file was given in open court; and the defendants' attorney was served with a copy of that complaint on the very day it was tendered and filed. On this part of the case the supreme court of the territory said that attorneys of record are presumed to be present during terms of the court in which their causes are pending, and in contemplation of law were chargeable with notice of all proceedings transpiring in open court in respect of such causes; also, that, "under the facts of this case, counsel are presumed to have been present, and to have such notice as the law requires of matters transpiring in open court on the day on which leave was granted to file the supplemental complaint, and the same was filed and served upon them. *Yonge v. Broxson*, 23 Ala. 684; *Saunders v. Savage* (Tenn. Ch. App.) 63 S. W. 218. The court was vested with discretion by the last clause of § 104, supra [Code of Civ. Proc. as amended by chap. 11 of Laws of 1901], which does not seem to have been

abused, nor was there any abuse of the general discretion *to allow an amended or supplemental bill in equity, conferred upon the courts of the United States, as may be seen by reference to the case of *Berliner Gramophone Co. v. Seaman*, 51 C. C. A. 440, 113 Fed. 750, in which it was held that "the granting of leave to file an amended and supplemental bill is a matter within the discretion of the court, and its action will not be reviewed in an appellate court unless there has been a gross abuse of this discretion." [13 N. M. 398, 85 Pac. 396.]

The objection that the trial court erred in taking the supplemental complaint for confessed cannot be sustained. That objection was thus properly disposed of by the supreme court of the territory: "There being no error or irregularity in the court's order allowing the supplemental complaint to be filed, the same having been done in open court, and a copy of the same having been served upon one of the attorneys of record on the same day on which it was filed, the statute required an answer or other proper pleading to be filed within twenty days from the date of such filing, and in the event of failure to plead, or secure additional time to plead, neither of which were done in this case, it was perfectly regular for the court to render decree. *Gregory v. Pike*, 29 Fed. 588. Appellants seek to be relieved from their own default by alleging neglect on the part of their attorneys. . . . There being service of a copy of the supplemental complaint upon one of the attorneys of record on the day on which it was filed, it was entirely regular for the court to render the decree when applied for forty-four days after such service, in the absence of any appearance or pleading by the appellants."

Some stress is laid on the fact that the government obtained an injunction to prevent the defendants from constructing its reservoir and dam. That fact, it is contended, estops the government from relying on the five-years' limitation prescribed by the above act of March 3d, 1891, chap. 561. But this view is without merit. The preliminary injunction referred to was dissolved July 31st, 1897, and was never reinstated. The supplemental bill was taken as confessed on *May 21st, 1903, and [278 a perpetual injunction was then awarded against the defendants. So that, between the dissolution of the preliminary injunction and the granting of the perpetual injunction, more than five years elapsed, during which the defendants were not impeded or hindered by any injunction against them. This is sufficient to show that the point just stated is without merit. We

need not, therefore, consider the larger question, whether the five-years' limitation prescribed by Congress in the above act of March 3d, 1891, could have been disregarded or enlarged, either by the action or non-action of the parties, or by any order of injunction made by the court in the progress of the cause.

There are some minor questions in the case, but they are not of substance and need not be noticed. We perceive no error of law in the record, and the judgment is affirmed.

Mr. Justice McKenna did not participate in the consideration or determination of this case.

UNITED STATES, Plff. in Err.,
v.
BOB CELESTINE.

(See S. C. Reporter's ed. 278-291.)

Appeal — by government in criminal case — decision on special plea in bar.

1. The decision of a Federal circuit court sustaining a special plea in bar to an indictment is reviewable in the Supreme Court, under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), although the decision may involve the application rather than the invalidity or construction, strictly speaking, of the statute upon which the indictment was founded.

[For other cases, see Appeal and Error, I. e., in Digest Sup. Ct. 1908.]

Courts — exclusive Federal jurisdiction — crimes on Indian reservation within state.

2. Land within the Tulalip Indian Reservation, in the state of Washington, allotted and patented in severalty, pursuant to the treaty with the Omahas of March 16, 1854 (10 Stat. at L. 1043), and the treaty of Point Elliott of January 22, 1855 (12 Stat. at L. 927), which provide for a conditional alienation only, is not, by reason of such allotment and patent, excepted from the reservation, so as to defeat the exclusive jurisdiction of the Federal courts under the act of March 3, 1885 (23 Stat. at L. 385, chap. 341), § 9, of crimes committed on such land by one Indian upon the person of another.

[For other cases, see Courts, 1468-1471, in Digest Sup. Ct. 1908.]

NOTE.—On the right of a state to appeal in a criminal case—see note to *People ex rel. Hodson v. Miner*, 19 L.R.A. 342.

As to the right of the Federal government to a review in criminal cases—see note to *United States v. Stevenson*, ante, 153.

On jurisdiction to punish crimes committed by or against Indians—see notes to *State v. Campbell*, 21 L.R.A. 169, and *Worcester v. Georgia*, 8 L. ed. U. S. 484.

54 L. ed.

Courts — exclusive Federal jurisdiction — crimes on Indian reservation within state.

3. Crimes committed by one Indian upon the person of another within the limits of the Tulalip Reservation, in the state of Washington, are not excepted from the exclusive jurisdiction of the Federal courts, under the act of March 3, 1885, § 9, because both parties hold patents from the United States, issued under the authority of the treaty with the Omahas of March 16, 1854, and the treaty of Point Elliott of January 22, 1855, and are therefore, by virtue of the act of February 8, 1887 (24 Stat. at L. 388, chap. 119), § 6, citizens of the United States.

[For other cases, see Courts, 1468-1471, in Digest Sup. Ct. 1908.]

[No. 235.]

Argued October 14, 1909. Decided December 13, 1909.

IN ERROR to the Circuit Court of the United States for the Western District of Washington to review a judgment sustaining a special plea in bar to an indictment charging an Indian with the murder of another Indian within the limits of an Indian reservation. **Reversed.**

Statement by Mr. Justice Brewer:

At the May term, 1908, of the circuit court of the United States for the western district of Washington an indictment was found against the defendant, the first count of which reads:

"That one Bob Celestine, an Indian, on the 30th day of August, in the year of our Lord 1906, within the limits of the Tulalip Indian Reservation, within the boundaries of the state of Washington, and within said western district of Washington, northern division, did, with force and arms, make an assault upon one Mary Chealco, an Indian woman, with an ax, which the said Bob Celestine then and there held in his hands, and did then and there feloniously, wilfully, knowingly, and with malice aforethought, strike, beat, and mortally wound said Mary Chealco with said ax upon the head of the said Mary Chealco, with intent to kill and murder her, the said Mary Chealco, giving to her, the said Mary Chealco, a mortal wound upon the head, from which mortal wound said Mary Chealco then and there languished and died, within said Tulalip Indian Reservation, in said western district of Washington."

The second count is in similar terms, but charges in addition that the Tulalip Indian Reservation, where the offense was committed, is "a place under the exclusive jurisdiction of the United States."

280] *By a special plea the defendant challenged the jurisdiction of the circuit court, alleging that at the time of the offense there had been allotted to him as the head of a family certain lands situate on the Tulalip Indian Reservation, within the limits of the state (then territory) of Washington, under the provisions of the treaty of January 22, 1855 (12 Stat. at L. 927), and in accordance with an executive order of December 23, 1873, and that a patent therefor was issued and delivered to him on May 19, 1885; that he was then a member of the Tulalip tribe of Indians; that ever since that date he "has been and still is a citizen of the United States, and therefore subject to the laws of the territory and state of Washington;" that he "was born within the territorial limits of the United States and has always resided within such limits," and that therefore he was entitled to "all the rights, privileges, and immunities of said citizens of the United States."

This plea also alleged that the murdered woman was a citizen of the United States and the widow of one Chealco Peter, who, like the defendant, had received an allotment of land within the Tulalip Reservation, and a patent thereof similar to that of defendant; that she became entitled to her husband's allotment upon his death, and that the place of the commission of the offense was upon the very land allotted to said Chealco Peter, and without the jurisdiction of the court.

A demurrer by the government to the plea was overruled and judgment entered sustaining the plea.

A writ of error to this court was then sued out by the United States under authority of the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209).

Assistant Attorney General **Harr** argued the cause and filed a brief for plaintiff in error:

The United States has authority to define and punish crimes by or against Indians on reservations within the states.

United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; *Draper v. United States*, 164 U. S. 240, 41 L. ed. 419, 17 Sup. Ct. Rep. 107; *United States v. Thomas*, 151 U. S. 577, 38 L. ed. 276, 14 Sup. Ct. Rep. 426; *Bad Elk v. United States*, 177 U. S. 529, 44 L. ed. 874, 20 Sup. Ct. Rep. 729; *United States v. Bridleman*, 7 Sawy. 243, 7 Fed. 894; *United States v. Martin*, 8 Sawy. 473, 14 Fed. 817; *United States v. Barnhart*, 10 Sawy. 491, 22 Fed. 285.

Exemption from Federal jurisdiction is

not to be presumed in the absence of clear legislative provision.

Ruggles v. Illinois, 108 U. S. 526, 541, 27 L. ed. 812, 818, 2 Sup. Ct. Rep. 832; *Re Heff*, 197 U. S. 488, 499, 49 L. ed. 848, 853, 25 Sup. Ct. Rep. 506.

Citizenship is not inconsistent with continued Federal jurisdiction.

United States v. Logan, 105 Fed. 240; *United States v. Mullin*, 71 Fed. 682; *Rainbow v. Young*, 88 C. C. A. 653, 161 Fed. 836; *United States v. Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; *McKay v. Kalyton*, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. Rep. 346; *Beck v. Flournoy Live-Stock & Real-Estate Co.* 12 C. C. A. 497, 27 U. S. App. 618, 65 Fed. 30; *Farrell v. United States*, 49 C. C. A. 183, 110 Fed. 942; *Re Coombs*, 127 Mass. 278; *State ex rel. Tompton v. Denoyer*, 6 N. D. 586, 72 N. W. 1014; *State v. George*, 39 Or. 127, 65 Pac. 604.

The rule contended for does not deprive the allottee of any of the rights or privileges of citizenship.

United States v. Flournoy Live-Stock & Real-Estate Co. 69 Fed. 891; *Robertson v. Baldwin*, 165 U. S. 275, 282, 41 L. ed. 715, 717, 17 Sup. Ct. Rep. 326.

The offense in question was committed on an Indian reservation within the meaning of the act of March 3, 1885.

Couture v. United States, 207 U. S. 581, 52 L. ed. 350, 28 Sup. Ct. Rep. 259; *Eells v. Ross*, 12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 417; *United States v. Flournoy Live-Stock & Real-Estate Co.* 71 Fed. 579; *United States v. Mullin*, 71 Fed. 682; *Rainbow v. Young*, 88 C. C. A. 653, 161 Fed. 836.

No counsel appeared for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The fourth paragraph of the act of March 2, 1907, *supra*, authorizes a review of a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." The defendant in this case had not been put upon trial, therefore he had not been in jeopardy. The decision of the circuit court sustained the special plea in bar. This fourth paragraph differs from the two preceding, in that the review authorized by them is limited to cases in which "the decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded," while no such limitation appears in this paragraph. The full significance of this difference need not now be determined, but clearly the fourth paragraph gives to

this court a right to review the precise question decided by a trial court in sustaining a special plea in bar, although that decision may involve the application rather than the invalidity or construction, strictly speaking, of the statute upon which the indictment was founded.

The general provision of the statutes in reference to punishment of the crime of murder committed within the exclusive jurisdiction of the United States is found in chap. 3, title 70, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3625), as amended by the act of January 15, 1897 (29 Stat. at L. 487, chap. 29, U. S. Comp. Stat. 1901, p. 3620).

Section 9 of the act of March 3, 1885 (23 Stat. at L. 385, chap. 341), provides for the punishment of certain crimes by Indians, as follows:

284] **"That immediately upon and after the date of the passage of this act, all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any territory of the United States . . . and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."*

By this section, Indians committing against other Indians on a reservation in a state any of the crimes named are subject to Federal laws and tried in Federal courts.

That the offense was committed within the limits of the Tulalip Indian Reservation is distinctly charged in the indictment, and not challenged in the plea in bar. Although the defendant had received a patent for the land within that reservation, and although the murdered woman was the owner of another tract within such limits, also patented, both tracts remained within the reservation until Congress excluded them therefrom.

By the second clause of § 3, art. 4, of the Constitution, to Congress, and to it alone, is given "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." From an early time in the history of the government it has exercised this power, and has also been legislating concerning Indians occupying such territory. Without noticing prior acts, it is sufficient to refer to that of June 30,

1834 (4 Stat. at L. 729, chap. 161), the 1st section of which reads:

*"Be it enacted, . . . that all that part of the United States west of the Mississippi, and not within the states of Missouri and *Louisiana, or the territory [285 of Arkansas, and also that part of the United States east of the Mississippi river, and not within any state, to which the Indian title has not been extinguished, for the purposes of this act be taken and deemed to be the Indian country."*

Construing this section, it was decided, in *Bates v. Clark*, 95 U. S. 204, 209, 24 L. ed. 471, 473, that all the country described in the act as "Indian country" remains such "so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress." The section was repealed by Rev. Stat. § 5596 (U. S. Comp. Stat. 1901, p. 3750). Still, it was held that it might be referred to for the purpose of determining what was meant by the term "Indian country" when found in sections of the Revised Statutes which were re-enactments of other sections of prior legislation. *Ex parte Crow Dog* (*Ex parte Kang-Gi-Shun-Ca*) 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; *United States v. Le Bris*, 121 U. S. 278, 30 L. ed. 946, 7 Sup. Ct. Rep. 894. But the word "reservation" has a different meaning, for while the body of land described in the section quoted as "Indian country" was a reservation, yet a reservation is not necessarily "Indian country." The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, and, when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress. By the treaty of January 22, 1855 (12 Stat. at L. 927), known as the treaty of Point Elliott, it was provided that certain lands should be reserved for the "use and occupation of the Indians." And, further, article 3, "that the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians." On December 23, 1873, the President established the boundaries of the Tulalip Reservation in the territory of Washington. The tract subsequently *al- [286] lotted to defendant, as well as that upon which the crime was committed, are within the boundaries prescribed in this executive order. Article 7 of the treaty of Point El-

liot authorizes the President to set apart separate tracts within the reservation to such individuals or families as were willing to avail themselves of the privilege and locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. The treaty with the Omahas, March 16, 1854 (10 Stat. at L. 1043), provides for the location by an individual or family on land within the Omaha Reservation, its assignment for a permanent home, for the issue of a patent to such person or family, with conditions against alienation or leasing, exemption from levy, sale, or forfeiture, not to be disturbed by the state without the consent of Congress; and, further, that if the "person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment; . . . and, in default of their return, the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land." The patent issued to the defendant recites that it is issued under the provisions of the article referred to in the treaty with the Omaha Indians.

The plea does not challenge the continued tribal organization of the Tulalip Indians, or question that the tribe, as well as the general body of the reservation, continues under the general care of the United States. Indeed, at the time of the crime, the Tulalip Reservation was occupied by 453 Indians, under the charge of an Indian agent. Rep. Com. Ind. Affairs, 1906, pp. 377, 483. Thirteen thousand, five hundred and sixty acres have been allotted to ninety-four of these Indians, and the residue, 8,930 acres, 287] remains unallotted. *Rep. Com. Ind. Affairs, 1908, p. 162. The fact of the patent to Chealeo Peter is all that is claimed shows a want of jurisdiction of the United States over the place of the offense, but the conditions of the treaty with the Omahas, made by reference a part of the treaty with the Tulalip Indians, providing for only a conditional alienation of the lands, make it clear that the special jurisdiction of the United States has not been taken away.

Eells v. Ross (12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 417, circuit court of appeals of the United States for the ninth circuit) presented the question of the revocation of a reservation. The treaty with the Puyallup Indians [10 Stat. at L. 1132] contains like provisions as to alienation and

forfeiture as are in the treaty with the Omahas. 24 Stat. at L. 388, chap. 119. Circuit Judge McKenna, now Mr. Justice McKenna of this court, in delivering the unanimous opinion of that court, said (page 207):

"It is not disputed that the lands are a part of those set apart as the Puyallup Reservation, and that the reservation has not been directly revoked; but it is contended that the allotment of the lands in severalty, and afterwards making the Indians citizens, necessarily had the effect to revoke the reservation. There is plausibility in the argument, and it needs to be carefully considered. It is clear that the allotment alone could not have this effect (The Kansas Indians [Blue Jacket v. Johnson County] 5 Wall. 737, 18 L. ed. 667), and citizenship can only have it if citizenship is inconsistent with the existence of a reservation. It is not necessarily so. Some of the restraints of a reservation may be inconsistent with the rights of citizens. The advantages of a reservation are not; and if, to secure the latter to the Indians, others not Indians are excluded, it is not clear what right they have to complain. The act of 1887, which confers citizenship, clearly, does not emancipate the Indians from all control, or abolish the reservations."

Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399, does not conflict with *these views, for there the [288 place of the offense was the village of Culusac, which although within the boundaries of the Nez Percé Reservation, as at first established, was located upon lands passed by patent from the United States under the town site laws to the probate judge of Nez Percé county, and by the town site act such location could only be on public lands. Rev. Stat. § 2380, U. S. Comp. Stat. 1901, p. 1455.

But it is contended that although the crime may have been committed on an Indian reservation, yet it does not come within the last sentence of § 9 of the act of March 3, 1885, supra, by reason of the fact that both defendant and the woman murdered held patents from the United States, and *Re Hell*, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506, is cited as authority. But there are these important differences between the two cases. In that, the person to whom the defendant sold liquor (the charge being that of selling liquor to an Indian) had received a patent under the provisions of the act of Congress of February 8, 1887, known as the general allotment act (24 Stat. at L. 388, chap. 119), whereas the patents in this case were issued under the authority of the treaty with the Omahas, March 16, 1854, supra, and the treaty

of Point Elliott, January 22, 1855, *supra*. It also appeared that the sale was made not on any reservation, while here the murder was committed within the limits of one.

Section 5 of the act of February 8, 1887, provides "that upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor," etc. Section 6 is as follows:

"Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its [289] jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States, to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

It will be seen that the first sentence of the latter section, which provides that the allottees shall be "subject to the laws, both civil and criminal, of the state or territory in which they may reside," applies to allotments and patents made under the authority of that act, whereas the other sentence refers to allotments made under the act of 1887, or under any law or treaty, and in respect to the allottee it is provided only that he "is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens." In other words, so far as the plea is concerned, it is only that Celestine was a citizen of the United States, and entitled to all the rights, privileges, and immunities of such citizenship.

We assume, without deciding, that although Celestine was born within the territorial limits of the United States, he was not, under the 1st section of the 14th Amendment, a citizen of the United States
54 L. ed.

prior to the issue of the patent to him; that the jurisdiction of the United States was over the tribe of which he was a member, and not over him personally; so that, by the act of 1887, he was given a citizenship in the United States and in the state which did not theretofore belong to him. But, although made a citizen of the *United [290 States and of the state, it does not follow that the United States lost jurisdiction over him for offenses committed within the limits of the reservation. We had occasion in *Re Heff*, *supra*, to notice the fact that the first dealings with Indians were with them as tribes, but that of late there had been a change in the policy, and a disposition to put an end to tribal organization, and give to them as individuals all the rights of citizenship, saying (p. 499):

"Of late years a new policy has found expression in the legislation of Congress,—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship, and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may, at any time, abandon its guardianship, and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear, the question is at an end."

Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of a reservation; at any rate, it cannot be said to be clear that Congress intended, *by the mere grant of citizen- [291 ship, to renounce entirely its jurisdiction over the individual members of this dependent race. There is not in this case in terms a subjection of the individual Indian to the

laws, both civil and criminal, of the state; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States.

The act of May 8, 1906 (34 Stat. at L. 182, chap. 2348), extending to the expiration of the trust period the time when the allottees of the act of 1887 shall be subject to state laws, is worthy of note as suggesting that Congress, in granting full rights of citizenship to Indians, believed that it had been hasty. See, upon the general questions discussed, *United States v. Mullin*, 71 Fed. 682; *Rainbow v. Young*, 88 C. C. A. 653, 161 Fed. 835; *State v. Columbia George*, 39 Or. 127, 65 Pac. 604, *Re Columbia George*, 201 U. S. 641, 50 L. ed. 901, 26 Sup. Ct. Rep. 759; *Couture v. United States*, 207 U. S. 581, 52 L. ed. 350, 28 Sup. Ct. Rep. 259; *Toy Toy v. Hopkins*, 212 U. S. 542, 53 L. ed. 644, 29 Sup. Ct. Rep. 416.

The judgment is reversed.

UNITED STATES, Plff. in Err.,

HARVEY SUTTON and Robert Miller.

(See S. C. Reporter's ed. 291-296.)

Appeal — by government in criminal case.

1. The decision of a Federal district court sustaining a demurrer to an indictment for introducing liquor into the Indian country is reviewable in the Federal Supreme Court by writ of error, under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1909, p. 220), where the question whether the indictment charges any offense against the United States involves the validity of the act of January 30, 1897 (29 Stat. at L. 506, chap. 109), as applied to the facts stated.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

Indians — congressional control — introducing liquor on allotted land.

2. Congress could enact so much of the act of January 30, 1897, as makes criminal the introduction of intoxicating liquor upon an allotment within the limits of the Yakima Indian Reservation, in the state of Washington, made and patented to the Indian allottee under the act of February 8, 1887 (24 Stat. at L. 388, chap. 119), by which the title is held in trust by the government, and is not alienable by the allottee without the consent of the United States, since, under the provisions with respect to

Washington of the enabling act of February 22, 1889 (25 Stat. at L. 677, chap. 180), § 4, jurisdiction and control of Indian lands remain in the United States.

[For other cases, see Indians, 54-61, in Digest Sup. Ct. 1908.]

[No. 312.]

Submitted October 15, 1909. Decided December 20, 1909.

IN ERROR to the District Court of the United States for the Eastern District of Washington to review a judgment sustaining a demurrer to an indictment charging the introduction of liquor upon an allotment within the limits of the Yakima Indian Reservation, in the state of Washington. Reversed.

See same case below, 165 Fed. 253.

Statement by Mr. Justice Brewer:

The defendants were indicted in the district court of the United States for the eastern district of Washington for introducing liquor into the Indian country, as thus stated in the indictment:

"To wit, into and upon a certain Indian allotment No. 670, within the limits of the boundary of the Yakima Indian Reservation, in the eastern district of Washington, which said allotment had theretofore been allotted to a certain Indian, a member of the Yakima tribe of Indians, named George Wesslike, under and by virtue of the provision of the act of Congress of February 8, 1887, entitled, 'An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations, and to Extend the Protection of the Laws of the United States and the Territories over the Indians, and for Other Purposes' (24 Stat. at L. 388, chap. 119), said allotment being then and now one held in trust by the government for said allottee, and being inalienable by the said allottee without the consent of the United States."

A demurrer was filed, and on that demurrer the following facts were agreed to:

"1. That the Yakima Indian Reservation, in the eastern district of Washington, is inhabited by the Yakima and other Indians, under the general charge and control of an Indian agent and superintendent of the United States.

"2. That prior to September 3, 1908, a very large number of allotments of land within said reservation had been made to Indians entitled thereto, which said allotments had been made and allotted under and by virtue of the provision of the act of Congress of February 8, 1887, known as the general allotment act.

"3. That allotment No. 670, described in

NOTE.—On the right of a state to appeal in a criminal case—see note to *People ex rel. Hodson v. Miner*, 19 L.R.A. 342.

As to the right of the Federal government to a review in criminal cases—see note to *United States v. Stevenson*, ante, 153.

the indictment, is a part of and within the 293] boundaries of the Yakima Indian Reservation, and the same had been made and allotted, and the usual trust patent thereto issued to the allottee named in the indictment under the provision of the act of February 8, 1887, prior to September, 1908.

"4. That the trust limitation has not yet expired, and the title to said allotment is still being held in trust by the government; that the title to said allotment is not alienable by the allottee without the consent of the United States.

"5. That on or about September 3, 1908, the defendants did go on and upon said allotment described in the indictment, taking and carrying with them certain ardent spirits and intoxicating liquor, to wit, alcohol, in a demijohn and flasks."

The indictment was founded on the act of January 30, 1897 (29 Stat. at L. 506, chap. 109), which provides:

"That . . . any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense, and not less than two hundred dollars for each offense thereafter."

The Yakima Reservation was established under the treaty of June 9, 1855 (12 Stat. at L. 951), which, in article 2, provides:

"All which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent.

* * * * *

294] "Article VI. The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas 54 L. ed.

[10 Stat. at L. 1044], so far as the same may be applicable."

The demurrer was sustained, and thereupon the government brought the case here on writ of error under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1909, p. 220).

Assistant Attorney General Harr submitted the cause for plaintiff in error:

The question as to the power of Congress to forbid the introduction of liquor upon an Indian allotment within the general jurisdiction of a state is concluded, adversely to the ruling of the district court, by the decision of this court in *Couture v. United States*, 207 U. S. 581, 52 L. ed. 350, 28 Sup. Ct. Rep. 259.

In line with the ruling of the court in the *Couture Case* are its decisions with respect to the jurisdiction of Congress over the public lands within the states.

Gibson v. Chouteau, 13 Wall. 92, 99, 20 L. ed. 534, 536; *Jourdan v. Barrett*, 4 How. 169, 185, 11 L. ed. 924, 931; *Camfield v. United States*, 167 U. S. 518, 525, 42 L. ed. 260, 262, 17 Sup. Ct. Rep. 864.

The government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it.

Ex parte Siebold, 100 U. S. 371, 395, 25 L. ed. 717, 725; *Re Neagle*, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

In *Ohio v. Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453, it was held that the state could not, in the exercise of its police powers, interfere with the administration of a national soldiers' home within its limits and general jurisdiction.

The matter of motive cannot be inquired into by the courts when Congress is acting in the exercise of its constitutional powers.

McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561.

The power here contended for is illustrated by the recognized authority of Congress to regulate the use of the mails in such a manner as to protect the people against fraud and other injuries.

Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789.

The adequate protection of Indians who have received allotments, as well as of those unallotted, against the deleterious influence of intoxicants, requires that the government also prohibit the introduction of liquor upon the allotted lands within the reservation.

United States v. Mullin, 71 Fed. 682; Rainbow v. Young, 88 C. C. A. 653, 161 Fed. 835; United States v. Logan, 105 Fed. 240; Re Lincoln, 129 Fed. 247; Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399.

No appearance for defendants in error.

Mr. Justice Brewer delivered the opinion of the court:

The question whether the indictment charges any offense against the laws of the United States involves the validity of the act of January 30, 1897, as applied to the facts stated, and therefore the case is one properly before us under the act providing for writs of error in certain instances in criminal cases. 34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1909, p. 220; United States v. Keitel, 211 U. S. 370, 397, 53 L. ed. 230, 244, 29 Sup. Ct. Rep. 123.

We have recently considered, in United States v. Celestine, 215 U. S. 278, ante, 93, 30 Sup. Ct. Rep. 93, the question of the jurisdiction of the United States over offenses committed within the limits of a reservation, as also the effect of allotments therein upon its continued existence, and further discussion of those matters is unnecessary. The limits of the Yakima Reservation were not changed by virtue of the allotments that are referred to in the 295] stipulation *of facts. The lands allotted were subject to restrictions against alienation, and the title which was conferred by the allotments was subject to defeasance. Sixth section treaty with the Omahas, 10 Stat. at L. 1043-1045; United States v. Celestine. The offense charged was not one committed by a white man upon a white man (United States v. McBratney, 104 U. S. 621, 26 L. ed. 869; Draper v. United States, 164 U. S. 240, 41 L. ed. 419, 17 Sup. Ct. Rep. 107), or by an Indian upon an Indian (United States v. Celestine), but it was the introduction of liquor into an Indian reservation. In this offense neither race nor color is significant. The Indians, as wards of the government, are the beneficiaries, but for their protection the prohibition is against all, white man and Indian alike. Legislation of this nature has been for a long time in force. Fourth sec., chap. 174, Laws 1832, 4 Stat. at L. 564; § 2139, Rev. Stat. If the Yakima Reservation were within the limits of a territory, there would be no question of the validity of the statute under which this indictment was found; but the contention is that the offense charged is of a police nature, and that the full police power is lodged in the state, and by it alone can such offenses be punished. By the second paragraph of § 4 of the enabling act with respect to the state of Wash-

ington (25 Stat. at L. 677, chap. 180), the people of that state disclaimed all right and title "to all lands lying within said limits owned or held by any Indian or Indian tribes; and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Construing this, in connection with other provisions of the enabling act, it was held in Draper v. United States, supra, that it did not deprive the state of jurisdiction over crimes committed within a reservation by others than Indians or against Indians, following, in this, United States v. McBratney, supra. But, in terms, "jurisdiction and control" over Indian lands remain in the United States; and there being nothing in the *section with- [296 drawing any other jurisdiction than that named in Draper v. United States undoubtedly Congress has the right to forbid the introduction of liquor, and to provide punishment for any violation thereof. Couture v. United States, 207 U. S. 581, 52 L. ed. 350, 28 Sup. Ct. Rep. 259. It is true that only a *per curiam* opinion was filed in that case, and the judgment was affirmed on the authority of United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; McKay v. Kalyton, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. Rep. 346, but an examination of the record shows that its facts are similar to those in the present case. See also an opinion by Shiras, District Judge, in United States v. Mullin, 71 Fed. 682, and one by Circuit Judge Van Devanter, speaking for the circuit court of appeals for the eighth circuit, in Rainbow v. Young, 88 C. C. A. 653, 161 Fed. 835.

Without pursuing the discussion further, we are of opinion that the District Court erred in its ruling, and the judgment is reversed.

BOARD OF COUNTY COMMISSIONERS
OF SANTA FE COUNTY et al., Appts.,
v.

TERRITORY OF NEW MEXICO EX REL.
BIRD S. COLER and E. T. Chapman.
(No. 42.)

BOARD OF COUNTY COMMISSIONERS
OF SANTA FE COUNTY et al., Appts.,
v.

TERRITORY OF NEW MEXICO EX REL.
BIRD S. COLER and E. T. Chapman.
(No. 43.)

(See S. C. Reporter's ed. 296-307.)

Mandamus — to enforce judgment —
defenses — *res judicata*.

1. Any uncertainty or indefiniteness in
215 U. S.

an act of Congress purporting to validate bonds issued by Santa Fe county, New Mexico, cannot be urged to defeat mandamus to compel the levy of a tax to pay judgments upon such bonds, since whatever defense could have been set up to prevent the rendition of such judgments is not afterwards available to prevent their enforcement.

[For other cases, see *Mandamus*, III. f; *Judgment*, 528-535, in *Digest Sup. Ct.* 1908.]

Mandamus — necessity for hearing.

2. A peremptory writ of mandamus may, by the express provisions of N. M. Comp. Laws 1897, § 2764, issue without hearing when the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it.

[For other cases, see *Mandamus*, III., in *Digest Sup. Ct.* 1908.]

Mandamus — demand.

3. A demand is not necessary before bringing suit by mandamus to compel a board of county commissioners to levy a tax to satisfy judgments on county bonds, where it is averred that it is clearly the purpose of the board not to perform the duty imposed upon it by such judgments.

[For other cases, see *Mandamus*, III., in *Digest Sup. Ct.* 1908.]

Mandamus — to enforce judgment on county bonds — defense — change of county boundary.

4. Mandamus to compel the board of county commissioners of Santa Fe county, New Mexico, to levy a tax to satisfy judgments on county bonds, will not be denied because portions of that county have since been annexed to two adjoining counties, where the territorial supreme court has construed N. M. Laws 1903, chap. 20, as authorizing Santa Fe county to compel contribution from the two other counties which have received a portion of its territory, in proportion to the amount of taxable property received.

[For other cases, see *Mandamus*, 165-200, 237-243, in *Digest Sup. Ct.* 1908.]

Appeal — from territorial supreme court — error in construing statute.

5. The construction placed by a territorial supreme court upon a local statute will not be disturbed by the Federal Supreme Court on appeal, unless manifestly erroneous.

[For other cases, see *Appeal and Error*, 4994, 4995; *Courts*, VII. e, in *Digest Sup. Ct.* 1908.]

Mandamus — parties.

6. Counties which have received a portion

of the territory of Santa Fe county, New Mexico, are not necessary parties to proceedings by mandamus to compel the levy of a tax to satisfy judgments on bonds issued by the latter county, where, under N. M. Laws 1903, chap. 20, as construed by the territorial supreme court, the county of Santa Fe can compel contribution from the other counties which have received a portion of its territory, in proportion to the amount of taxable property received.

[For other cases, see *Mandamus*, II. b, 2, in *Digest Sup. Ct.* 1908.]

Mandamus — to enforce judgment on county bonds — sufficiency of tax levy.

7. A tax levy cannot be deemed sufficient to pay the judgments on county bonds, so as to defeat the right to mandamus to compel the levy of an additional tax for that purpose, where the original levy was with the purpose only, and was sufficient only, to pay the then amount of the judgments with accrued interest, and no provision was made for the interest to accrue, which amounted to a large sum when the mandamus issued.

[For other cases, see *Mandamus*, 165-200, 237-243, in *Digest Sup. Ct.* 1908.]

Mandamus — to enforce judgment on county bonds — tax rate.

8. The tax levy ordered by mandamus to satisfy the accrued interest, amounting to more than \$30,000, on judgments on county bonds, cannot be said to be excessive when, upon the presumed assessed valuation of the property in the county, it would produce, if collected in full, an excess of little more than \$100, and where, since the writ issued, additional interest to the amount of \$10,000 has accrued.

[For other cases, see *Mandamus*, 165-200, in *Digest Sup. Ct.* 1908.]

Appeal — rendering modified judgment — mandamus.

9. Power to modify, on appeal, a judgment of a district court in mandamus, is included in the grant to the New Mexico supreme court by N. M. Comp. Laws 1897, § 897, of the authority to render such other judgment as may be right and just and in accordance with law in cases which may have been tried by the equity side of the court, or which may have been tried by a jury on the common-law side of the court, or in which a jury may have been waived and the case tried by the court or judge.

[For other cases, see *Appeal and Error*, IX. d, in *Digest Sup. Ct.* 1908.]

NOTE.—On the right to go behind a judgment against county or municipality in mandamus proceedings to enforce the judgment—see note to *Brunson v. Caskie*, 9 L.R.A. (N.S.) 1002.

On mandamus to levy tax to enforce municipal obligation—see notes to *Holt County v. National L. Ins. Co.* 25 C. C. A. 475, and *Davenport v. United States*, 19 L. ed. U. S. 704.

On review by Federal Supreme Court of territorial decisions—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

54 L. ed.

As to state decisions as rules of decision in Federal courts—see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553; *Griffin v. Overman Wheel Co.* 9 C. C. A. 548; *Elmendorf v. Taylor*, 6 L. ed. U. S. 290; *Jackson ex dem. St. John v. Chew*, 6 L. ed. U. S. 583; *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490; *Clark v. Graham*, 5 L. ed. U. S. 334; *Forcpaugh v. Delaware, L. & W. R. Co.* 5 L.R.A. 508; and *Mitchell v. Burlington*, 18 L. ed. U. S. 351.

Federal courts — following territorial decisions — local practice.

10. The question of the power of a territorial supreme court, under its local statutes and procedure, to render a modified judgment on appeal in mandamus, will ordinarily not be reviewed by the Federal Supreme Court.

[For other cases, see Courts, VII. e, in Digest Sup. Ct. 1908.]

[Nos. 42, 43.]

Submitted November 29, 1909. Decided December 20, 1909.

A PPEALS from the Supreme Court of the Territory of New Mexico to review judgments modifying, and affirming as modified, judgments of the District Court of Santa Fe county, in that territory, compelling the levy of a tax to satisfy judgments recovered on bonds issued by that county. Affirmed.

See same case below (N. M.) 89 Pac. 252. The facts are stated in the opinion.

Mr. A. B. Renchan submitted the cause for appellants:

There should have been demand before suit.

Spelling, Inj. & Extr. Rem. §§ 1381, 1447; State ex rel. White v. Goodfellow, 1 Mo. App. 495.

The action should have been directed against the treasurer, and not against the county board.

Bass v. Taft, 137 U. S. 458, 34 L. ed. 752, 11 Sup. Ct. Rep. 154; Ex parte Rowland, 104 U. S. 615, 26 L. ed. 865.

Where the facts are disputed, a peremptory writ cannot issue in the first instance.

13 Enc. Pl. & Pr. p. 772.

The relator's right to an immediate peremptory writ must be clear before it will issue, and it must appear that the respondent has no valid excuse for not performing the act sought to be compelled.

13 Enc. Pl. & Pr. pp. 773-775.

If an issue of fact is probable, an alternative, not a peremptory, writ should issue.

13 Enc. Pl. & Pr. p. 775, note 3.

There is no statute in this territory providing for jury trials in mandamus proceedings. The common-law procedure governs.

State ex rel. Columbia County v. Suwannee County, 21 Fla. 19; Castle v. Lawlor, 47 Conn. 340.

The remedy given by the statute, § 343, Compiled Laws of 1897, is exclusive.

Fourth Nat. Bank v. Franklyn, 120 U. S. 751, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; 7 Enc. Pl. & Pr. pp. 372, 373, notes 1, 2.

Pleading upon information and belief is

insufficient where the pleader is presumed to have knowledge of the fact.

Jones v. Pearl Min. Co. 20 Colo. 423, 38 Pac. 700; Nichols & S. Co. v. Hubert, 150 Mo. 620, 51 S. W. 1031.

The rule of *res judicata* is not pertinent.

Atchison, T. & S. F. R. Co. v. Territory, 11 N. W. 669, 72 Pac. 14; United States v. County Ct. 99 U. S. 591, 25 L. ed. 333; Taxing Dist. v. Loague, 129 U. S. 502, 32 L. ed. 780, 9 Sup. Ct. Rep. 327.

Mr. Charles A. Spicess submitted the cause for appellees:

Mandamus is the proper remedy of a judgment creditor to collect a judgment against a county or municipal corporation.

Mobile v. Watson, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. Rep. 398; East St. Louis v. Amy, 120 U. S. 600, 30 L. ed. 798, 7 Sup. Ct. Rep. 739.

Mandamus to enforce the payment of a county or municipal judgment is not a new suit, but becomes a substitute for the ordinary process of execution.

Washington County v. Durant (Washington County v. United States) 9 Wall. 415, 19 L. ed. 732.

If the board of county commissioners had any valid defense which could have been asserted against the bonds or coupons, such defense could not be of avail in this proceeding. The judgments are *res judicata* as to such defense, and cannot be impeached in this collateral manner.

Rock Island County v. United States, 4 Wall. 435, 18 L. ed. 419.

Mr. Justice McKenna delivered the opinion of the court:

These appeals are prosecuted to review judgments of the supreme court of New Mexico, modifying, and affirming as modified, judgments of mandamus of the district court of Santa Fe county, commanding the appellants to levy a tax of 10 mills in each case on each dollar of taxable property in the county, to pay certain judgments for the amount of principal and interest upon bonds issued by the county. The cases are here on separate records, but, as they are submitted together, we dispose of them, as the supreme court of the territory did, in one opinion.

The proceedings were commenced by petitions, which are alike, except as to the amount of the judgment recovered. In No. 42 it is alleged to be \$60,926.02; in No. 43 it is alleged to be \$74,358.19. Both judgments were recovered in the district court of the county in which the petitioners (appellees here) were complainants and the board of county commissioners were defendants. It is alleged that the judgments ordered the sums due as above stated, and

the interest thereon to become due at 5 per cent per annum from the date of the judgments, "to be assessed and levied upon and out of the taxable property situate in the said county of Santa Fe, and to cause the same to be collected in the manner provided by law, and to pay the same out of the treasury of said county to the said complainants, their legal representatives or assignees, upon the delivery of a proper voucher therefor." Default in the payment of each of the judgments and its requirements is alleged, and that the board held a meeting during the month of July or August, 1905, [300] and made a levy *for various territorial purposes, but "wholly failed and refused to make any levy whatsoever, and still fail and refuse to make any levy whatsoever, for the said year of 1905, for the purpose of raising funds to pay the aforesaid judgment, and interest and cost thereon." The want of a plain, speedy, and adequate remedy at law is also alleged. Peremptory writs of mandamus were issued without a hearing.

Subsequently the appellants filed a petition in each case in the district court, and prayed "that the peremptory order be suspended herein, and that they be permitted to show cause and be heard before the order and writ are made permanent."

To sustain this prayer they alleged that, at the date of the rendition of the judgments of appellees, all of the property within the county of Santa Fe subject to taxation was liable for the payment of its *pro rata* of the judgments; that the thirty-fifth legislative assembly "eliminated" portions of Santa Fe county, and attached them respectively to the county of Rio Arriba and the county of Torrance, and made them subject to their proportions of the indebtedness of Santa Fe county; that the taxable property situate therein is liable for its part of the indebtedness; that the county commissioners are without jurisdiction to levy and assess taxes upon it, and that the peremptory writs include only "the property and territory within the present boundaries" of Santa Fe, and do not pretend to include that in Rio Arriba and Torrance; that by a mandamus issued out of the district court on the 25th day of January, 1901, the county commissioners were required to levy a tax upon the taxable property in Santa Fe sufficient in amount to produce a sum of \$135,284.19, with interest thereon from the 24th of September, 1900, until paid, at 5 per cent per annum, and \$30 costs, the said sum being for the amount of the judgments in cases 4091 and 4092 of the district court of Santa Fe county; that the board obeyed the writ, and levied 82 mills on each dollar of taxable valuation, and

*certified the same to the treasurer [301 and *ex officio* tax collector of the county, and directed him to place the same on the tax rolls and collect in the manner provided by law; that the levy is still standing on the tax rolls of the county, and is a lien upon the taxable property of the county as then existing, and subject to the payment of the judgments; that the commissioners are without authority to enforce the same, and that the levy is ample and sufficient to cover the amount of the judgments in cases Nos. 4091 and 4092, and that the levy of 10 mills in each case is largely in excess of the amount required, and is "unjust and unfair" to the taxpayers of the county of Santa Fe, and ruinous to its "progress and prosperity." It is alleged that the board is entitled to be heard on the amount of levy, or whether any levy should be ordered, as there exists a legal and adequate levy to cover the judgments; that it is impossible to determine the amount of levy necessary to be made for the year succeeding 1905 until the tax roll for that year has been completed and the amount of taxable property determined; that the board should not be held in default until the time shall arrive when the levy can be made, and they shall have failed to perform their duty; that the levy of the tax, as required by the writ, is not one which the law "enjoins as a duty resulting from an office, trust, or station," because the levy of 82 mills, when collected, will be sufficient to pay the judgments, and that it is not a duty of the board to collect it, but "the duty of the treasurer and *ex officio* tax collector of Santa Fe county." It is alleged appellees have a plain, speedy, and adequate remedy at law.

As an additional ground of the motions, it is alleged that the act of Congress, by which the bonds are "pretended to have been validated, approved, and confirmed is indefinite, uncertain, and incapable of reasonable interpretation and enforcement, so as to be applied to any bonds issued by the county of Santa Fe," and does not sufficiently identify what bonds are intended to be validated, approved, and confirmed; *nor [302 what holders of the bonds, it being alleged that they "are subjects of different ownership and are not all in the hands of one person, and it cannot be determined from the said act of Congress what holder of said bonds, in excess of the amount named in the said act of Congress, shall not have the benefits of validation." And further, that at the time of the passage of the act of Congress there was more than one refunding act in force in the territory, but what refunding act is referred to by the act of Congress is not disclosed.

The motions to suspend the peremptory writs were denied, and the orders denying them were affirmed by the supreme court of the territory. The latter court, however, modified the writs, as will be presently pointed out.

The assignments of error in the supreme court of the territory repeated and emphasized the grounds urged in the motions to suspend the peremptory writs of mandamus. In this court the modification of the judgments by the supreme court of the territory is attacked and some new contentions are made.

The case is submitted on briefs, and we shall not attempt to trace an exact correspondence of the arguments of appellants with the assignments of error, nor, indeed, shall we follow the details of the argument, but consider those matters only which we think can in any way affect the merits of the controversy. It will be observed in the beginning that the writs of mandamus issued by the district court are but the execution by it of its judgments of the 24th of September, 1900, the amounts of which the board of commissioners were ordered to assess against the taxable property of the county and pay the same. We may say, therefore, at the outset, that whatever could have been urged to prevent the rendition of the judgments cannot now be urged to prevent their enforcement. This disposes of the defense made against the orders under review, that the act of Congress validating the bonds is uncertain and indefinite, even if it had merit otherwise. The objections that are urged against the act of 303] Congress are *that it cannot be understood from it what refunding act is referred to, there being two, it is contended, or whether all of the bonds issued under it have been validated or only an amount thereof not exceeding \$172,500, and, if no more than \$172,500, which bonds have been validated. And it is urged further that there is no identification of what holders of the bonds in excess of the amount named in the act of Congress shall not have the benefits of the validation. Manifestly, such defenses should have been set up in the original actions, and are now precluded by the judgments therein rendered. It is established by the judgments that the amount of bonds issued was in accordance with the act of Congress, and was not excessive in amount, and also that the plaintiffs in the action (appellees here) were legal owners of such bonds, and entitled to the "benefits of validation." *Murphy v. Utter*, 186 U. S. 95, 113, 46 L. ed. 1070, 1079, 22 Sup. Ct. Rep. 776. The appellants, therefore, are confined to the other objections urged by them.

The principal of these objections is that

peremptory writs should not have been issued without a hearing, and that there should have been a demand made of the commissioners before suit. As to the first, it may be said that it probably appeared to the district court that the board could have no possible excuse, and in such case a peremptory writ is authorized in the first instance by the laws of the territory. By § 2764 of the Compiled Laws of New Mexico for the year 1897, it is provided that "when the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory [writ of] mandamus may be allowed in the first instance."

The second ground is also untenable. The original judgments expressed the obligation of the board. They imposed the duty of levying taxes to pay them, and it is alleged that the board had levied taxes for other territorial and county purposes, but had failed and refused to make any levy whatever to pay the judgments. In other words, it is averred that it is clearly the purpose of the board not to perform the *duty [304 imposed upon it. In such a case no demand is necessary. *Northern P. R. Co. v. Washington Territory*, 142 U. S. 508, 35 L. ed. 1098, 12 Sup. Ct. Rep. 283.

We are therefore brought to the consideration of the sufficiency of the excuses which the board made in its motions to suspend the writs. We may briefly repeat them: (1) that portions of Santa Fe county were attached to other counties, which portions are subject to the payment of the judgments, and that the board is without jurisdiction over them; (2) that a levy of 82 mills had been made, which is a lien upon the property of Santa Fe county "as then existing," and that the board is without authority to enforce the collection of the levy; (3) that the levy of 20 mills (10 in each case) is excessive; (4) that the board was entitled to be heard as to the amount of the levy, or whether any levy was necessary, "there existing upon the tax rolls a legal and adequate levy to cover" the judgments, which it is the duty of the tax collector to collect; (5) that it was impossible to determine the amount of the levy necessary for the year succeeding the year 1905 until the rolls for that year had been completed and the amount of taxable property determined; (6) that the board is not in default, and should not be held liable until in default.

The district court evidently considered that these excuses were without substantial merit, and such also was the view of the supreme court of the territory. To the first, that is, that the portions of Santa Fe county which had been segregated from

it should have been included in the writs, it was replied by the supreme court that it was provided by chapter 20 of the Session Laws of 1903 that such segregated portions were required to contribute their just proportion to the bonded debt of Santa Fe, that provision was made for assessment, levy, and collection of such proportion by the officers of the new county upon the order of the old county, and that the money collected should be paid into the treasury of the old county. It was therefore decided that the county of Santa Fe could "compel contribution from the two other counties" *which had received a portion of its territory, in proportion to the amount of taxable property received, and this is the method provided by law." This view of the statute is not directly attacked by appellants, and, if it may be said that the general argument is a criticism of it, the answer is what was said in *English v. Arizona*, 214 U. S. 359, 363, 53 L. ed. 1030, 1033, 29 Sup. Ct. Rep. 658, that "unless in a case of manifest error, this court will not disturb a decision of the supreme court of the territory construing a local statute." Chapter 20 of the Session Laws of 1903 is an answer also to other contentions of appellants. If the county of Santa Fe is primarily liable for the bonds, she is the proper party to an action upon them, and through her officers the payment of the judgments recovered can be enforced. The contention of appellants, therefore, that the counties of Rio Arriba and Torrance are "necessary parties to a complete determination of the case," is untenable, as indeed all other contentions that are based upon the addition to those counties of portions of Santa Fe county.

The most serious contentions of appellants are that the levy of 82 mills was sufficient to pay the judgments, interest and costs, and that the levy of 20 mills in addition was excessive. We think, however, that the reply made by the supreme court of the territory adequately disposed of them. The learned court pointed out that the resolution of the board of county commissioners, a copy of which appears in the record, showed that the levy of 82 mills had the purpose only, and was sufficient only, to pay the then amount of the judgments, together with interest. It was further pointed out that the interest to accrue was not provided for, and that it amounted on the day when the peremptory writs of mandamus were issued to \$32,874.05. It follows necessarily, as the court said, that the contention that the 82 mills levied was sufficient "is unfounded and untrue in fact." To the contention that the 20 mills levied are excessive, in that they are more than

sufficient to pay \$32,874.05, the court replied that, if this were so, the "per-emptory writs should not have been issued. But, the court added, it is not shown that the assessable value of property in Santa Fe county has increased, while it does appear, on the other hand, that portions of the county had been cut off; therefore, it was said, it is fair to presume "that the assessed valuation of the county is not in excess of what it was in 1901, when the 82 mills levy was made." From this presumption it was concluded that 20 mills would produce, if collected in full, \$32,996, an excess only of \$112.05. And it was observed that since the peremptory writs were issued interest had accrued to the amount of \$10,000.

The writs required not only the levy of 20 mills for the year 1905, but for each and every year thereafter, and until the judgments, with interest and costs, be paid. This the supreme court pronounced error, and modified the judgments by striking out the requirements for a continuous levy. This appellants assign as error, contending that the supreme court had no jurisdiction to modify the judgments of the lower court, and that, by doing so, it changed the "theory and cause of action." The argument to sustain the contention is somewhat roundabout. Exclusive original jurisdiction in mandamus, it is said, is conferred on the district court by § 2771 of the laws of the territory, and, while an appeal lies to the supreme court as in other civil actions (§ 2772), that the power of the court to modify the judgment of a district court, given by § 897,† does not extend to a judgment.

†"In all cases now pending in the supreme court, or which may hereafter be pending in the supreme court, and which may have been tried by the equity side of the court, or which may have been tried by a jury on the common-law side of the court, or in which a jury may have been waived and the case tried by the court or the judge thereof, it shall be the duty of the supreme court to look into all the rulings and decisions of the court which may be apparent upon the records, or which may be incorporated in a bill of exceptions, and pass upon all of them and upon the errors, if any shall be found therein, in the ruling and decisions of the court below, grant a new trial or render such other judgment as may be right and just and in accordance with law; and said supreme court shall not decline to pass upon any question of law or fact which may appear in any record, either upon the face of the record or in the bill of exceptions, because the cause was tried by the court or judge thereof without a jury, but shall review said cause in the same manner and to the same extent as if it had been tried by a jury."

307] ment in *mandamus. The jurisdiction of the supreme court, it is urged, "was simply to affirm or reverse and remand." This, it will be observed, is very general. It would seem even to imply that the supreme court has not even the power of direction, but must leave the district court to get right ultimately through successive judgments, appeals, and reversals. And the anomaly is attempted to be sustained by saying that mandamus is not included in the useful power given to the supreme court by § 897 in cases taken to it to "render such other judgment as may be right and just and in accordance with law," because, it is said, that mandamus "is not a case on the equity side of the court, nor is it one tried on the law side with a jury, nor is it one in which a jury has been waived and trial had by the court or judge, especially as concerns the present proceeding." This is a misunderstanding of the statute. Its purpose is to not only give the power to review, but to prevent its defeat through the distinction between causes of action and modes of trial. Further argument is unnecessary. Even if the contention had grounds of support, it would be answered by the case of *English v. Arizona*, supra, and the case of *Armijo v. Armijo*, 181 U. S. 561, 45 L. ed. 1002, 21 Sup. Ct. Rep. 707. In the latter case we said that practice "in the courts of a territory is based upon local statutes and procedure, and we are not disposed to review the decision of the supreme court in such cases. *Sweeney v. Lommre*, 22 Wall. 208, 22 L. ed. 727." Of the other contentions of appellants, it is enough to say that they are without merit.

Judgments affirmed.

308] *ILLINOIS CENTRAL RAILROAD COMPANY OF THE STATE OF ILLINOIS, Plff. in Err.,

v.

ROBERT W. SHEEGOG, Administrator of the Estate of John E. Sheegog, Deceased.

(See S. C. Reporter's ed. 308-331.)

Removal of causes—fraudulent joinder—sufficiency of petition.

Allegations in the removal petition that the lessor railway company and the conductor of the train were fraudulently joined as party defendants solely for the purpose of preventing a removal to a Federal circuit court for diverse citizenship, of an action commenced in a Kentucky court,

NOTE.—On fraudulent joinder to prevent removal of cause to Federal court—see notes to *Boatmen's Bank v. Fritzlen*, 22 L.R.A. (N.S.) 1235, and *Offner v. Chicago & E. R. Co.* 78 C. C. A. 362.

against the nonresident railway company exclusively operating the road, to recover for the death of an engineer, caused by the alleged negligent operation of the train and the defective condition of the road, are not sufficient to entitle the petitioner to the removal of the cause, where, in Kentucky, the facts alleged and proved against the lessee railway company in the state court made its lessor jointly liable as a matter of law.

[For other cases, see *Removal of Causes*, IV. b; VI. d, in *Digest Sup. Ct.* 1908.]

[No. 41.]

Argued December 1, 2, 1909. Decided December 20, 1909.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Union County, in that state, in favor of plaintiff in an action for the negligent killing of a railway employee, in which a removal of the cause to a Federal court was refused. Affirmed.

See same case below, 126 Ky. 252, 103 S. W. 323.

The facts are stated in the opinion.

Mr. Edmund F. Trabue argued the cause, and, with Messrs. John C. Doolan, Attila Cox, Jr., and Blewett Lee, filed a brief for plaintiff in error:

The allegations of fact in petition for removal must be accepted by the state court as true because an issue on such allegations can be tried only in the Federal court.

Burlington, C. R. & N. R. Co. v. Dunn, 122 U. S. 513, 517, 30 L. ed. 1159, 1160, 7 Sup. Ct. Rep. 1262; *Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co.* 118 U. S. 264, 270, 30 L. ed. 232, 233, 6 Sup. Ct. Rep. 1034; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 601, 33 L. ed. 474, 475, 10 Sup. Ct. Rep. 203; *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 218, 50 L. ed. 447, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; *Wecker v. National Enameling & Stamping Co.* 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. Rep. 184, 9 A. & E. Ann. Cas. 757; *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430; *Dow v. Bradstreet Co.* 46 Fed. 824; *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. 165; *Diday v. New York, P. & O. R. Co.* 107 Fed. 565; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 209; *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369, 49 L. ed. 238, 25 Sup. Ct. Rep. 49; *Kelly v. Chicago & A. R. Co.* 122 Fed. 286; *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 85; *Dishon v. Cincinnati, N. O. & T. P. R. Co.* 66 C. C. A. 345, 133 Fed. 471; *Boatmen's Bank v. Fritzlen*, 68 C. C. A. 288, 135 Fed. 668, 198

215 U. S.

U. S. 586, 49 L. ed. 1174, 25 Sup. Ct. Rep. 803; South Dakota C. R. Co. v. Chicago, M. & St. P. R. Co. 73 C. C. A. 176, 141 Fed. 581; Thomas v. Great Northern R. Co. 77 C. C. A. 255, 147 Fed. 86; Atlanta, K. & N. R. Co. v. Southern R. Co. 82 C. C. A. 256, 153 Fed. 126, 11 A. & E. Ann. Cas. 766; McGuire v. Great Northern R. Co. 153 Fed. 439; Politz v. Wabash R. Co. 153 Fed. 941; McAlister v. Chesapeake & O. R. Co. 85 C. C. A. 316, 157 Fed. 740, 13 A. & E. Ann. Cas. 1068; Harrington v. Great Northern R. Co. 169 Fed. 714; Donovan v. Wells, F. & Co. 22 L.R.A.(N.S.) 1250, 94 C. C. A. 609, 169 Fed. 363.

Where the plaintiff joins as the real defendant's codefendants persons known to be improper parties, and fabricates averments concerning them in order to misstate their connection with the case, a petition for removal, in alleging fraud in the joinder of the improper defendants, may aver the untruth of the plaintiff's averments; otherwise the right of removal to the Federal court might always be frustrated by the plaintiff *ad libitum*; and the courts will be astute to prevent such devices.

Arrowsmith v. Nashville & D. R. Co. 57 Fed. 169; Arapahoe County v. Kansas P. R. Co. 4 Dill. 277, Fed. Cas. No. 502; Gustafson v. Chicago, R. I. & P. R. Co. supra; Crawford v. Illinois C. R. Co. 130 Fed. 395; Chicago, R. I. & P. R. Co. v. Stepp, 151 Fed. 908.

Permission of state practice to join defendants does not prevent a separable controversy between plaintiff and one of them.

Kelly v. Chicago & A. R. Co. 122 Fed. 291; Williard v. Spartanburg, U. & C. R. Co. 124 Fed. 801; Yeates v. Illinois C. R. Co. 137 Fed. 943; Iowa Lilloet Gold Min. Co. v. Bliss, 144 Fed. 446; Manufacturers' Commercial Co. v. Brown Alaska Co. 148 Fed. 310; South Dakota C. R. Co. v. Chicago, M. & St. P. R. Co. supra; Stockton v. Oregon Short Line R. Co. 170 Fed. 633; Wallin v. Reagan, 171 Fed. 763.

State legislation cannot control Federal jurisdiction.

Hyde v. Stone, 20 How. 170, 175, 15 L. ed. 874, 875; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Wabash Western R. Co. v. Brow, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126.

Messrs. Edmund F. Trabue, John C. Doolan, Attila Cox, Jr., Blewett Lee, and H. D. Allen also filed a brief for plaintiff in error:

The petition for removal sufficiently set up the fraudulent joinder.

Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 54 L. ed.

430; Dishon v. Cincinnati, N. O. & T. P. R. Co. 66 C. C. A. 345, 133 Fed. 471; Atlanta, K. & N. R. Co. v. Southern R. Co. 82 C. C. A. 256, 153 Fed. 126, 11 A. & E. Ann. Cas. 766; McAlister v. Chesapeake & O. R. Co. 85 C. C. A. 316, 157 Fed. 743, 13 A. & E. Ann. Cas. 1068; Donovan v. Wells, F. & Co. 22 L.R.A.(N.S.) 1250, 94 C. C. A. 609, 169 Fed. 367.

Mr. John G. Miller argued the cause, and, with Messrs. John K. Hendrick and P. B. Miller, filed a brief for defendant in error:

The petition and bond for removal constitute the process by which the case is transferred from the state to the Federal court.

Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; Kinney v. Columbia Sav. & L. Asso. 191 U. S. 78, 48 L. ed. 103, 24 Sup. Ct. Rep. 30.

The state court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further.

Crehore v. Ohio & M. R. Co. 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; Carson v. Hyatt, 118 U. S. 279, 30 L. ed. 167, 6 Sup. Ct. Rep. 1050; Stevens v. Nichols, 130 U. S. 230, 32 L. ed. 914, 9 Sup. Ct. Rep. 518; Phoenix Ins. Co. v. Peehner, 95 U. S. 183, 24 L. ed. 427; National S. S. Co. v. Tugman, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643.

The controversy must be wholly between citizens of different states in order to remove case, and such is not the case when one or more defendants jointly sued are citizens of the same state with plaintiff.

Core v. Vinal, 117 U. S. 347, 29 L. ed. 912, 6 Sup. Ct. Rep. 767; Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; Cincinnati, N. O. & T. P. R. Co. v. Bohon, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166, 4 A. & E. Ann. Cas. 1152.

If the act of an individual is within the terms of the law, whatever may be the reasons which govern him, or whatever may be the result, it cannot be impeached.

Doyle v. Continental Ins. Co. 94 U. S. 535, 54 L. ed. 148; Prewitt v. Security L. Ins. Co. 119 Ky. 321, 1 L.R.A.(N.S.) 1019, 115 Am. St. Rep. 264, 83 S. W. 611, 84 S. W. 527.

Plaintiff's motive in the performance of a lawful act was not open to inquiry.

Chesapeake & O. R. Co. v. Dixon, *supra*.

The construction given to the statute of the state by the highest tribunal of the state is regarded as part of the statute, and is binding upon the courts of the United States.

Leffingwell v. Warren, 2 Black, 599, 17 L. ed. 261; *Commercial Bank v. Buckingham*, 5 How. 317, 12 L. ed. 169; *Jackson ex dem. Hart v. Lamphire*, 3 Pet. 280, 7 L. ed. 679.

When the highest judicial tribunal of a state has determined the extent of the powers and liabilities of corporations created under its laws, the decision is conclusive on the national courts in all cases in which no question of general or commercial law, and no question of right under the Constitution of the United States, are involved.

Seymore v. Franklin, 92 Fed. 124; *Clairborne v. Brooks*, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489; *Detroit v. Osborne*, 135 U. S. 499, 34 L. ed. 262, 10 Sup. Ct. Rep. 1012; *Gilman v. Sheboygan*, 2 Black, 518, 17 L. ed. 309; *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 508, 46 L. ed. 302, 22 Sup. Ct. Rep. 95; *Connell v. Utica, U. & E. R. Co.* 13 Fed. 241; *Chesapeake & O. R. Co. v. Dixon*, *supra*; *Southern R. Co. v. Carson*, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; *Alabama G. S. R. Co. v. Thompson and Cincinnati, N. O. & T. P. R. Co. v. Bohon*, *supra*.

In case of a misjoinder, a plaintiff's motive in joining a party as defendant can be questioned only when, by legislative act or judicial decision, it is the settled law of the state in which the action is brought that the defendant, alleged to be joined as a sham and a fraud, is not liable; and no such question can arise where the law of the state, by judicial decision or legislative act, fixes the liability of such defendant.

Alabama G. S. R. Co. v. Thompson and Cincinnati, N. O. & T. P. R. Co. v. Bohon, *supra*; *Person v. Illinois C. R. Co.* 118 Fed. 342.

It is the settled law of Kentucky that, independent of the constitutional provision, the corporation owning the road, and having received a charter from the state, is under certain public duties that even a duly authorized lease will not shift or change; and the owner cannot divest itself of those public duties.

Brooker v. Maysville & B. S. R. Co. 119 Ky. 137, 83 S. W. 117; *McCabe v. Maysville & B. S. R. Co.* 112 Ky. 861, 66 S. W. 1054; *Swice v. Maysville & B. S. R. Co.* 116 Ky. 253, 75 S. W. 278; *Howard v.*

Maysville & B. S. R. Co. 24 Ky. L. Rep. 1051, 70 S. W. 631; *Davis v. Chesapeake & O. R. Co.* 116 Ky. 144, 75 S. W. 275; *Clinger v. Chesapeake & O. R. Co.* 128 Ky. 736, 15 L.R.A. (N.S.) 998, 109 S. W. 317.

While the lessor may not be liable to the servant of the lessee for an injury caused by the negligent act or omission of the lessee as to some duty growing out of the mere relationship of master and servant, the lessor is liable for an injury to any member of the public, including the servant of the lessee, who may be injured by a negligent act or omission as to a public duty, such as a failure to keep its roadbed or track, cattle guards, fences, or station houses in a reasonably safe condition.

Swice v. Maysville & B. S. R. Co. *supra*; *Nugent v. Boston, C. & M. R. Co.* 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797; *St. Louis, W. & W. R. Co. v. Curl*, 28 Kan. 622; *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. 165; *Lee v. Southern P. R. Co.* 116 Cal. 97, 38 L.R.A. 71, 58 Am. St. Rep. 152, 47 Pac. 932.

To sue all three of the defendants for damages resulting from the negligent acts charged in the petition of the plaintiff is allowable under the Kentucky practice, and all were jointly bound or liable.

Pugh v. Chesapeake & O. R. Co. 101 Ky. 77, 72 Am. St. Rep. 392, 39 S. W. 695; *Rutherford v. Illinois C. R. Co.* 120 Ky. 15, 85 S. W. 199; *Illinois C. R. Co. v. Jones*, 118 Ky. 158, 80 S. W. 484; *Illinois C. R. Co. v. Coley*, 121 Ky. 385, 1 L.R.A. (N.S.) 370, 89 S. W. 234; *Central Pass. R. Co. v. Kuhn*, 86 Ky. 578, 9 Am. St. Rep. 309, 6 S. W. 441; *Hawkins v. Riley*, 17 B. Mon. 101; *Chesapeake & O. R. Co. v. Dixon and Cincinnati, N. O. & T. P. R. Co. v. Bohon*, *supra*.

The failure to inclose the track at the point in question was a violation of § 1793 of the Kentucky statutes, and made the railway company liable.

McGhee v. Guyn, 98 Ky. 209, 32 S. W. 615; *McGhee v. Gaines*, 98 Ky. 182, 32 S. W. 602; *McKee v. Cincinnati, N. O. & T. P. R. Co.* 102 Ky. 253, 43 S. W. 241; *Parish v. Louisville & N. R. Co.* 25 Ky. L. Rep. 1524, 78 S. W. 186; *Henderson v. Clayton*, 22 Ky. L. Rep. 284, 53 L.R.A. 145, 57 S. W. 1; *Hays v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369.

The construction given by the court of appeals of Kentucky to § 119 of the Kentucky Civil Code is conclusive; and no act of the legislature or authority for the lease is set forth in the petition for removal; and that being true, the lease, if such existed, is not shown by any allega-

tion to have been authorized by law, and should, therefore, be treated as void.

Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; York & M. Line R. Co. v. Winans, 17 How. 30, 15 L. ed. 27.

Federal courts will not take cognizance where the record does not affirmatively show jurisdiction to be in those courts, and the presumption at every stage of the case is that it is without their jurisdiction, unless the contrary appears from the record.

Bors v. Preston, 111 U. S. 253, 28 L. ed. 420, 4 Sup. Ct. Rep. 407; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 383, 28 L. ed. 464, 4 Sup. Ct. Rep. 510.

Mr. Justice Holmes delivered the opinion of the court:

This is a writ of error to reverse a judgment rendered by the court of appeals of Kentucky in favor of the defendant in error, notwithstanding a petition and bond for removal to the circuit court of the United States. 126 Ky. 252, 103 S. W. 323.

The defendant in error brought this action for causing the death of his intestate, John E. Sheegog, by the throwing off the track of a railroad train upon which the deceased was employed as an engineer. The defendants were the conductor of the train, the Illinois Central Railroad Company, which was operating the railroad and owned the train, and the Chicago, St. Louis, & New Orleans Railroad Company, which owned the road and tracks where the accident happened, but which had let the same to the first-mentioned road. It was alleged that through the negligence of both companies the roadbed, track, etc., were in an improper condition; that through the negligence of the Illinois Central the engine and cars were in an improper condition; and that the death was due to these causes acting jointly, the negligence of the Illinois Central in permitting its engine, cars, and road to be operated while in such condition, and the negligence of the conductor in ordering and directing the management of the train.

In due season the Illinois Central Railroad Company, being an Illinois corporation, filed its petition to remove. The difficulty in its way was that the other two defendants were citizens and residents of Kentucky, to which state the plaintiff also belonged. To meet this the petition alleged that the plaintiff had joined these parties as defendants solely for the purpose of preventing the removal. It admitted the lease, and averred that the Illinois Central Company operated the road exclusively, and alone employed the deceased. It went on to allege that the charge of joint negligence against the lessor and lessee in causing the wreck,

as stated, was made only for the above purpose, and was fraudulent and knowingly false. *The question is whether these [316] allegations were sufficient to entitle the petitioner to have its suit tried in the Federal court. It may be mentioned here that the jury found for the other two defendants and against the Illinois Central Railroad Company, but that fact has no bearing upon the case. Whitcomb v. Smithson, 175 U. S. 635, 637, 44 L. ed. 303, 304, 20 Sup. Ct. Rep. 248.

Of course, if it appears that the joinder was fraudulent, as alleged, it will not be allowed to prevent the removal. Wecker v. National Enameling & Stamping Co. 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. Rep. 184, 9 A. & E. Ann. Cas. 757. And further, there is no doubt that the allegations of fact, so far as material, in a petition to remove, if controverted, must be tried in the court of the United States, and therefore must be taken to be true when they fail to be considered in the state courts. Crchore v. Ohio & M. R. Co. 131 U. S. 240, 244, 33 L. ed. 144, 145, 9 Sup. Ct. Rep. 692; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430. On the other hand, the mere epithet "fraudulent" in a petition does not end the matter. In the case of a tort which gives rise to a joint and several liability, the plaintiff has an absolute right to elect, and to sue the tortfeasors jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face. Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; Cincinnati, N. O. & T. P. R. Co. v. Bohon, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166, 4 A. & E. Ann. Cas. 1152. If the legal effect of the declaration in this case is that the Illinois Central Railroad Company was guilty of certain acts and omissions by reason of which a joint liability was imposed upon it and its lessor, the joinder could not be fraudulent in a legal sense on any ground except that the charge against the alleged immediate wrongdoer, the Illinois Central Railroad itself, was fraudulent and false.

We assume, for the purposes of what we have to say, that the allegations concerning the lessor state merely a conclusion of law from the acts and omissions charged against its lessee. Or, if they be taken to be allegations of fact, we assume, *again mere-[317] ly for the purposes of decision, that they are effectively traversed by the petition to remove. The Kentucky court of appeals appears to us to have discussed the case on

this footing. Whether it did or not, the question whether a joint liability of lessor and lessee would arise from the acts and omissions of the Illinois Central Railroad Company alone was a question of Kentucky law for it to decide, and it appears to us to have decided it.

We should observe in the first place that the cause of action alleged is not helped, but rather hindered, by the allegation that the deceased was an employee of the Illinois Central Road. The case did not stand on the breach of any duty owed peculiarly to employees, and, on the other hand, was encumbered with the fact that a part of the negligence charged was that of a fellow servant. The plaintiff recovered for a breach of a duty to the public which at best was not released or limited by his intestate's having been in the company's service. Now, whether we agree with it or not, the doctrine is familiar that, in the absence of statute, a railroad company cannot get rid of the liabilities attached to the exercise of its franchise by making a lease. Whatever may be the law as to purely contract relations, to some extent, at least, the duties of the lessor to the public, including that part of the public that travels on the railroad, are held to remain unchanged. In this case the court of appeals, after noting that it does not appear that the lessor was relieved by statute, quotes an earlier Kentucky decision which seemingly adopted the following language of a commentator: "If it be true, as the decisions with substantial unanimity admit, that the lessor railway remains liable for the discharge of its duties to the public unless expressly exempted therefrom by statute, it seems difficult to conceive its absence of liability in any event, except, perhaps, where the plaintiff is suing upon an express contract made with him by the lessee corporation." *McCabe v. Maysville & B. S. R. Co.* 112 Ky. 861, 875, 66 S. W. 1054.

The court, however, then goes on to refer to **§18**] a distinction *taken in a later Kentucky case between torts arising from negligent operation and those resulting from the omission of such duties as the proper construction and maintenance of the road (*Swice v. Maysville & B. S. R. Co.* 116 Ky. 253, 75 S. W. 278), and quotes, with seeming approval, decisions in other states, limiting the liability of the lessor to the latter class. But it then proceeds to show that the recovery in this case is upon a breach of a duty to the public, and that, according to the declaration and the verdict, the injury was due, in part, at least, to the defective condition of the road. It ends by saying: "The appellee not only had reasonable grounds to believe

that the resident corporation was responsible to him, but he had actual grounds to believe it." We understand the words "actual grounds" to mean that the belief was correct on the allegations and findings according to Kentucky law. So that, whatever may be the precise line drawn by that court hereafter, it stands decided that in Kentucky the facts alleged and proved against the Illinois Central Railroad in this case made its lessor jointly liable as matter of law. This decision we are bound to respect.

It follows, if our interpretation of the decision is correct, that no allegations were necessary concerning the Chicago, St. Louis, & New Orleans Railroad Company except that it owned and had let the road to its codefendant. The joint liability arising from the fault of the Illinois Central Road gave the plaintiff an absolute option to sue both if he preferred, and no motive could make his choice a fraud. The only way in which fraud could be made out would be by establishing that the allegation of a cause of action against the Illinois Central Railroad was fraudulent, or, at least, any part of it for which its lessor possibly could be held. But it seems to us that to allow that to be done on such a petition as is before us would be going too far in an effort to counteract evasions of Federal jurisdiction. We have assumed, for purposes of decision, that the railroad held on what may be called a secondary ground is to be charged, if at all, only as *a consequence of the liability of **§19** its lessee. But when we come to the principal and necessary defendant, a man is not to be prevented from trying his case before that tribunal that has sole jurisdiction, if his declaration is true, by a mere allegation that it is fraudulent and false. The jury alone can determine that issue, unless something more appears than a naked denial. *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 603, 33 L. ed. 474, 476, 10 Sup. Ct. Rep. 203; *Cheaspeake & O. R. Co. v. Dixon*, 179 U. S. 131, 138, 45 L. ed. 121, 124, 21 Sup. Ct. Rep. 67. However, the petition for removal hardly raises this point. For it directs itself wholly against the allegations of joint negligence, and does not attempt to anticipate the trial on the merits so far as the conduct of the Illinois Central is concerned.

Judgment affirmed.

Mr. Justice Day, dissenting:

In my view, this decision departs from rulings recently made, and tends to disturb settled principles essential to the maintenance of jurisdiction in the Federal courts. In order to apply my views I will briefly restate the facts of the case.

Sheegog's administrator brought an action in the state court of Kentucky against the Illinois Central Railroad Company, a corporation of the state of Illinois, the Chicago, St. Louis, & New Orleans Railroad Company, a corporation of the state of Kentucky, and F. J. Durbin, a citizen of Kentucky. The Illinois Central Railroad Company was the lessee of the Chicago, St. Louis, & New Orleans Railroad Company, and F. J. Durbin was alleged to be a conductor in the employ of the lessee road and in charge of the train, in the operation of which, as engineer, plaintiff's intestate was killed. The charge of the complaint was that, at the time of injury, the defendant the Chicago, St. Louis, & New Orleans Railroad Company was the owner of the roadbed, right of way, etc., and the Illinois Central Railroad Company was the lessee of the railroad property, and the owner of the cars, engines, trains, and appliances; in the operation of which the intestate was killed; that the defendant Durbin was the conductor in the employ of the Illinois Central Railroad Company, operating the train at the time of the injury. The negligence charged against the defendant railroad companies was that the roadbed, rails, track, cattle guards, ties, fences, and right of way of the railroad were allowed to be, and for a long time had been, in a weak, rotten, ruinous, and defective condition; and, in addition thereto, as to the Illinois Central Railroad Company, its cars and engines were knowingly allowed to be and remain in an improper, defective, and dangerous condition, and were improperly constructed, whereby the injury was caused, and that the defendant Durbin was guilty of negligence in running, ordering, and directing the train, and contributed to the injury thereby. And as a conclusion, the plaintiff charged the negligence of the railroad companies, as above described, in the maintenance of the track, roadbed, cattle guards, etc.; together with the negligence of the Illinois Central Railroad Company in directing and permitting its cars, engines, and road to be operated while in a dangerous and defective condition, and the negligence of the conductor in directing the running and management of the train, "all together jointly caused said wreck, and killed the plaintiff's intestate."

Within the time allowed by law, the Illinois Central Railroad Company, the present plaintiff in error, appeared and filed its petition for removal to the Federal court. As the sufficiency of this petition to make a cause for removal is the ultimate question in the case, it is necessary to set out its allegations somewhat in detail.

"Your petitioner says that plaintiff's decedent, at the time he received the fatal

injury complained of, was an employee of your petitioner, and not an employee of either of your petitioner's codefendants, and was not and never had been an employee or in the employ of said lessor, or said F. J. Durbin, *and that all the said facts were [321 well known to plaintiff when this action was brought. Your petitioner says that, to avoid such removal to the Federal court of this action, plaintiff joined your petitioner's codefendants, one a Kentucky corporation and the other a citizen of Kentucky, and falsely and fraudulently alleged in its petition that the train on which decedent was engaged was, through joint and gross negligence and carelessness of all the defendants, derailed, and said decedent instantly killed, and falsely and fraudulently alleged that, by the negligence of both, defendants' roadbed, rails, track, cattle guards, fences, and right of way of the said railroad was allowed to be, and for a long time had been, in a weak, rotten, ruinous, defective, and improper condition, and by the negligence of your petitioner its engine and cars were knowingly allowed to remain in an improper and defective and dangerous condition, and said engine and cars to be so constructed as to be in a dangerous condition, and that this improper and dangerous condition of the road, premises, and cars of the defendants was known to the defendants, and that, at the time of the wreck and accident, the same were being operated in a careless manner by all the defendants, and the defendant Durbin, by his negligence in running, ordering, and directing said train, contributed to cause said accident, and that the negligence of the defendant in its maintenance of its track, roadbed, engine, cattle guards, rails, ties, fences, etc., as set out above, together with the negligence of your petitioner in directing and permitting its engine, cars, and roadbed to be operated while in a defective and dangerous condition, and the negligence of said Durbin in ordering and directing the running and management of said train, and in failing to give proper directions, all together caused said wreck, and killed said decedent, when the plaintiff well knew that such allegations were untrue, and plaintiff did not expect to establish said allegations, and did not make them for the purpose of proving them at the trial, or of substantiating his cause of action therewith, but made them solely for the purpose *of attempting to set up a joint [322 cause of action against the three defendants, in order to make a case which would not be removable to the Federal court."

The state court overruled this motion to remove, and its action was affirmed by the court of appeals of Kentucky. 126 Ky. 252, 103 S. W. 323.

In the court below, a peremptory instruction was given the jury to find in favor of the Kentucky corporation and the individual defendant. Notwithstanding this fact, the court of appeals of Kentucky applied a rule which it had laid down in former decisions, and held that the facts developed on the trial had shown that the administrator had reasonable grounds to join the local defendants, and was therefore justified in overruling the motion to remove. In other words, while the opinion seems to recognize that, if the allegations of the petition for removal were true, a fraudulent joinder was shown, nevertheless, the proof upon the merits showed that the joinder was proper.

The ground upon which the Kentucky court of appeals held the Kentucky railroad jointly liable with the Illinois Central for the injuries sustained is not very clear, in view of the fact that the opinion, in some parts of it, seems to make the liability depend upon the failure to construct a proper road, and in other parts seems to rest the responsibility upon the continuing duty of the lessor railroad company to furnish and maintain a safe roadbed in order to discharge the duties which it had undertaken by accepting the franchise which the state had conferred upon it. In the case to which the court makes reference (*Nugent v. Boston, C. & M. R. Co.* 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797), where a brakeman was injured by reason of the negligent construction of an awning of a station house of the defendant company, near the track, the liability of the lessor company was rested both upon the ground of the continuing duty to the public and because of the application of the principle which makes a lessor liable for a defective construction of the subject-matter of the lease. In either view it is perfectly *apparent that the liability of the Illinois Central to its employees, and that of the lessor company to the public, rests upon entirely different principles. In the case of the latter, the liability is because of the duty which, it is held, the lessor owes to the public; and in the former, because of the obligations of the employer to his employee, arising from the relation of master and servant. In this connection, the court of appeals of Kentucky, in the opinion in this case, said:

"In all cases where a valid lease is found (or, as in this discussion, where it is assumed), the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of relationship of employer and employee under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company, when it attaches, does not spring from this relationship, but arises

from a failure of the lessor company to perform its duty to the public, of which public the employee of the operating company may be regarded as one. Thus, in these cases where the injury has resulted to an employee of the operating company by reason of the negligence of a fellow servant, or of want of care of the lessee company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company, for injury which may result, the lessor is in no way responsible. But where injury has resulted to an employee of the operating company by reason of a failure of the lessor to perform its public duty, as in the failure to construct a safe road, as is here charged, the injured employee may sue the lessor company, as one of the public, for its failure to perform that duty, and not because, between himself and the lessor company, the relation of employee and employer, or any relation of contractual privity, exists."

After citing the case from 80 Me. supra, the court adds:

"This case is very similar to the one at bar, in which it was *alleged and [324 proved that the intestate's death was the proximate result of the failure of the lessor to perform its public duty in its failure to construct a safe roadbed."

It is apparent that the liability of the two railroad companies, although both might be liable for a defective roadbed, track, etc., sprang from a different relation, and was controlled by different principles. The liability to the plaintiff's intestate, of the Kentucky corporation, was to him as one of the public; that of the Illinois corporation arose from the relation of master and servant, and the duties thereby imposed upon the employer.

But let it be conceded that a proper construction of the opinion of the Kentucky court of appeals holds both the railroad companies, although upon different relations to the plaintiff's intestate, liable for a defective roadbed, it is none the less true that the Illinois Central Railroad Company had a right of removal to the Federal jurisdiction, in which to test its liability, unless it was properly joined with the other defendants in an action brought in good faith in the state court.

It is the result of the decisions of this court, as I understand them, that, if the facts which asserted a joint liability with the local defendant are shown by proper petition for removal, and proof, if necessary, to have been made for the purpose of defeating the jurisdiction of the Federal court, the right of removal still exists in favor of the nonresident company. This court has had occasion to consider this subject in a

number of recent cases. Before taking them up, we may state certain principles applicable to the law of removals under the removal act which are so well settled as scarcely to need the citation of authorities.

When the petition for removal is filed in the state court, accompanied by the proper bond, a question of law as to the sufficiency of the petition for removal only is presented to that court. *National S. S. Co. v. Tugman*, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; *Stone v. South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Carson v. Hyatt*, 118 U. S. 279, 30 L. 325]ed. 167, 6 Sup. Ct. Rep. 1050; **Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 513, 30 L. ed. 1159, 7 Sup. Ct. Rep. 1262; *Crehore v. Ohio & M. R. Co.* 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; *Madisonville Traction Co. v. St. Bernard Min. Co.* 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251.

It is equally well settled, and is a result of the principle just stated, that where the right of removal arises because of certain facts averred in the petition, that issue cannot be tried in the state court, but must be heard in the Federal court, which alone has jurisdiction to determine such issues of fact. *Carson v. Dunham*, 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030; *Burlington C. R. & N. R. Co. v. Dunn and Crehore v. Ohio & M. R. Co.* supra; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 34 L. ed. 963, 11 Sup. Ct. Rep. 306; *Madisonville Traction Co. v. St. Bernard Min. Co.* supra.

In recent cases in this court the former adjudications have been reviewed and followed, and it has been held that, for the purposes of removal, the cause of action must be regarded as joint or several, accordingly as the plaintiff has averred the same to be in his complaint, in the absence of inferences arising from the pleadings or shown extrinsically upon a petition for removal, which warrant the conclusion that a fraudulent joinder has been made for the purpose of avoiding the jurisdiction of the Federal court. *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; *Cincinnati, N. O. & T. P. R. Co. v. Bohon*, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166, 4 A. & E. Ann. Cas. 1152. In the *Alabama & G. S. R. Co. Case*, supra, certain employees, citizens of Tennessee, had been joined with the Alabama & Great Southern Railroad Company in an action for negligence, and the question of the right to join them was certified to this court, and it was held, after reviewing the former cases, that, in the ab-

sence of fraudulent joinder, the cause of action might be regarded, for the purposes of removal, to be that which the plaintiff had averred it to be.

In the *Bohon Case*, supra, considered with the *Alabama G. S. R. Co. Case*, supra, the action was brought against the railroad company and one Milligan, an engineer *in [326 charge of an engine, the negligent operation of which, it was alleged, resulted in the death of the plaintiff's intestate. It appeared that the joinder was permitted by the laws of Kentucky, and it was held in this court that, in the absence of a showing of fraudulent joinder, the case was not a removable one. An examination of the petition for removal in that case shows that while there were allegations that the joinder was fraudulent, that conclusion was averred to arise because there was no joint liability of the railroad company and the employee; that he was joined because he was a resident of Kentucky, for the purpose of preventing removal. But there is no averment in the petition for removal in the *Bohon Case*, as there is in this case, that the allegations of fact upon which the complaint was based were untrue, made without any expectation of proving them, and for the purpose of defeating a removal to the Federal court. In concluding the discussion in the opinion in the *Bohon Case*, it was said:

"A state has an unquestionable right, by its Constitution and laws, to regulate actions for negligence; and where it has provided that the plaintiff in such cases may proceed jointly or severally against those liable for the injury, and the plaintiff, in due course of law and in good faith, has filed a petition electing to sue for a joint recovery given by the laws of the state, we know of nothing in the Federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a non-resident defendant therein, properly joined in the action under the Constitution and laws of the state wherein it is conducting its operations and is duly served with process."

In *Wecker v. National Enameling & Stamping Co.* 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. Rep. 184, 9 A. & E. Ann. Cas. 757, suit was brought in the state court in Missouri by Wecker against the Enameling & Stamping Company, Harry Schenck, and George Wettengel. Wettengel was a citizen of the state of Missouri, the enameling company was a foreign corporation. The complaint charged that the plaintiff was employed by the company in working about certain pots *used in the melting of grease [327 and lubricant matter, which matter was delivered to the plaintiff in barrels of great

weight, and which it was the plaintiff's duty to hoist to the top of the furnace and into the pots for melting. The negligence charged against the corporation consisted in allowing the pots to remain open and exposed while filled with hot and boiling lubricants, without covering, railing, or device or means of any character to protect the plaintiff from slipping or falling therein, and negligently failing to provide safe and sufficient hoisting apparatus for the use of the plaintiff in his employment, and failing to instruct him in his duties, whereby and because of the negligence charged, the plaintiff lost his balance and fell into one of the unguarded and open pots, receiving thereby great and painful injuries. Wettengel, it was charged, was employed by the corporation, and charged with the superintendence and oversight of the plaintiff in the performance of his duties, and with the duty of superintending and planning the construction of the furnace, and providing for the pots a reasonably safe and suitable covering, and sufficiently safe hoisting apparatus, and with the duty of instructing the plaintiff as to the manner of performing his duties. The complaint charges the negligence of Wettengel in planning and directing the construction of the furnace structure, and in providing suitable coverings and railings, and in providing and placing reasonably safe and sufficient hoisting apparatus, and in giving instructions as to the manner of performing the plaintiff's duties, and therefore charges that the negligence of the corporation and Wettengel, jointly, caused the injury, and prayed for a joint judgment against them.

In its petition for removal, the nonresident corporation charged that Wettengel was not, at the time of the accident and prior thereto, charged with the superintendence and oversight of the plaintiff, or with the duties of planning or directing the construction of the furnace, or providing a reasonably safe and suitable furnace and pots and railings or other device to protect the plaintiff, and was not charged with the duty of placing reasonably safe and sufficient hoisting apparatus, nor with the duty of instructing the plaintiff in respect to his duties; that Schenck was a nonresident of Missouri, and that Wettengel had been improperly and fraudulently joined as a defendant for the purpose of fraudulently and improperly preventing, or attempting to prevent, the defendant from removing the cause to the United States circuit court, and that plaintiff well knew at the beginning of the suit that Wettengel was not charged with the duties aforesaid, and joined him as a defendant to prevent the removal of the case, and not in good faith. Defendant offered af-

fidavits tending to show that Wettengel was employed in the office as a draftsman; that he had nothing to do with the selecting of plans or approving the same; that he had no authority to superintend the work, or to give instructions to any of the men as to the manner in which they should perform the work; that he was merely a subordinate in the employ of the company, whose sole duties were to attend to the mechanical work of drafting, to make the necessary drawings for the use of the mechanics, and he had nothing to do with the providing of the pots, railings, etc., or the hoisting apparatus; that his position was merely clerical, and confined to the making of drawings to enable mechanics to construct work from plans furnished by others in the employ of the defendant. Upon these affidavits the circuit court reached the conclusion that the attempt to join Wettengel was not made in good faith; that the allegations as to him were fraudulent and fictitious, for the purpose of preventing a removal to the Federal court.

This court declined to consider the question as to whether, as a matter of law, the cause of action was joint or several, or whether, upon the allegations of the complaint, Wettengel could be held jointly with the corporation (204 U. S. 183), and affirmed the judgment of the court below upon its findings of fact upon the issue of fraudulent joinder.

This case, therefore, held the doctrine of this court to be *that the circuit court [329 of the United States, upon a proper petition for removal, may examine into the merits sufficiently to determine whether the allegations by reason of which a nonresident defendant may be sued in a state court are fraudulently and fictitiously made for the purpose of preventing removal. It is true that where one has a cause of action of which both state and Federal courts have jurisdiction, his motive in bringing the action in the one jurisdiction or the other is immaterial, and he may sue in the state court because he preferred that jurisdiction to a Federal court to which he had an equal right to go.

But this case presents a very different question. The inquiry here is not whether a cause of action exists which may be prosecuted in either court, but whether the allegations of the complaint, which give the right to a joint action in the state court, are falsely and fictitiously made, without the intention of proving them, and with the sole purpose of avoiding Federal jurisdiction. Since its decision, the case of *Wecker v. National Enameling & Stamping Co.* has been frequently cited and followed in the Federal courts. *McGuire v. Great North-*

ern R. Co. 153 Fed. 434; *Donovan v. Wells, F. & Co.* 22 L.R.A.(N.S.) 1250, 94 C. C. A. 609, 169 Fed. 363; *Lockard v. St. Louis & S. F. R. Co.* 167 Fed. 675; *People's United States Bank v. Goodwin*, 160 Fed. 727; *McAlister v. Chesapeake & O. R. Co.* 85 C. C. A. 316, 157 Fed. 740, 13 A. & E. Ann. Cas. 1068.

Applying these principles to the case at bar, the allegations of the complaint filed in the state court undertook to make a cause of action against the Illinois Central Company, the nonresident corporation, upon three grounds: First, because it was jointly liable with the Chicago, St. Louis, & New Orleans Railroad Company, the local corporation, for a defective roadbed; second, because it was liable for the negligent conduct of the conductor, Durbin, in running its trains; third, because it was liable for the negligent and improper construction of its locomotive and cars. As to the third ground of the complaint, the defective locomotive 330]and *cars, the authorities agree that there is no responsibility upon the part of the lessor company. The policy of the law, as ruled by the Kentucky court of appeals, made the lessor corporation responsible for a defective roadbed; it was not responsible for defective appliances supplied by the lessee company, or for negligence in the running and management of the road. This was expressly held by the Kentucky court of appeals in *Swice v. Maysville & B. S. R. Co.* 116 Ky. 253, 75 S. W. 278, prior to its decision in the case at bar. Therefore, as to this ground of complaint, there was no contributing neglect of the local company or the conductor, Durbin.

If the allegations which gave a right to join these defendants were false and fictitious, such joinder should not be allowed to defeat the right of the foreign corporation to avail itself of the Federal jurisdiction. As we had occasion to say in the *Wecker Case*, the courts of the United States should not interfere with the jurisdiction of the state courts in cases properly within the same, and the Federal courts should be equally vigilant to defeat all fraudulent devices or attempts to avoid the jurisdiction of the Federal courts. If the allegations of the petition for removal were true, the statements of the complaint as to the negligence of Durbin and the local corporation were false and fraudulent, and made without the intention of proving the same, and for the purpose of preventing removal.

The sole jurisdiction to inquire into the truth of these allegations was in the Federal court; and while it would require a clear and strong case to make out such allegations of fraudulent joinder, jurisdiction to make just such an inquiry is vested by law, 54 L. ed.

under the removal act, in the Federal courts. It may be that the allegations for removal might have been more specific, but they were sufficient to enable the Federal court to enter into an inquiry as to the fraudulent character of the joinder of the resident defendants. It might find, upon investigation, that the allegations as to the condition *of the roadbed and the negligence of [331 the conductor were so entirely without foundation as to warrant the conclusion that the local corporation and the conductor were fraudulently joined to avoid the Federal jurisdiction. Indeed, it is to be noted in this connection that, at the close of the evidence, the trial court directed a verdict in favor of the local corporation and the conductor. It is true that the right to remove depends upon the allegations of the petition, but the course of the case in the state court is an illustration of the possible result of an investigation of the truth of the allegations of the petition for removal.

I therefore reach the conclusion that, upon the face of the petition for removal, there were allegations which ended the jurisdiction of the state court, and a sufficient statement of facts to enable the Federal court to investigate the truthfulness thereof, with a view to determine whether they were so false and fictitious as to show that they were made with a view to prevent the removal to the United States court.

In my opinion, the judgment of the court of appeals of Kentucky should be reversed.

Mr. Justice Harlan concurs in this dissent.

JENNIE L. GRAVES, Ida J. Graves, and
Minnie C. Graves, Petitioners,
v.

ANNA P. ASHBURN, Executrix of W. W.
Ashburn, Deceased, and H. T. Crawford.

(See S. C. Reporter's ed. 331-335.)

Injunction — against cutting timber.

1. Equity may intervene by injunction to prevent the wrongful boxing and cutting of timber valuable for turpentine purposes, since the remedy at law in damages is of doubtful adequacy.

[Injunction against injury to real property, see Injunction, I. e, in Digest Sup. Ct. 1908.]

NOTE.—On injunction against trespass to cut timber—see note to *Carney v. Hadley*, 22 L.R.A. 233.

As to the effect of remedy at law upon equitable jurisdiction to remove cloud on title—see note to *Whitehouse v. Jones*, 12 L.R.A.(N.S.) 49.

As to necessity of possession to support suit to remove cloud on title—see note to *Miller v. Cook*, 10 L.R.A. 295.

Cloud on title — possession.

2. The cancellation for fraud of a deed to land containing pine woods valuable for timber and turpentine should not be denied because the complainants do not allege that they are in possession of the land. [For other cases, see *Cloud on Title*, II. d, in Digest Sup. Ct. 1908.]

Cloud on title — invalid deed.

3. The inability of the grantee in a fraudulent deed to recover if he should sue does not defeat the right to have a deed canceled as a cloud on title, where the invalidity does not appear upon the face of the deed, but rests partly on matter *in pais*, and where possession under it for seven years might, under Ga. Code, § 3589, give title.

[For other cases, see *Cloud on Title*, II. b, in Digest Sup. Ct. 1908.]

Injunction — against cutting timber — cloud on title — effect of acts pending suit.

4. The cutting, *pendente lite*, by the grantee in a fraudulent deed, of the timber valuable for turpentine purposes on a part of the land, does not defeat the jurisdiction of equity to enjoin further cutting, and to cancel the deed as a cloud on title.

[For other cases, see *Equity*, 13-29, in Digest Sup. Ct. 1908.]

Appeal — objection of multifariousness — when not available.

5. The objection of multifariousness will not prevail on appeal, where the bill charges a conspiracy between several trespassers, and trespasses extending over the greater part of contiguous lots, treated as one, — especially where defendants did not stand upon their demurrers setting up such objection, and the case has been tried after long delay.

[No. 51.]

Argued and submitted December 7, 1909.
Decided December 20, 1909.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which, affirming in part a decree of the Circuit Court for the Southern District of Georgia, dismissed a bill to enjoin the cutting of timber and to cancel certain fraudulent deeds as a cloud on title. Reversed and remanded for further proceedings.

See same case below, 79 C. C. A. 478, 149 Fed. 968.

The facts are stated in the opinion.

Mr. Marion Erwin argued the cause, and, with Mr. William J. Wallace, filed a brief for petitioners:

Equitable jurisdiction to enjoin continuing trespasses in the taking of turpentine and timber from what is generally called wild or timber lands is based upon the inadequacy of a complete remedy at law, in that the injury is irreparable, because the measure of damages collectable at law will

not afford adequate compensation for the property destroyed, and because it would entail a multiplicity of suits to recover the damages in continuing trespasses.

Camp v. Dixon, 112 Ga. 878, 52 L.R.A. 755, 38 S. E. 71; Beach, *Modern Law of Eq. Jur.* 720; Griffin v. Sketoe, 30 Ga. 300; Lamb v. Farrell, 21 Fed. 8; Gormley v. Clark, 134 U. S. 348, 33 L. ed. 913, 10 Sup. Ct. Rep. 554.

Plaintiff need not be in possession, nor aver or prove insolvency of defendant, or that the damages were irreparable.

Gray Lumber Co. v. Gaskin, 122 Ga. 342, 50 S. E. 164; Camp v. Garbutt Lumber Co. 129 Ga. 414, 58 S. E. 870.

Possession in complainant is nonessential in Georgia to a suit to remove a cloud on title.

Griffin v. Sketoe, *supra*; Pierce v. Middle Georgia Land & Lumber Co. 131 Ga. 102, 61 S. E. 1114; 18 Am. & Eng. Enc. Law, 2d ed. p. 124.

The averments of the bill as to grants, conveyances, heirship, title, and character of the lands, are equivalent to averments of constructive actual seisin in complainants. No more needs to be averred than has to be proved.

Barr v. Gratz, 4 Wheat. 222, 4 L. ed. 555; Green v. Liter, 8 Cranch, 244, 3 L. ed. 550.

The legal constructive possession of wild and vacant lands is in the possessor of the legal title.

Gage v. Kaufman, 133 U. S. 471, 33 L. ed. 725, 10 Sup. Ct. Rep. 406; Thompson v. Etowah Iron Co. 91 Ga. 542, 17 S. E. 688; Rogers v. Hoskins, 15 Ga. 276; Simmons Creek Coal Co. v. Doran, 142 U. S. 418-449, 35 L. ed. 1063-1076, 12 Sup. Ct. Rep. 239; Ga. Code 1895, § 3878; Green v. Liter, 8 Cranch, 229, 3 L. ed. 545; Barr v. Gratz, 4 Wheat. 213, 4 L. ed. 553.

Averments and proof of trespass and waste committed by defendants do not constitute such possession in defendants as to prevent the true owner from filing a bill *quia timet*.

Simmons Creek Coal Co. v. Doran, 142 U. S. 418, 35 L. ed. 1063, 12 Sup. Ct. Rep. 239.

Under the peculiar laws in Georgia relative to seven years' possession under color of title, it cannot be questioned that where a party is interfering by continuing trespasses with complainant's title, and doing it under color of a deed by acts which would ripen into prescriptive title unless the deed can be shown by extrinsic evidence to have been obtained by fraud, the fraud not appearing on the face of the deed, such deed does throw a cloud upon the complainant's title.

Pierce v. Middle Georgia Land & Lumber Co. and Griffin v. Sketoe, supra; Camp v. Dixon, 112 Ga. 879, 52 L.R.A. 755, 38 S. E. 71; King v. Stuart, 84 Fed. 546; Gray Lumber Co. v. Gaskin and Camp v. Garbutt Lumber Co. supra.

There was jurisdiction on the ground of fraud.

Bunce v. Gallagher, 5 Blatchf. 481, Fed. Cas. No. 2,133; Sharon v. Tueker, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720; Pom. Eq. Jur. 533; Wehrman v. Conklin, 155 U. S. 328, 39 L. ed. 174, 15 Sup. Ct. Rep. 129; Barrow v. Hutton, 99 U. S. 80, 25 L. ed. 407; Cowley v. Northern P. R. Co. 159 U. S. 579, 40 L. ed. 265, 16 Sup. Ct. Rep. 127; Robb v. Vos, 155 U. S. 13, 39 L. ed. 52, 15 Sup. Ct. Rep. 4; Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594; Griffin v. Sketoe, supra.

Destruction by defendants of the trees pending suit does not affect the jurisdiction.

Baxter v. Camp, 129 Ga. 465, 59 S. E. 283; United States v. Union P. R. Co. 160 U. S. 52, 40 L. ed. 337, 16 Sup. Ct. Rep. 190; 16 Cyc. Law & Proc. pp. 106-109; Taylor v. Taylor, 43 N. Y. 578; 1 Story, Eq. Jur. §§ 64, 709; Franklin Ins. Co. v. McCrea, 4 G. Greene, 229; Turner v. Thomas, 13 Bush, 518; Miller v. McCan, 7 Paige, 451; Providence Rubber Co. v. Goodyear, 9 Wall. 800, 19 L. ed. 570; Powell v. Cheshire, 70 Ga. 357, 48 Am. Rep. 572; United States v. Guglard, 79 Fed. 21; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. 63 Fed. 540; Carrington v. Lentz, 40 Fed. 18; 30 Am. & Eng. Enc. Law, p. 300; Story, Eq. 64K; Ober v. Gallagher, 93 U. S. 206, 23 L. ed. 831; Gormley v. Clark, 134 U. S. 349, 33 L. ed. 914, 10 Sup. Ct. Rep. 554.

Mr. Alfred R. Kline submitted the cause for respondents. Mr. Robert L. Shipp was on the brief:

This equity proceeding would not be maintainable in the Georgia courts.

Wilcox Lumber Co. v. Bullock, 109 Ga. 532, 35 S. E. 52; Camp v. Dixon, 111 Ga. 674, 36 S. E. 878; Jenkins Bros. v. Carmen, 112 Ga. 476, 37 S. E. 719; Wiggins v. Middleton, 117 Ga. 162, 43 S. E. 432; Ocmulgee Lumber Co. v. Mitchell, 112 Ga. 528, 37 S. E. 749; Rogers v. Brand, 115 Ga. 494, 45 S. E. 305; Woodstock Iron Works v. Leake, 118 Ga. 642, 45 S. E. 429; Powell v. Brinson, 120 Ga. 36, 47 S. E. 499; Stonecipher v. Wilson, 120 Ga. 466, 47 S. E. 936; Dixon v. Monroe, 112 Ga. 158, 37 S. E. 180; Morgan v. Baxter, 113 Ga. 144, 38 S. E. 411.
54 L. ed.

The equity statutes of this state have no bearing whatever on the ease at bar.

16 Cyc. Law & Proc. p. 37.

The judgment overruling this respondent's (Ashburn's) demurrer cannot stand without doing violence to the principles as enunciated in the ease of McGuire v. Pensacola City Co. 44 C. C. A. 670, 105 Fed. 677.

Rogers v. Brand and Woodstock Iron Works v. Leake, supra; Cruickshank v. Bidwell, 176 U. S. 81, 44 L. ed. 381, 20 Sup. Ct. Rep. 280; Gause v. Perkins, 56 N. C. (3 Jones, Eq.) 177, 69 Am. Dec. 728; Carney v. Hadley, 32 Fla. 344, 22 L.R.A. 233, 37 Am. St. Rep. 101, 14 So. 4; Poindexter v. Henderson, Walk. (Miss.) 12 Am. Dec. 550; Camp v. Dixon, 111 Ga. 674, 36 S. E. 878; Dixon v. Monroe, 112 Ga. 158, 37 S. E. 180; Wiggins v. Middleton, supra; Galt v. Galloway, 4 Pet. 332, 7 L. ed. 876; Smyth v. New Orleans Canal & Bkg. Co. 141 U. S. 656, 35 L. ed. 891, 12 Sup. Ct. Rep. 113.

This ease cannot be maintained as an action to quiet title, because complainants were out of possession.

Frost v. Spitley, 121 U. S. 556, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1129; McGuire v. Pensacola City Co. supra; Munson v. Munson, 28 Conn. 582, 73 Am. Dec. 693; Thompson v. Etowah Iron Co. 91 Ga. 538, 17 S. E. 663; United States v. Wilson, 118 U. S. 86, 37 L. ed. 110, 6 Sup. Ct. Rep. 991; Smyth v. New Orleans Canal & Bkg. Co. supra; Adams v. Johnson, 129 Ga. 612, 59 S. E. 269; Orton v. Smith, 18 How. 263, 15 L. ed. 393.

This bill could not be maintained as a bill to remove cloud on title.

Thompson v. Etowah Iron Co. supra; Pixley v. Huggins, 15 Cal. 133; Detroit v. Martin, 34 Mich. 170, 22 Am. Rep. 512; 7 Cyc. Law & Proc. p. 253; Black, Law Diet. p. 204; Munson v. Munson, supra; Adams v. Johnson, 129 Ga. 611, 59 S. E. 269.

Complainants are estopped by their laches.

Abraham v. Ordway, 158 U. S. 416, 39 L. ed. 1036, 15 Sup. Ct. Rep. 894; Gallilher v. Cadwell, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; Hammond v. Hopkins, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; Fletcher v. Fuller, 120 U. S. 534, 30 L. ed. 759, 7 Sup. Ct. Rep. 667; St. Paul, S. & T. F. R. Co. v. Sage, 1 C. C. A. 256, 4 U. S. App. 160, 49 Fed. 315; 16 Cyc. Law & Proc. pp. 163-165; Caulk v. Page, 3 C. C. A. 631, 2 U. S. App. 531, 53 Fed. 709; Badger v. Badger, 2 Wall. 87-94, 17 L. ed. 836-838; Akins v. Hill, 7 Ga. 577; Reynolds & H. Estate Mortg. Co. v. Martin, 116 Ga. 502, 42 S. E. 796; Schlawig v. Purslow, 8 C. C. A. 319, 19 U.

S. App. 501, 59 Fed. 848; *Wetzel v. Minnesota R. Transfer Co.* 12 C. C. A. 493, 27 U. S. App. 594, 65 Fed. 23, 169 U. S. 237, 42 L. ed. 730, 18 Sup. Ct. Rep. 307; *Felix v. Patriek*, 145 U. S. 317, 36 L. ed. 719, 12 Sup. Ct. Rep. 862; *Allen v. Colburn*, 65 N. H. 37, 23 Am. St. Rep. 20, 17 Atl. 1060; *Naddo v. Bardon*, 2 C. C. A. 339, 4 U. S. App. 642, 51 Fed. 493; *Kelley v. Boetteher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 55; *Lemoine v. Dunklin County*, 2 C. C. A. 343, 10 U. S. App. 227, 51 Fed. 487.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity, brought by the petitioners against H. T. Crawford, W. W. Ashburn, now represented by his executrix, his lessees, and, originally, against other defendants, who have been disposed of and are not before us. The petitioners show title in themselves, derived from the state, to four nearly square lots of land, of about 490 acres each, contiguous to each other, and making one large square in the eighth district of Colquitt county, Georgia. The right hand upper square upon the map is numbered 353, the left hand upper square, 354, the left hand lower, 383, and the right hand lower, 384. This land had upon it pine woods, 333]valuable *for timber and turpentine. The bill alleges that the petitioners, being residents of New York, employed a firm of lawyers to look after the same; that, by a breach of trust, and without title or authority, a deed was made on behalf of the firm, purporting to convey the north half of lot 353 to the defendant Ashburn; that he had notice of the want of title, but nevertheless let the timber privileges to another defendant, and that the latter was about to cut the timber, and had already boxed the trees and taken turpentine from other portions of the same lot. In pursuance of the same general fraudulent plan, another voidable or void conveyance was made to Crawford of lot 383, and thereafter Crawford began to box the trees on that lot and to carry away the turpentine. Further particulars are not necessary here. The bill sought an injunction against boxing the trees, carrying away turpentine, or cutting timber, and a cancellation of the fraudulent deeds.

The circuit court dismissed the bill against Crawford, on the ground that the plaintiffs had a complete remedy at law, and it did not pass on the title to lot 383 and the south half of 353. It declared the plaintiffs' title to lots 354, 384, and the north half of 353, and granted the relief prayed in respect of them against Ashburn and others.

There were cross appeals, and the circuit court of appeals dismissed the bill, concurring with the circuit court as to Crawford, and holding, with regard to Ashburn, that, so far as the cloud upon the title was concerned, it did not appear sufficiently, from the bill, that the plaintiffs were in possession, and, if they were, the deed to Ashburn did not constitute a cloud. As to the cutting of trees, it was held that the remedy at law was complete.

We shall deal first with the last ground of decision, which involves a difference of opinion between different circuit courts of appeal. It is assumed, as was found by the circuit court, that the plaintiffs' title was made out, and that the defendant is or may be responsible for the wrong. If the *de- [334]fendant is responsible, we are of opinion that an injunction ought to issue. The industry concerned is so important to the state of Georgia, and the remedy in damages is of such doubtful adequacy, that equity properly may intervene, although, in different circumstances, an injunction against cutting ordinary timber might be denied. The policy of the state is indicated by § 4927 of the Civil Code 1895, continuing earlier acts. "In all applications . . . to enjoin the cutting of timber, or boxing or otherwise working the same for turpentine purposes, it shall not be necessary to aver or prove insolvency, or that the damages will be irreparable." Although in form addressed to procedure, this implies a principle grounded upon a view of public policy. See *Camp v. Dixon*, 112 Ga. 872, 52 L.R.A. 755, 38 S. E. 71; *Gray Lumber Co. v. Gaskin*, 122 Ga. 342, 50 S. E. 164. The same result has been reached apart from statute by the circuit court of appeals for the sixth circuit and in other cases. *Peek v. Ayers & L. Tie Co.* 53 C. C. A. 551, 116 Fed. 273; *United States v. Guglard*, 79 Fed. 21; *King v. Stuart*, 84 Fed. 546. Whatever the ultimate disposition of the case, a final decree should not be entered until the evidence has been considered in the light of the rule that we lay down. We leave the further consideration to the court below.

As the case is before us, it is proper to add that we perceive no sufficient reason in the grounds stated for denying a cancellation of the deed to Ashburn. The first of these grounds is that the plaintiffs do not allege that they are in possession of the land concerned. We infer that the premises, or the greater part of them, are woodland, not inclosed by fences, but in their original natural condition. If so, then possession is a fiction of law rather than a possible fact, and

it would be reasonable to assume that possession remains with the title. *Green v. Litter*, 8 Cranch, 229, 3 L. ed. 545; *Ga. Code*, § 3878. We may say more broadly, and without qualifying *Lawson v. United States Min. Co.* 207 U. S. 1, 9, 52 L. ed. 65, 73, 28 Sup. Ct. Rep. 15, that, in view of the statute, the relief, in case of such lands, should not be made to depend upon shadowy 335] distinctions, according to the *greater or less extent of the trespasses committed. See *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 449, 35 L. ed. 1063, 1075, 12 Sup. Ct. Rep. 239. It has been intimated by the Georgia court that relief would be granted, irrespective of possession. *Pierce v. Middle Georgia Land & Lumber Co.* 131 Ga. 99, 61 S. E. 1114; *Griffin v. Sketoe*, 30 Ga. 300. See also *Sharon v. Tucker*, 144 U. S. 533, 536, 543, 36 L. ed. 532, 533, 535, 12 Sup. Ct. Rep. 720. The other ground mentioned is that, if *Ashburn* should sue, his deed would not enable him to recover. But, in any case proper for relief, the deed does not convey a good title. It is enough that the invalidity does not appear upon its face, but rests partly on matter *in pais*, and that possession under it for seven years might give a title by the Georgia Code, § 3589, embodying earlier statutes.

The fact that *Crawford*, during the pendency of the suit, had cut the trees on a portion of the land, did not destroy the jurisdiction of the court. If that or the other grounds that we have mentioned were the reasons for dismissing the bill as to him, it should be retained and damages assessed. *Milkman v. Ordway*, 106 Mass. 232, 253. If different facts from those that we have discussed were found to exist, it does not appear.

It is urged that the bill is multifarious. But it charges a conspiracy between the several trespassers, and trespasses extending over the greater part of the four contiguous lots, treated as one. The objection of multifariousness is an objection of inconvenience. The defendants did not stand upon their demurrers setting it up. There has been a trial after long delay. In view of the evidence and the fact that the objection did not prevail with the lower courts, we are of opinion that it should not prevail now. While the decree must be reversed, our decision is without prejudice to any finding upon the facts consistent with the rules that we have laid down.

Decree reversed and case remitted to the Circuit Court for further proceedings.

*SCOTT COUNTY MACADAMIZED [336
ROAD COMPANY, Plff. in Err.,
v.

STATE OF MISSOURI EX REL. T. D.
HINES, Prosecuting Attorney of Cape
Girardeau County.

(See S. C. Reporter's ed. 336-341.)

Toll roads — right to tolls after expiration of charter.

The right of a toll-road company to take any tolls whatever, and not merely the right given by its special charter to take higher tolls than those allowed to toll-road companies organized under a general act then in force, expired with the lapse of fifty years from the date of such special charter, which provided that the privileges therein granted should continue for fifty years, subject to a right of purchase on behalf of the public after twenty years, or at any time thereafter, there being no reference in the charter to the general act.

[Rights of turnpike companies, see *Tolls and Toll Roads*, in *Digest Sup. Ct.* 1908.]

[No. 52.]

Argued December 7, 8, 1909. Decided December 20, 1909.

IN ERROR to the Supreme Court of the State of Missouri to review a decree which affirmed a decree of the Circuit Court of St. Francois County in that state, enjoining the further maintenance of toll gates upon a road alleged to be a public highway. Affirmed.

See same case below, 207 Mo. 54, 105 S. W. 752, 13 A. & E. Ann. Cas. 656.

The facts are stated in the opinion.

Mr. Edward S. Robert argued the cause, and, with Messrs. Douglas W. Robert and William L. Beektoold, filed a brief for plaintiff in error:

A franchise or a charter granted by a state to a quasi public corporation is a contract, the obligation of which cannot be impaired.

St. Clair County Turnp. Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *Pearsall v. Great Northern R. Co.* 161 U. S. 663, 40 L. ed. 844, 16 Sup. Ct. Rep. 705.

The decision of a state court holding, as a matter of construction, that a particular charter or charter provision does not constitute a contract, is not binding on this court.

Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968.

Where the judgment of the highest court

of a state gives effect to a state law which is claimed by the unsuccessful party to impair the contract set out and relied upon, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation.

Mobile & O. R. Co. v. Tennessee, supra.

Due process of law requires compensation to be made or secured to the owner of private property when it is taken by a state or under its authority for public use.

Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is wanting in the due process of law required by the 14th Amendment of the United States Constitution.

Chicago, B. & Q. R. Co. v. Chicago, supra; *Tindal v. Wesley*, 167 U. S. 222, 42 L. ed. 143, 17 Sup. Ct. Rep. 770; *Smyth v. Ames*, 169 U. S. 526, 42 L. ed. 842, 18 Sup. Ct. Rep. 418.

Corporations are persons within the meaning of the constitutional provision forbidding the deprivation of property without due process, as well as a denial of the equal protection of the laws.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *New York v. Roberts*, 171 U. S. 658-683, 43 L. ed. 323-333, 19 Sup. Ct. Rep. 58; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *United States v. Northwestern Exp. Stage & Transp. Co.* 164 U. S. 686, 41 L. ed. 599, 17 Sup. Ct. Rep. 206; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739.

If an instrument is subject to two constructions, the rule that that most favorable to the public should be adopted will not apply if its application would obviously defeat the legislative intent. *A fortiori* the rule has no application where the meaning of the grant is clear and free from ambiguity.

Moran v. Miami County, 2 Black, 722,

17 L. ed. 344; *St. Clair County Turnp. Co. v. Illinois*, supra.

Messrs. **M. A. Dempsey** and **T. D. Hines** argued the cause and filed a brief for defendant in error:

The roadbed in question was a public highway, established by public authority for public use, and is to be regarded as a public easement, and not as private property. The right to travel over the road was an easement vested in the public, and when the charter expired this easement continued, disburdened of tolls, but otherwise unaffected.

State ex rel. Allison v. Hannibal & R. County Gravel Road Co. 138 Mo. 332, 36 L.R.A. 457, 39 S. W. 910; 8 Campbell, Highways, p. 8; 14 Campbell, Highways, p. 11; *Benedict v. Goit*, 3 Barb. 469; *Davis v. New York*, 14 N. Y. 516, 67 Am. Dec. 186; *St. Clair County Turnp. Co. v. Illinois*, 96 U. S. 63, 24 L. ed. 651; 27 Am. & Eng. Enc. Law, p. 320; *Pittsburgh, M. & Y. R. Co. v. Com.* 104 Pa. 583; *State ex rel. Boardman v. Lake*, 8 Nev. 276; *State ex rel. Buckley v. Curry*, 6 Nev. 75; *State ex rel. Keith v. Dayton & V. Tollroad Co.* 10 Nev. 155; *Wood v. Truckee Turnp. Co.* 24 Cal. 474; *Craig v. People*, 47 Ill. 487; *Police Jury v. Thibodaux Bridge Co.* 44 La. Ann. 137, 10 So. 677; *Heyward v. New York*, 5 Barb. 492; *Hooker v. Utica & M. Turnp. Road Co.* 12 Wend. 371; *State, Simmons, Prosecutor, v. Passaic*, 42 N. J. L. 524; *State, Vanderbeck, Prosecutor, v. Jersey City*, 29 N. J. L. 441; *Jersey City v. State*, 30 N. J. L. 521; *State, Felix, Prosecutor, v. Atlantic City*, 34 N. J. L. 99; *State v. Leith*, 83 Cal. 239; *Dawes v. Hawkins*, 8 C. B. N. S. 858; 12 Eng. Rul. Cas. 619; *State v. Western North Carolina R. Co.* 95 N. C. 602; *State ex rel. Green v. Lawrence Bridge Co.* 22 Kan. 438; *Blood v. Woods*, 95 Cal. 78; *People ex rel. Eldorado County v. Davidson*, 79 Cal. 166, 21 Pac. 538; *State v. Maine*, 27 Conn. 641, 71 Am. Dec. 89; *Central Bridge Corp. v. Lowell*, 15 Gray, 106; *People ex rel. Clauson v. Newburgh & S. Pl. Road Co.* 86 N. Y. 1; *Heath v. Barmore*, 50 N. Y. 302.

The words "perpetual succession" mean continuous succession during the life of the charter only. Of themselves they do not confer perpetuity upon a corporation. The word "perpetual" qualifies the succession, and not the duration of the corporation.

State ex rel. Walker v. Payne, 129 Mo. 477, 33 L.R.A. 576, 31 S. W. 797; *State ex rel. Allison v. Hannibal & R. County Gravel Road Co.* supra.

There is no Federal question in the case.

Mills v. St. Clair County, 8 How. 569, 12 L. ed. 1201; *Davidson v. New Orleans*, 96

U. S. 97, 24 L. ed. 616; New Orleans Water-works Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; Satterlee v. Matthewson, 2 Pet. 380, 7 L. ed. 458; Watson v. Mercer, 8 Pet. 88, 8 L. ed. 876; Charles River Bridge v. Warren Bridge, 11 Pet. 583, 9 L. ed. 838; Commercial Bank v. Buckingham, 5 How. 317, 12 L. ed. 169; note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231; Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 18 L. ed. 381.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit brought in pursuance of a statute to enjoin the plaintiff in error from maintaining toll gates upon a road alleged to be a public highway. The defendant justifies under a charter granted by a special act of February 24, 1853, which contained the following section: "8. The privileges granted in this charter shall continue for fifty years; provided, that the county courts of the counties of Cape Girardeau and Scott may, at the expiration of twenty years, or any time thereafter, purchase said road at the actual cost of construction, and make it a free road." Mo. Law 1853, pp. 337, 338. The defendant says that it has not received the cost of construction, and sets up the Constitution of the United States, art. 1, § 10, the 14th Amendment, and other less material clauses. The reply is that the right to take tolls expired on February 24, 1903, when the fifty years contemplated by the charter had elapsed. There was a trial and a judgment for the relator, which was affirmed by the supreme court of the state, and the case was brought here. 207 Mo. 54, 105 S. W. 752, 13 A. & E. Ann. Cas. 656.

The plaintiff in error contends that the privileges referred to in § 8 are but three; the life of the corporation brought into being by the charter, the exclusive right to maintain a toll road, granted by § 2, and the right to take higher tolls than those allowed to toll companies organized under a general act then in force; but that it cannot be deprived of its right to take tolls except by a purchase of the road at the actual cost of construction. It says that the provision for the right to purchase at the expiration of twenty years "or at any time thereafter" imports that the right to make the road free, even after fifty years, can be 340] gained only by purchase, *and that the cause makes a contract and creates a right of property which it is beyond the power of the state to impair or take away. The supreme court of Missouri took a different view. It held, after an elaborate discussion, that the plaintiff in error never had more than an easement, that this easement was of a public character, charged only with the bur-

den of paying toll during the time allowed by the charter, and that after that time the public had an unencumbered right. The sole question here is whether the construction of the charter and the supposed contract was wrong.

We are of opinion that the decision of the state court was right, and that the meaning of § 8 is so plain that it cannot be made much clearer by argument. "The privileges granted in this charter" means all the privileges, including the privilege of taking toll. The limitation of fifty years would be almost meaningless if tolls were not embraced. The plaintiff in error recognizes the difficulty, and tries to meet it by the suggestion that, as applied to tolls, the word "privileges" is to be limited to the excess of the tolls allowed above those mentioned in a general act then in force. But the general act is not referred to in the section granting the right to charge tolls, or, indeed, in the charter at all; it was a law with which the specially chartered corporation had nothing to do. There is not the slightest reason to suppose that there was any implied reference to or thought of it when this act was passed. The words of purchase, "at the expiration of twenty years, or any time thereafter," do not convey the meaning that the express limitation of fifty years is done away with in the same section that imposes it, but must be read subject to that more specific phrase, even if "any time thereafter" practically is cut down to any time within the fifty years, so far as its value to the plaintiff in error is concerned. It was a reservation in favor of the county, not the grant of a new right to the plaintiff in error, and its operation is sufficient if as extensive as the need.

*As we are of opinion that the plain- [341] tiff in error has no such rights as it claims, even if we assume that it has all the rights of the original corporation created by the charter, it is unnecessary to consider other difficulties in the case.

Judgment affirmed.

FIRST NATIONAL BANK OF ESTHERVILLE, IOWA, E. B. Soper, C. J. Ives, et al., Plffs. in Err.,

v.

CITY COUNCIL OF ESTHERVILLE, Sitting as a Board of Equalization and Review, et al.

(See S. C. Reporter's ed. 341-348.)

Error to state court — Federal question — national bank taxation.

Objections to the valuation of national bank stock for taxation, as being in excess of the actual value, exorbitant and unjust,

and not in proportion to other like personal property, but grossly in excess thereof, and constituting unfair and unequal taxation, do not raise any Federal question which will sustain a writ of error from the Federal Supreme Court to a state court, where no mention of the national bank act was made, nor of any right or privilege claimed under it, and the provisions of the United States Revised Statutes were not invoked, by name or otherwise, and there was no assertion that the local statutes under which the assessment was made were repugnant to the terms of U. S. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502, or to the Federal Constitution.

[For other cases, see Appeal and Error, 1168-1248, 1922-1939, in Digest Sup. Ct. 1908.]

[No. 64.]

Argued December 10, 1909. Decided January 3, 1910.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment which affirmed a judgment of the District Court of Emmett County, in that state, affirming the action of the members of the city council of Estherville, sitting as a board of equalization and review, in fixing the assessed value of shares of national bank stock for purposes of taxation. Dismissed for want of jurisdiction.

See same case below, 136 Iowa, 203, 112 N. W. 829.

The facts are stated in the opinion.

Mr. Charles A. Clark argued the cause and filed a brief for plaintiffs in error:

The supreme court of Iowa knew perfectly well that the system of taxation of which plaintiffs in error complained was wholly void under U. S. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502.

San Francisco Nat. Bank v. Dodge, 197 U. S. 70, 49 L. ed. 669, 25 Sup. Ct. Rep.

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On error to state court in cases involving questions under the national banking law—see note to Rankin v. Barton, 50 L. ed. U. S. 163.

384; Hubbard v. Johnson County, 23 Iowa, 145.

The settled doctrine of that court is, as the case is triable here *de novo*, we understand, that all questions may be presented in this court which legitimately arise on the record, whether the same were urged or relied on in argument in the district court or not.

We cannot rely on assertions of counsel in this respect, but must look alone to the record; and if a question now urged is made therein, or fairly arises because of the allegations contained in the pleadings, then the conclusive presumption must be indulged that such question was before the court, although it may not have been specially relied on in argument.

Seymour v. Shea, 62 Iowa, 711, 16 N. W. 196; Kaufman v. Dostal, 73 Iowa, 691, 36 N. W. 643; Smith v. Knight, 88 Iowa, 280, 55 N. W. 189; Johnston v. Myers, 138 Iowa, 500, 116 N. W. 600; Hackworth v. Zollars, 30 Iowa, 436; Sherwood v. Sherwood, 44 Iowa, 192; Burns v. McNally, 90 Iowa, 436, 57 N. W. 908; Schoenover v. Peteina, 126 Iowa, 266, 100 N. W. 490.

It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights.

Rogers v. Alabama, 192 U. S. 230, 48 L. ed. 418, 24 Sup. Ct. Rep. 257; Smithsonian Institution v. St. John, 214 U. S. 19, 53 L. ed. 892, 29 Sup. Ct. Rep. 601.

The same rule applies to rights arising under statutes of the United States, enacted to protect constitutional rights, as in the present instance.

Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 548, 31 L. ed. 235, 238. 8 Sup. Ct. Rep. 211; Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; McCullough v. Virginia, 172 U. S. 117, 43 L. ed. 387, 19 Sup. Ct. Rep. 134; Missionri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 534, 46 L. ed. 673, 676, 22 Sup. Ct. Rep. 446; Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; The Banks v. New York (New York ex rel. Bank of N. Y. Nat. Bkg. Asso. v. Connelly) 7 Wall. 16, 19 L. ed. 57; Williams v. Weaver, 100 U. S. 547, 25 L. ed. 708; Waite v. Dowley, 94 U. S. 527, 24 L. ed. 181; Swope v. Lefingwell, 105 U. S. 3, 26 L. ed. 939.

The jurisdiction cannot be defeated by showing that the record does not, in direct terms, refer to statutory or constitutional provisions, nor expressly state that a Fed-

eral question was presented. The true jurisdictional test is whether it appears that such a question was decided adversely to the Federal right claimed.

Murray v. Charleston, 96 U. S. 432, 441, 24 L. ed. 760, 761; *Crowell v. Randell*, 10 Pet. 368, 9 L. ed. 458; *Eureka Lake & Y. Canal Co. v. Superior Ct.* 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. Rep. 429.

It will be observed that the contention of plaintiffs in error arises under the second clause of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, and hence need not be set up and claimed with the particularity required under the third clause of that section.

Miller v. Nicholls, 4 Wheat. 311, 4 L. ed. 578; *Willson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412; *Satterlee v. Matthewson*, 2 Pet. 380, 410, 7 L. ed. 458, 468; *Fisher v. Cockerell*, 5 Pet. 248, 8 L. ed. 114; *Harris v. Dennie*, 3 Pet. 292, 7 L. ed. 683; *Farney v. Towle*, 1 Black, 350, 17 L. ed. 216; *Hoyt v. Shelden* (*Hoyt v. Thompson*) 1 Black, 518, 17 L. ed. 65; *Crowell v. Randell*, *supra*; *Mississippi & M. R. Co. v. Rock*, 4 Wall. 177, 18 L. ed. 381; *Furman v. Nichol*, 8 Wall. 44, 19 L. ed. 370; *Kaukauma Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 487, 488, 43 L. ed. 525, 526, 19 Sup. Ct. Rep. 247.

If a Federal question is shown by the record, this court has jurisdiction, although the state court may have evaded a decision of such question.

Chapman v. Goodnow (*Chapman v. Crane*) 123 U. S. 548, 31 L. ed. 238, 8 Sup. Ct. Rep. 211; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 554, 555, 31 L. ed. 203, 204, 8 Sup. Ct. Rep. 217; *Deposit Bank v. Frankfort*, 191 U. S. 518, 519, 43 L. ed. 283, 284, 24 Sup. Ct. Rep. 154.

Mr. Byron M. Coon argued the cause and filed a brief for defendants in error:

The construction of state statutes belongs to the state courts, and is not a Federal question which we can review on a writ of error to a state court.

Phœnix Ins. Co. v. The Treasurer (*Phœnix Ins. Co. v. Gardiner*) 11 Wall. 208, 20 L. ed. 114.

Not every mere allegation of a Federal question will suffice to give jurisdiction. There must be a real, substantive question on which the case may be made to turn; that is, a real, and not a merely formal, Federal question, is essential to the jurisdiction of this court.

Equitable Life Assur. Soc. v. Brown, 187 54 L. ed.

U. S. 311, 47 L. ed. 192, 23 Sup. Ct. Rep. 123.

Some question enumerated in the judiciary act of 1789, § 25, must be involved in order to sustain a writ of error from the Supreme Court of the United States to the supreme court of a state, for that act is the only foundation for and source of authority by which the United States Supreme Court can review the decision of a state court, and it is only in the cases enumerated in that act that the aggrieved party in the highest court of a state has a right to be heard further by the Supreme Court.

Davis v. Texas, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep. 675.

It must appear in direct terms or by necessary intendment that the Federal question was brought to the notice of the state court and decided by it, for it is not sufficient that a Federal question might have been raised or might have been decided, and was involved in the case, if it was not in fact called to the attention of the trial court in unmistakable terms.

Endowment Benev. Asso. v. Kansas, 120 U. S. 104, 30 L. ed. 593, 7 Sup. Ct. Rep. 499; *Marsh v. Nichols, S. & Co.* 140 U. S. 354, 35 L. ed. 416, 11 Sup. Ct. Rep. 798; *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 239, 44 L. ed. 751, 20 Sup. Ct. Rep. 620.

The Federal question must be made to appear in express terms. Judicial knowledge will not be resorted to to locate the Federal question.

Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375.

No Federal question was decided, and the case could be very readily and fairly decided without a decision of a Federal question, for there was no allegation or issue in the case claiming the local statute to be in terms, or by necessary intendment or effect, in conflict with or repugnant to the terms of U. S. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502, or the Constitution of the United States.

California Powder Works v. Davis, 151 U. S. 393, 38 L. ed. 207, 14 Sup. Ct. Rep. 350; *Kipley v. Illinois*, 170 U. S. 186, 42 L. ed. 1001, 18 Sup. Ct. Rep. 550; *Chapin v. Fye*, 179 U. S. 129, 45 L. ed. 121, 21 Sup. Ct. Rep. 71; *Northern P. R. Co. v. Austin*, 135 U. S. 318, 34 L. ed. 219, 10 Sup. Ct. Rep. 758; *New York L. Ins. Co. v. Hendren*, 92 U. S. 287, 23 L. ed. 710; *Grand Gulf R. & Bkg. Co. v. Marshall*, 12 How. 167, 13 L. ed. 939; *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 633, 44 L. ed. 302, 20 Sup. Ct. Rep. 205; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 643, 43 L. ed. 843, 19 Sup. Ct. Rep. 530, 571; *Dewey v. Des Moines*, 173 U. S. 199, 43 L. ed. 666, 19 Sup. Ct.

Rep. 379; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648; 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

Although it is true that under the third clause of § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), where a title, right, privilege, or immunity is claimed under the Federal law, such title, right, privilege, or immunity must be especially set up or claimed, and that no such provision is made as to cases within the second clause, it none the less is true that the authority of the statute must be drawn in question by someone affected by the decision of a state court in favor of its validity, and in this particular the three clauses of the section are practically identical.

Tyler v. Registration Ct. Judges, 179 U. S. 408, 45 L. ed. 253, 21 Sup. Ct. Rep. 206.

And where a right is claimed under the Constitution, it must appear that the section of the Constitution relied on was brought to the notice of the state court, and that the right claimed in this court was claimed under it.

Maxwell v. Newbold, 18 How. 511, 15 L. ed. 506; *Susquehanna Boom Co. v. West Branch Boom Co.* 110 U. S. 57, 28 L. ed. 69, 3 Sup. Ct. Rep. 408; *The Victory*, 6 Wall. 382, 18 L. ed. 848.

It is an invariable rule of the supreme court of Iowa to refuse to hear upon the appeal of a case a matter that is there introduced for the first time, and could have been presented before the trial court, but was not.

Zion Church v. Parker, 114 Iowa, 1, 86 N. W. 60; *Petty v. Mutual F. Ins. Co.* 111 Iowa, 359, 82 N. W. 767; *Smith v. McQuiston*, 108 Iowa, 363, 79 N. W. 130; *Ross v. Hawkeye Ins. Co.* 93 Iowa, 222, 34 L.R.A. 466, 61 N. W. 852.

In the supreme court of Iowa a party will be bound by the case made by the pleadings and evidence as exhibited by the record.

Joyce v. Perry, 111 Iowa, 567, 82 N. W. 941; *Dubuque Lumber Co. v. Kimball*, 111 Iowa, 48, 82 N. W. 458; *Mason v. Des Moines*, 108 Iowa, 658, 79 N. W. 389.

In the lower court, the plaintiffs in error (herein) proceeded with their case on the theory that the interpretation they gave to § 1322 of the Code of Iowa was correct, and that under the statute shares of stock of national banks could not, in Iowa, be taxed at more than their book value, ascertained in the manner they contend the book value and taxable value of the shares should be ascertained. Then on appeal they reversed their position and contended that the statute is in conflict with the terms of U. S. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502. In other words, they proceed with

their case in the supreme court on an entirely different theory than they held in the lower court. This is not permissible under the Iowa practice.

Ross v. Hawkeye Ins. Co. supra; *Hopper v. Chicago, M. & St. P. R. Co.* 91 Iowa, 639, 60 N. W. 487; *Miner v. Rhynders*, 111 Iowa, 725, 82 N. W. 909; *Dormoy v. Knowler*, 55 Iowa, 722, 8 N. W. 670.

Nor can matters left out on the trial in the lower court by oversight be supplied to and brought into the case in the state supreme court.

Patterson v. Stiles, 6 Iowa, 54; *Latterett v. Cook*, 1 Iowa, 1, 63 Am. Dec. 428; *Brazelton v. Jenkins, Morris* (Iowa) 15.

These rules apply not only to law cases, but to equity cases triable *de novo* as well.

Zion Church v. Parker, 114 Iowa, 6, 86 N. W. 60; *Wheeler & W. Mfg. Co. v. Hasbrouck*, 68 Iowa, 554, 27 N. W. 738.

The supreme court of Iowa could not perform any other function than that of determining the correctness of the assessment with reference to the complaints made by the appealing taxpayer in the trial court.

Farmers' Loan & T. Co. v. Fonda, 114 Iowa, 732, 87 N. W. 724; *Cedar Rapids & M. C. R. Co. v. Cedar Rapids*, 106 Iowa, 476, 76 N. W. 728.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was an appeal under § 1373 of the Code of Iowa, from the action of the members of the city council of the city of Estherville, Iowa, sitting as a board of equalization and review, in fixing the assessed value of the shares of stock in the plaintiff bank for the year 1906. The shares of stock in the plaintiff bank were assessed by the assessor on the basis of the book or assessed value, obtained by adding the capital, surplus, and undivided profits of the bank, and dividing the sum total by the number of shares of capital stock, to ascertain the value of one share, a proper deduction having been made on account of real estate owned by the bank. The board of review and equalization raised the assessed valuation of the shares to \$130 per share. The bank and its shareholders appeared before the board, and objected to its action and to the valuation fixed by them as being in excess of the actual value, and exorbitant and unjust. The bank contended that the stock was not assessed and valued in proportion to other like personal property in the city of Estherville, but was grossly in excess thereof, and constituted unfair and unequal taxation, and that the taxable value of the shares of the stock in the bank should be found as the assessor had previously found

it. But the board adhering to its own judgment, plaintiffs perfected an appeal to the **345]**district court of Emmett County, *Iowa. In that court plaintiffs filed a pleading containing a recital of the facts and demanding relief, and reiterating the same contention as made below, and the same claim as to the proper manner to arrive at the assessable valuation of said shares of stock. Answer was filed in behalf of the board, wherein it was denied that the assessment, as raised, was unjust, and asserted that the market value was the proper criterion for valuation, and that the actual and market value of the stock in question was even greater than that fixed in the raised assessment. It was also denied that the assessment was unfair as related to the assessment on other like property.

The district court sustained the action of the board of review, whereupon the case was appealed to the supreme court of Iowa, which affirmed the decree of the district court. 136 Iowa, 203, 112 N. W. 829. In the supreme court it was contended for the first time that the action of the board worked a violation of § 5219 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 3502), touching upon state taxation of national bank shares. Because of the fact that such matter was not presented to the board or suggested on the trial in the court below, the supreme court refused to entertain the question. What the court said was this:

"In doing so we shall first dispose of a matter of contention brought forward for the first time in argument in this court. This contention is, through the action of the defendant board, as complained of, there was worked a violation of § 5219 of U. S. Revised Statutes, having to do with the subject of state taxation of national bank shares. As confessedly such matter was not presented to the board, or suggested on the trial in the court below, we cannot give consideration thereto on merits in this court. But this is to follow our repeated decisions bearing on the subject. Cedar Rapids & M. C. R. Co. v. Cedar Rapids, 106 Iowa, 476, 76 N. W. 728; Farmer's Loan & T. Co. v. Fonda, 114 Iowa, 728, 87 N. W. 724."

And further:

"On appeal to the district court, the statute (Code, § 1373) provides for a hearing as **346]**in equity. This, however, is not to be construed as clothing the court with jurisdiction to sit as an assessing tribunal. Frost v. Board of Review, 114 Iowa, 103, 86 N. W. 213; Farmers' Loan & T. Co. v. Fonda, supra."

We are met at the threshold by a motion to dismiss for want of jurisdiction. It was

ruled in Tyler v. Registration Ct. Judges, 179 U. S. 408, 45 L. ed. 252, 21 Sup. Ct. Rep. 206, that although "it is true that under the third clause of § 709 [of the Revised Statutes], U. S. Comp. Stat. 1901, p. 575, where a title, right, privilege, or immunity is claimed under Federal law, such title, etc., must be 'specially set up or claimed,' and that no such provision is made as to cases within the second clause, involving the constitutionality of state statutes or authorities, but it is none the less true that the authority of such statute must 'be drawn in question' by someone who has been affected by the decision of a state court in favor of its validity, and that, in this particular, the three clauses of the section are practically identical."

In order to give this court jurisdiction of a writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively that a Federal question was presented for decision, that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment rendered could not have been given without deciding it.

The only complaint made before the reviewing board and the district court was that the assessment was in excess of the actual value of such stock, and exorbitant and unjust, and that the taxable value thereof should be no greater sum than is obtained by adding the capital, surplus, and undivided profits of said bank, subtracting therefrom the amount of the bank's capital invested in real estate, and dividing the remainder by the number of its shares of capital stock to obtain the true assessable value of one share of stock; also that "said stock is not assessed and valued in proportion to other like personal property in the city of Estherville, but is grossly in excess thereof, and unfair to these appellants, and is unequal taxation."

*These were not Federal questions. **[347]** No mention of the national banking act was made, nor any right or privilege claimed under it, nor were the provisions of the Revised Statutes invoked, by name or otherwise. There was no assertion of an issue in the case claiming the local statutes to be in conflict with, or repugnant to the terms of, § 5219 of the Revised Statutes, or the Constitution of the United States. Plaintiffs filed a written pleading in the district court, in which they set out all proceedings leading up to the appeal and the grounds for their complaint against the action of the equalization board, and when the case went to trial filed an amendment, alleging the additional grievance of inequality.

Section 1322 of the Iowa Code reads as follows:

"National, State, and Savings Banks.—Shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies, and not to the individual stockholders. At the time the assessment is made, the officers of national banks shall furnish the assessor with a list of all the stockholders and the number of shares owned by each, and he shall list to each stockholder, under the head of corporation stock, the total value of such shares. To aid the assessor in fixing the value of such shares, the corporation shall furnish him a verified statement of all the matters provided in the preceding section, which shall also show, separately, the amount of capital stock, and the surplus and undivided earnings, and the assessor, from such statement and other information he can obtain, including any statement furnished to and information obtained by the auditor of state, which shall be furnished him on request, shall fix the value of such stock, taking into account the capital, surplus, and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them [and in the shares of stock 348] of corporations *owning only the real estate (inclusive of leasehold interest, if any) on or in which the bank or trust company is located] shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporations shall not be otherwise assessed."

But the court held that the assessor need not rely entirely upon the statements which the bank is required by the section to furnish, but might take into consideration other information he might obtain, and, construing that section in connection with § 1305 of the Code, reading, "All property subject to taxation shall be valued at its actual value. . . . Such assessed value shall . . . be taken and considered as the taxable value of such property, . . . upon which the levy shall be made. Actual value of property, as used in this chapter, shall mean its value in the market in the ordinary course of trade," found that the shares should be assessed at their market or sale values; and then the court proceeded to ascertain, on the facts, whether the shares were taxed at more than their market value, and whether at a greater rate in proportion to the value of other like personal property.

If plaintiffs in error believed that the lo-

cal statute was unconstitutional and invalid because of conflict with the Federal Constitution or statute, they could and should have said so; but the validity of the act was nowhere specifically drawn in question.

Writ of error dismissed.

*BARTON W. KUHN, Plff. in Err., [349
v.
FAIRMONT COAL COMPANY, Deft. in
Err.

(See S. C. Reporter's ed. 349-372.)

Federal courts — following state court decisions — subjacent support — decision after rights of parties are fixed.

A decision of the highest state court that the grantor in a deed conveying the coal under a tract of land, with the right to enter upon and under said land, and to mine, excavate, and remove all of the coal, cannot maintain an action for damages in tort, founded upon the failure of the grantee or his successors to leave sufficient support to the overlying or surface land, is not binding upon the Federal courts in a similar action based on almost identical facts and circumstances, the granting clause of the two deeds being in fact identical, where such decision was handed down after the deed upon which the defendant relies was executed, and after the injury complained of was sustained, and the action begun, and where the point decided had not been previously adjudged by the state supreme court.

[For other cases, see Courts, VII. e, in Digest Sup. Ct. 1908.]

[No. 50.]

NOTE. — As to state decisions and laws as rules of decision in Federal courts—see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553; *Griffin v. Overman Wheel Co.* 9 C. C. A. 548; *Ehrendorf v. Taylor*, 6 L. ed. U. S. 290; *Jackson ex dem. St. John v. Chew*, 6 L. ed. U. S. 583; *United States ex rel. Butz v. Museatine*, 19 L. ed. U. S. 490; *Clark v. Graham*, 5 L. ed. U. S. 334; *Forepaugh v. Delaware, L. & W. R. Co.* 5 L.R.A. 508; and *Mitchell v. Burlington*, 18 L. ed. U. S. 351.

On right to subjacent support of coal lands—see note to *Griffin v. Fairmont Coal Co.* 2 L.R.A. (N.S.) 1115.

On the liability of a lessor of a mining right for injury to surface—see note to *Campbell v. Louisville Coal Min. Co.* 10 L.R.A. (N.S.) 822.

As to injunction against removal of subjacent support by mining—see *Berkey v. Berwind-White Coal Min. Co.* 16 L.R.A. (N.S.) 851.

On the liability for the removal of lateral and subjacent support—see note to *Kansas City Northwestern R. Co. v. Selwake*, 68 L.R.A. 673.

Argued December 3, 6, 1909. Decided January 3, 1910.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fourth Circuit, presenting the question whether the Federal courts are bound by a decision of the highest state court on the question of subjacent support, handed down after the rights of the parties were fixed. Answered in the negative.

The facts are stated in the opinion.

Mr. Homer W. Williams argued the cause and filed a brief for Kuhn:

No rule of property has been established. Ryan v. Staples, 23 C. C. A. 541, 40 U. S. App. 427, 76 Fed. 721.

All the cases hold that decisions of a state court, even when decided upon a statute or upon the principle of an established rule of property, do not preclude the United States court from passing upon the question if the contract out of which the cause of action arose was executed, or the right of action accrued, before the decision of the state court.

Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Rowan v. Runnels, 5 How. 134, 12 L. ed. 85; Griffin v. Overman Wheel Co. 9 C. C. A. 548, 21 U. S. App. 151, 61 Fed. 568; Lawrence v. Wickware, 4 McLean, 56, Fed. Cas. No. 8,148; Pease v. Peck, 18 How. 599, 15 L. ed. 520; Roberts v. Bolles, 101 U. S. 119, 25 L. ed. 880; Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; Detroit v. Detroit City R. Co. 55 Fed. 569; King v. Dundee Mortg. & Trust Invest. Co. 28 Fed. 33; Groves v. Slaughter, 15 Pet. 497, 10 L. ed. 818; Sims v. Hundley, 6 How. 1, 12 L. ed. 319; Enfield v. Jordan, 119 U. S. 680, 30 L. ed. 523, 7 Sup. Ct. Rep. 358; Bolles v. Brimfield, 120 U. S. 759, 30 L. ed. 786, 7 Sup. Ct. Rep. 736; Barnum v. Okolona, 148 U. S. 393, 37 L. ed. 495, 13 Sup. Ct. Rep. 638; Gibson v. Lyon, 115 U. S. 439, 29 L. ed. 440, 6 Sup. Ct. Rep. 129; Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; Hill v. Hite, 29 C. C. A. 553 note; Central Trust Co. v. Citizens' Street R. Co. 82 Fed. 1; Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; Jones v. Great Southern Fireproof Hotel Co. 79 Fed. 477, 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 370; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 62 Fed. 904; Bartholomew v. Austin, 29 C. C. A. 568, 52 U. S. App. 512, 85 Fed. 359; Speer v. Kearney County, 32 C. C. A. 101, 60 U. S. App. 38, 88 Fed. 749; Clapp v. Otoe County, 45 C. C. A. 579, 104 Fed. 473; Southern Pine Co. v. Hall, 44 C. C. A. 363, 105 Fed. 84; United States Sav. & L. Co. v. Harris, 113 Fed. 36.

The decision of a state court should not

be followed to such an extent as to make a sacrifice of truth, justice, and law.

Faulkner v. Hart, 82 N. Y. 416, 37 Am. Rep. 574.

The mere construction of a will by a state court does not, as the construction of a statute of the state, constitute a rule of decision for the courts of the United States.

Lane v. Vick, 3 How. 464, 11 L. ed. 681.

On a question not of local law, but of general jurisdiction, this court will exercise its own judgment, uncontrolled by the decisions of the several courts.

Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261. See also Judge Goff in King Iron Bridge Co. v. Harrison County, in August, 1892.

A decision of a state court upon the construction of a deed as to matters and language belonging to the common law, and not to any local statute, although entitled to high respect, is not conclusive upon the court.

Foxcroft v. Mallett, 4 How. 353, 11 L. ed. 1008.

Mr. Edward A. Brannon argued the cause and filed a brief for the Fairmont Coal Company:

Federal courts follow decisions of the highest state courts in construing instruments passing title to real estate within the particular state.

Boyle v. Zacharie, 6 Pet. 648, 8 L. ed. 532; Russell v. Southard, 12 How. 139, 13 L. ed. 927; De Vaughn v. Hutchinson, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461; Clarke v. Clarke, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873; Oliver v. Clarke, 45 C. C. A. 360, 106 Fed. 402; Berry v. Northwestern & P. Hypotheek Bank, 35 C. C. A. 185, 93 Fed. 44; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Abraham v. Casey, 179 U. S. 210, 45 L. ed. 156, 21 Sup. Ct. Rep. 88; Claiborne v. Brooks, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Williams v. Kirtland, 13 Wall. 306, 20 L. ed. 683; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Suydam v. Williamson, 24 How. 427, 16 L. ed. 742; Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; Green v. Neal, 6 Pet. 291, 296, 8 L. ed. 402, 404; Warburton v. White, 176 U. S. 484, 44 L. ed. 555, 20 Sup. Ct. Rep. 404; 11 Cyc. Law & Proc. pp. 903, 904; Buford v. Kerr, 33 C. C. A. 166, 62 U. S. App. 270, 90 Fed. 513; Foster v. Elk Fork Oil & Gas Co. 32 C. C. A. 560, 61 U. S. App. 576, 99 Fed. 178; Roberts v. Lewis, 153 U. S. 367, 38 L. ed. 747, 14 Sup. Ct. Rep. 945; Lowndes v. Huntington, 153

U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758; *Moore v. Citizens' Nat. Bank*, 104 U. S. 625, 26 L. ed. 870; *Forsyth v. Hammond*, 166 U. S. 518, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665; *Wilkes County v. Coler*, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458; *Beauregard v. New Orleans*, 18 How. 497, 15 L. ed. 469; *Jackson ex dem. St. John v. Chew*, 12 Wheat. 153, 6 L. ed. 583; *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 52 L. ed. 379, 28 Sup. Ct. Rep. 482; *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. ed. 945, 27 Sup. Ct. Rep. 681; *Tracy v. Ginzberg*, 205 U. S. 170, 51 L. ed. 755, 27 Sup. Ct. Rep. 461; *Chanler v. Kelsey*, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550; *Halsted v. Buster*, 140 U. S. 273, 35 L. ed. 484, 11 Sup. Ct. Rep. 782; *Ridings v. Johnson*, 128 U. S. 212, 32 L. ed. 401, 9 Sup. Ct. Rep. 72; *Gornley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Clement v. Packer*, 125 U. S. 309, 31 L. ed. 721, 8 Sup. Ct. Rep. 907; *Hanrick v. Patrick*, 119 U. S. 156, 20 L. ed. 396, 7 Sup. Ct. Rep. 147; *Bryan v. Willard*, 21 W. Va. 65; *Slaughter v. Glenn*, 98 U. S. 242, 25 L. ed. 122; *Davis v. Mason*, 1 Pet. 503, 7 L. ed. 239.

There are cases holding that a Federal court will not be bound by state decisions, but will exercise its own independent judgment, though that judgment differ from state decisions. Such is the case in suits involving general commercial law, the law of insurance, the law of fellow-servantcy, and some others of like nature, depending on general law applicable the country over.

Lane v. Vick, 3 How. 464, 11 L. ed. 681; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Rowan v. Runnels*, 5 How. 134, 12 L. ed. 85; *Douglass v. Pike County*, 101 U. S. 687, 25 L. ed. 971.

But in *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865, while it is stated that in certain cases the Federal court may act on its own independent judgment in such cases, it is admitted and stated that where rights and titles to things having a permanent locality, such as rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character, are concerned, the state decision governs.

In *Balkam v. Woodstock Iron Co.* 154 U. S. 177, 38 L. ed. 953, 14 Sup. Ct. Rep. 1010, Mr. Justice White shows clearly the distinction between the case of *Leffingwell v. Warren*, 2 Black, 599, 17 L. ed. 261, and that of *Burgess v. Seligman*, *supra*, which latter is often relied upon as authorizing the United States courts to form an inde-

pendent judgment; but Justice White shows that the latter case affords no such authority in such a case as *Leffingwell v. Warren*, which turned upon the construction of a state statute of limitations as to real estate within a state.

The mere fact that a contract (the deed here) conveying realty was made or a suit was instituted in a Federal court, or a cause of action had arisen before the decision of the question as to the construction of the contract by the highest state court, does not change this rule. If the state court decides first upon the true construction of such contract conveying realty, the Federal court will follow the state court, no matter when it took jurisdiction of a similar case (*Western U. Teleg. Co. v. Poe*, 64 Fed. 9; *Stutsman v. Wallace*, 142 U. S. 293, 35 L. ed. 1018, 12 Sup. Ct. Rep. 227; *Roberts v. Lewis*, *supra*). This rule is especially true in cases where the highest state courts have already construed instruments passing title to real estate within the particular state (*De Vanghn v. Hutchinson*; *Clarke v. Clarke*; *Brine v. Hartford F. Ins. Co.*; and *Abraham v. Casey*,—*supra*). The questions involved in this case were not passed upon by the Federal circuit court until after a most careful consideration and adjudication of the same questions by the highest court of West Virginia.

Mr. Z. Taylor Vinson also argued the cause, and, with Messrs. Vinson & Thompson, filed a brief for the Fairmont Coal Company:

The fact that the deed under consideration was executed before the bringing of this action, and the decision in the *Griffin Case* had been rendered, but not become final, cannot affect the duty of the Federal courts to follow the decision of the state court when identically the same question is presented to them.

Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 91-108, 44 L. ed. 84-92, 20 Sup. Ct. Rep. 33; *Rowan v. Runnels*, 5 How. 134, 139, 12 L. ed. 85, 87; *Morgan v. Curtenius*, 20 How. 1, 15 L. ed. 823; *Fairfield v. Gallatin County*, 100 U. S. 47, 52, 25 L. ed. 544, 546; *Burgess v. Seligman*, 107 U. S. 20, 35, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; *Bauserman v. Blunt*, 147 U. S. 647, 653-656, 37 L. ed. 316, 318-320, 13 Sup. Ct. Rep. 466; *Williams v. Eggleston*, 170 U. S. 304, 311, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 173 U. S. 99, 43 L. ed. 628, 19 Sup. Ct. Rep. 341; *Wade v. Travis County*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715; *Polk v. Wendal*, 9 Craneh, 87,

3 L. ed. 665; *Luther v. Borden*, 7 How. 1, 40, 12 L. ed. 581, 598; *Nesmith v. Sheldon*, 7 How. 812, 12 L. ed. 925; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *Leffingwell v. Warren*, 2 Black, 599, 17 L. ed. 261; *Christy v. Pidgeon*, 4 Wall. 196, 18 L. ed. 322; *Post v. Kendall County*, 105 U. S. 667, 26 L. ed. 1204; *Bueher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974.

The construction of deeds for the transfer of land between private parties, given by the highest court of the state in which the land lies, will be adopted and followed by the Federal courts whenever the same question is presented to them.

East Central Eureka Min. Co. v. Central Eureka Min. Co. 204 U. S. 266, 272, 51 L. ed. 476, 481, 27 Sup. Ct. Rep. 258; *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 636, 24 L. ed. 858, 861; *De Vaughn v. Hutchinson*, 165 U. S. 566, 570, 41 L. ed. 827, 829, 17 Sup. Ct. Rep. 461; *United States v. Crosby*, 7 Cranch, 115, 3 L. ed. 287; *Clark v. Graham*, 6 Wheat. 577, 5 L. ed. 334; *McGoon v. Seales*, 9 Wall. 23, 19 L. ed. 545; *Olcott v. Bynum*, 17 Wall. 44, 21 L. ed. 570; *Ex parte McNeil*, 13 Wall. 236, 20 L. ed. 624.

The Federal courts will lean toward an agreement of views with the state courts if the question seems to them balanced with doubt,—a principle reinforced by the later cases.

Tampa Waterworks Co. v. Tampa, 199 U. S. 244, 50 L. ed. 170, 26 Sup. Ct. Rep. 23; *Mead v. Portland*, 200 U. S. 163, 50 L. ed. 420, 26 Sup. Ct. Rep. 171; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Wilson v. Standefer*, 184 U. S. 399-412, 46 L. ed. 612-618, 22 Sup. Ct. Rep. 384; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 220, 46 L. ed. 1132, 1135, 22 Sup. Ct. Rep. 820; *Chicago Theological Seminary v. Illinois*, 188 U. S. 662-675, 677, 47 L. ed. 641-649, 650, 23 Sup. Ct. Rep. 386.

The construction placed upon the deed in the *Griffin Case* by the supreme court of appeals of West Virginia announced no new rules of interpretation of deeds, but, on the contrary, followed strictly a line of decisions of that court and the court of appeals of Virginia, made a long time prior to the date of the deed from Griffin to Camden, in 1889.

Hurst v. Hurst, 7 W. Va. 339; *Snodgrass v. Wolf*, 11 W. Va. 158; *Barber v. Fire & M. Ins. Co.* 16 W. Va. 658, 37 Am. Rep. 800; *O'Brien v. Breece*, 21 W. Va. 704; *Gibney v. Fitzsimmons*, 45 W. Va. 334, 32 S. E. 189; *Long v. Perine*, 41 W. Va. 314, 23 S. E. 611; *McDougal v. Mnsgrave*, 46 W. Va. 509, 33 S. E. 281; 2 Minor, Inst. 54 L. ed.

pp. 996, 1066-4-2; *Carrington v. Goddin*, 13 Gratt. 587; *Wilson v. Langhorne*, 102 Va. 631, 47 S. E. 871; *King v. Norfolk & W. R. Co.* 99 Va. 625, 39 S. E. 701.

The rule that deeds of conveyance will be construed most strongly against the grantor, and in the absence of ambiguous language in the instrument itself, the courts will not write into these instruments new covenants and reservations which the parties expressly and intentionally omitted, has been established and followed in Virginia and West Virginia by an unbroken course of decisions which have become rules of property in these states. To depart from these rules now would introduce confusion and disturbance in our land titles. This rule is the doctrine of the Supreme Court of the United States.

Gavinzel v. Crump, 22 Wall. 308, 319, 22 L. ed. 783, 785; *Baltzer v. Raleigh & A. Air Line R. Co.* 115 U. S. 634, 647, 29 L. ed. 505, 509, 6 Sup. Ct. Rep. 216; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 8 Wall. 276, 278, 19 L. ed. 349.

The Federal courts will follow decisions of the highest courts of the state that have become rules of property.

Bueher v. Cheshire R. Co. 125 U. S. 583, 31 L. ed. 798, 8 Sup. Ct. Rep. 974; *Clarke v. Clarke*, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873; *Palmer v. Low*, 98 U. S. 11, 25 L. ed. 62; *Suydam v. Williamson*, 24 How. 427, 16 L. ed. 742; *Derby v. Jacques*, 1 Cliff. 425, Fed. Cas. No. 3,817; *New York Secur. & T. Co. v. Lombard Invest. Co.* 65 Fed. 271; *Orvis v. Powell*, 98 U. S. 177, 25 L. ed. 238; *Wade v. Travis County*, 174 U. S. 508, 43 L. ed. 1064, 19 Sup. Ct. Rep. 715; *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. ed. 1018, 12 Sup. Ct. Rep. 227; *United States Sav. & L. Co. v. Harris*, 113 Fed. 27; *Wheeling Bridge & Terminal R. Co. v. Reymann Brewing Co.* 32 C. C. A. 571, 61 U. S. App. 531, 90 Fed. 189; *Madisonville Traction Co. v. St. Bernard Min. Co.* 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 175 U. S. 100, 44 L. ed. 89, 20 Sup. Ct. Rep. 33; *North Carolina Min. Co. v. Westfeldt*, 151 Fed. 290; *Troy Wagon Works Co. v. Hancock*, 81 C. C. A. 595, 152 Fed. 605.

Mr. Justice Harlan delivered the opinion of the court:

This case is here on a question propounded under the authority of the judiciary act of March 3d, 1891, relating to the jurisdiction of the courts of the United States. 26 Stat. at L. 826, chap. 517, § 6, U. S. Comp. Stat. 1901, p. 549. The facts out of which the question arises are substantially as will be now stated.

On the 21st day of November, 1889, the plaintiff, Kuhn, a citizen of Ohio, sold and conveyed to Camden all the coal underlying a certain tract of land in West Virginia of which he, Kuhn, was the owner in fee. The deed contained these clauses: "The parties of the first part do grant unto the said Johnson N. Camden all the coal and mining privileges necessary and convenient for the removal of the same, in, upon, and under a certain tract or parcel of land situated in the county of Marion, on the waters of the West Fork river, bounded and described as follows, to wit: . . . Together with the right to enter upon and under said land, and to mine, excavate, and remove all of said coal, and to remove upon and under the said lands the coal from and under adjacent, coterminous, and neighboring lands, and also the right to enter upon and under the tract 354]of land hereinbefore described *and make all necessary structures, roads, ways, excavations, air shafts, drains, drain ways and openings necessary or convenient for the mining and removal of said coal and the coal from coterminous and neighboring lands to market."

The present action of trespass on the case was brought January 18th, 1906. The declaration alleged that the coal covered by the above deed passed to the defendant, the Fairmont Coal Company, a West Virginia corporation, on the — of January, 1906; that the plaintiff Kuhn was entitled of right to have all his surface and other strata overlying the coal supported in its natural state, either by pillars or blocks of coal or by artificial support; that on the day named the defendant company mined and removed coal from under the land, leaving, however, large blocks or pillars of coal as a means of supporting the overlying surface; that the coal company, disregarding the plaintiff's rights, did knowingly, wilfully, and negligently, without making any compensation therefor, or for the damages arising therefrom, mine and remove all of said blocks and pillars of coal so left, by reason whereof and because of the failure to provide any proper or sufficient artificial or other support for the overlying surface, the plaintiff's surface land, or a large portion thereof, was caused to fall; and that it was cracked, broken, and rent, causing large holes and fissures to appear upon the surface, and destroying the water and water courses.

The contract under which the title to the coal originally passed was executed in West Virginia, and the plaintiff's cause of action arose in that state.

A demurrer to the declaration was sustained by the circuit court, an elaborate opinion being delivered by Judge Dayton. 152 Fed. 1013. The case was then taken

upon writ of error to the circuit court of appeals.

It appears from the statement of the case made by the circuit court of appeals, that, in the year 1902, after Kuhn's deed to Camden, one Griffin brought, in a court of West *Virginia, an action, similar in all [355 respects to the present one, against the Fairmont Coal Company, the successor of Camden. His rights arose from a deed almost identical with that executed by Kuhn to Camden. That case was ruled in favor of the coal company, and subsequently was taken to the supreme court of West Virginia, which announced its opinion therein in November, 1905. A petition for rehearing having been filed, the judgment was stayed. But the petition was overruled March 27th, 1906, on which day, after Kuhn's suit was brought, the decision previously announced in the Griffin Case became final under the rules of the supreme court of the state. *Griffin v. Fairmont Coal Co.* 59 W. Va. 480, 2 L.R.A. (N.S.) 1115, 53 S. E. 24.

The contention by the coal company in the court below was that, as the decision in the Griffin Case covered substantially the same question as the one here involved, it was the duty of the Federal court to accept that decision as controlling the rights of the present parties, whatever might be its own opinion as to the law applicable to this case. The contention of Kuhn was that the Federal court was under a duty to determine the rights of the present parties upon its own independent judgment, giving to the decision in the state court only such weight as should be accorded to it according to the established principles in the law of contracts and of sound reasoning; also, that the Federal court was not bound by a decision of the state court in an action of trespass on the case for a tort not involving the title to land.

Such being the issue, the circuit court of appeals, proceeding under the judiciary act of March 3d, 1891, chap. 517, have sent up the following question to be answered:

"Is this court bound by the decision of the supreme court in the case of *Griffin v. Fairmont Coal Co.*, that being an action by the plaintiff against the defendant for damages for a tort, and this being an action for damages for a tort based on facts and circumstances almost identical, the language of the deeds with reference to the granting clause being *in fact identical, that case having [356] been decided *after* the contract upon which defendant relies was executed, *after* the injury complained of was sustained, and *after* this action was instituted?"

There is no room for doubt as to the scope of the decision in the Griffin Case. The syllabus—which, in West Virginia, is the

law of the case, whatever may be the reasoning employed in the opinion of the court—is as follows: “1. Deeds conveying coal with rights of removal should be construed in the same way as other written instruments, and the intention of the parties, as manifest by the language used in the deed itself, should govern. 2. The vendor of land may sell and convey his coal, and grant to the vendee the right to enter upon and under said land, and to mine, excavate, and remove all of the coal purchased and paid for by him, and, if the removal of the coal necessarily causes the surface to subside or break, the grantor cannot be heard to complain thereof. 3. Where a deed conveys the coal under a tract of land, together with the right to enter upon and under said land, and to mine, excavate, and remove all of it, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface in its original position. 4. It is the duty of the court to construe contracts as they are made by the parties thereto, and to give full force and effect to the language used, when it is clear, plain, simple, and unambiguous. 5. It is only where the language of a contract is ambiguous and uncertain, and susceptible of more than one construction, that a court may, under the well-established rules of construction, interfere to reach a proper construction and make certain that which in itself is uncertain.”

Nor can it be doubted that the point decided in the Griffin Case had not been previously adjudged by the supreme court of that state. Counsel for the coal company expressly state that the question here involved was never before the legislature or courts of West Virginia until the deed in-
357]volved in the *Griffin Case came before the supreme court of that state for construction; that “until then there was no law and no local custom upon the subject in force in West Virginia;” and that “only after the holding of the state court in the Griffin Case could it be said that the narrow question therein decided had become a rule of property in that state.”

In this view of the case, was not the Federal court bound to determine the dispute between the parties according to its own independent judgment as to what rights were acquired by them under the contract relating to the coal? If the Federal court was of opinion that the coal company was under a legal obligation, while taking out the coal in question, to use such precautions and to proceed in such way as not to destroy or materially injure the surface land, was it bound to adjudge the contrary simply because, in a *single case, to which Kuhn was not a party, and* which was determined after
54 L. ed.

the right of the present parties had accrued and become fixed under their contract, and *after* the injury complained of had occurred, the state court took a different view of the law? If, when the jurisdiction of the Federal court was invoked, Kuhn, the citizen of Ohio, had, in its judgment, a valid cause of action against the coal company for the injury of which he complained, was that court obliged to subordinate its view of the law to that expressed by the state court?

In cases too numerous to be here cited, the general subject suggested by these questions has been considered by this court. It will be both unnecessary and impracticable to enter upon an extended review of those cases. They are familiar to the profession. But in the course of this opinion we will refer to a few of them.

The question as to the binding force of state decisions received very full consideration in *Burgess v. Seligman*, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10. After judgment in that case by the United States circuit court, the supreme court of the state rendered two judgments, each of which was adverse to the grounds upon which the circuit court had proceeded, and the contention *was that this court [358 should follow those decisions of the state court, and reverse the judgment of the circuit court. The opinion in that case states that, in order to avoid misapprehension, the court had given the subject special consideration, and the extended note at the close of that opinion shows that the prior cases were all closely scrutinized by the eminent justice who wrote the opinion. A conclusion was reached that received the approval of all the members of the court. We place in the margin† an extract from the opinion *of [359 Mr. Justice Bradley. In *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974, Mr. Justice Miller, speaking for the court observed: “It may be said generally that wherever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the state, that the decisions upon the subject are usually con-

†“We do not consider ourselves bound to follow the decision of the state court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The Federal courts have an independent jurisdiction in the administration of state laws, coordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of

clusive, and always entitled to the highest respect of the Federal courts. The whole of this subject has recently been very ably reviewed in the case of *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10. Where such local law or custom has been established by repeated decisions of the highest courts of a state, it becomes, also the law governing the courts of the United States sitting in that state." See also *Jackson ex dem. St. John v. Chew*, 12 Wheat. 153, 6 L. ed. 583.

Up to the present time these principles have not been modified or disregarded by this court. On the contrary, they have been reaffirmed without substantial qualification in many subsequent cases, some of which are here cited. *East Alabama R. Co. v. Doe*, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 869; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Gormly v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Folsom v. Township* 96, 159 U. S. 611, 40 L. ed. 278, 16 Sup. Ct. Rep. 174; *Barber v. Pittsburgh, Ft. W. & C. R. Co.* 166 U. S. 83, 41 L. ed. 925, 17 Sup. Ct. Rep. 448; *Stanly County v. Coler*, 190 U. S. 437, 47 L. ed. 1126, 23 Sup. Ct. Rep. 811; *Julian v. Central Trust Co.* 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399; *Wicomico County v. Bancroft*, 203 U. S. 112, 51 L. ed. 112, 27 Sup. Ct. Rep. 21; *Presidio County v. Noel-Young Bond & Stock Co.* 212 U. S. 58, 53 L. ed. 402, 29 Sup. Ct. Rep. 237.

360] *We take it, then, that it is no longer to be questioned that the Federal courts, in determining cases before them, are to be

guided by the following rules: 1. When administering state laws and determining rights accruing under those laws, the jurisdiction of the Federal court is an independent one, not subordinate to, but co-ordinate and concurrent with, the jurisdiction of the state courts. 2. Where, *before the rights of the parties accrued*, certain rules relating to real estates have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the Federal court as authoritative declarations of the law of the state. 3. *But where the law of the state has not been thus settled*, it is not only the right, but the duty, of the Federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. 4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, *or when there has been no decision by the state court on the particular question involved*, then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the Federal court should always lean to an agreement with the state court if the question is balanced with doubt.

The court took care, in *Burgess v. Seligman*, to say that the Federal court would not only fail in its duty, but would defeat the object for which the national courts were given jurisdiction of controversies be-

two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, *or when there has been no decision, of the state tri-*

bunal, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But, even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded, as they are, on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudications."

tween citizens of different states, if, while leaning to an agreement with the state court, it did not exercise an independent judgment in cases involving principles not settled by previous adjudications.

It would seem that according to those principles, now firmly established, the duty **361]** was upon the Federal court, in *the present case, to exercise its independent judgment as to what were the relative rights and obligations of the parties under their written contract. The question before it was as to the liability of the coal company for an injury arising from the failure of that corporation, while mining and taking out the coal, to furnish sufficient support to the overlying or surface land. Whether such a case involves a rule of property in any proper sense of those terms, or only a question of general law, within the province of the Federal court to determine for itself, the fact exists that there had been no determination of the question by the state court before the rights of the parties accrued and became fixed under their contract, or before the injury complained of. In either case, the Federal court was bound under established doctrines to exercise its own independent judgment, with a leaning, however, as just suggested, for the sake of harmony, to an agreement with the state court, if the question of law involved was deemed to be doubtful. If, before the rights of the parties in this case were fixed by written contract, it had become a settled rule of law in West Virginia, as manifested by decisions of its highest court, that the grantee or his successors in such a deed as is here involved was under no legal obligation to guard the surface land of the grantor against injury resulting from the mining and removal of the coal purchased, a wholly different question would have been presented.

There are adjudged cases involving the meaning of written contracts having more or less connection with land that were not regarded as involving a rule in the law of real estate, but as only presenting questions of general law, touching which the Federal courts have always exercised their own judgment, and in respect to which they are not bound to accept the views of the state courts. Let us look at some of those cases. They may throw light upon the present discussion.

In *Chicago v. Robbins*, 2 Black, 418, 429, **362]** 17 L. ed. 298, 304, which was *an action on the case for damages, the question was as to the right of the city of Chicago—which was under a duty to see that its streets were kept in safe condition for persons and property—to hold one Robbins liable in damages for so using his lot on a public

street as to cause injury to a passer-by. The city was held liable to the latter, and sued Robbins on that account. The state court, in a similar case, decided for the defendant, and it was contended that the Federal court should accept the views of the local court as to the legal rights of the parties. But this court, speaking by Mr. Justice Davis, said: "Where rules of property in a state are fully settled by a series of adjudications, this court adopts the decisions of the state courts. But where private rights are to be determined by the application of common-law rules alone, this court, although entertaining for state tribunals the highest respect, does not feel bound by their decisions."

In *Lane v. Vick*, 3 How. 464, 472, 476, 11 L. ed. 681, 685, 687, the nature of the controversy was such as to require a construction of a will which, among other property, devised certain real estate which, at the time of suit, was within the limits of Vicksburg, Mississippi. There had been a construction of the will by the supreme court of the state (1 How. [Miss.] 379, 31 Am. Dec. 167), and that construction, it was insisted, was binding on the Federal court. But this court said: "Every instrument of writing should be so construed as to effectuate, if practicable, the intention of the parties to it. This principle applies with peculiar force to a will. . . . The parties in that case were not the same as those now before this court; and that decision does not affect the interests of the complainants here. The question before the Mississippi court was whether certain grounds within the town plat had been dedicated to public use. The construction of the will was incidental to the main object of the suit, and, of course, was not binding on anyone claiming under the will. With the greatest respect, it may be proper to say, that this court does not follow the state courts in their construction of a will or any other instrument, *as they do in **[363]** the construction of statutes. Where, as in the case of *Jackson ex dem. St. John v. Chew*, 12 Wheat. 167, 6 L. ed. 588, the construction of a will had been settled by the highest courts of the state, and *had long been acquiesced in as a rule of property*, this court would follow it, because it had become a rule of property. The construction of a statute by the supreme court of a state is followed without reference to the interests it may affect, or the parties to the suit in which its construction was involved. But the mere construction of a will by a state court does not, as the construction of a statute of the state, constitute a rule of decision for the courts of the United States. In the case of *Swift v.*

Tyson, 16 Pet. 1, 10 L. ed. 865, the effect of the 34th section of the judiciary act of 1789 [1 Stat. at L. 92, chap. 20, U. S. Comp. Stat. 1901, p. 581], and the construction of instruments by the state courts, are considered with greater precision than is found in some of the preceding cases on the same subject."

In Foxcroft v. Mallett, 4 How. 353, 379, 11 L. ed. 1008, 1019, the object of the action was to recover certain land in Maine. The case turned in part on the construction to be given to a mortgage of certain land to Williams College, and to local adjudications relating to those lands, which, it was contended, were conclusive on the parties. "But," this court said, "on examining the particulars of the cases cited to govern this (Williams College v. Mallett, 12 Me. 398; Williams College v. Mallett, 16 Me. 84; Randell v. Mallett, 14 Me. 51), it will be seen that the construction of the mortgage to the college, in respect to this reservation or condition, never appears to have been agitated. *If it had been*, the decision would be entitled to high respect, though it should not be regarded as conclusive on the mere construction of a deed as to matters and language belonging to the common law, and not to any local statute. Williams v. Suffolk Ins. Co. 3 Sumn. 270, 277, Fed. Cas. No. 17,738."

In Russell v. Southard, 12 How. 139, 147, 13 L. ed. 927, 930, the controlling question was whether, in any case, it was admissible to show by extraneous evidence that a deed on its face of certain real estate in Kentucky was really intended by the parties as a security for a loan and as a mortgage. The court, speaking *by Mr. Justice Curtis, after citing adjudged cases sustaining the proposition that evidence of that kind was admissible in certain states, said: "It is suggested that a different rule is held by the highest court of equity in Kentucky. If it were, with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted or rejected, not by the mere force of any state statute, but upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles,"—citing Robinson v. Campbell, 3 Wheat. 212, 4 L. ed. 372; United States v. Howland, 4 Wheat. 108, 4 L. ed. 526; Boyle v. Zacharie, 6 Pet. 658, 8 L. ed. 536; Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Foxcroft v. Mallett, 4 How. 379, 11 L. ed. 1019.

In Yates v. Milwaukee, 10 Wall. 497, 506, 19 L. ed. 984, 987, the question was as to the nature and extent of the right of an owner of land in Wisconsin, bordering on a public navigable water, to make a land-

ing, wharf, or pier for his own use or for the use of the public. There was a question in the case of dedication to public use, and the city of Milwaukee sought to change or remove the wharf erected by the riparian owner in front of his lot. This court, speaking by Mr. Justice Miller, said: "This question of dedication, on which the whole of that case turned, was one of fact, to be determined by ascertaining the intention of those who laid out the lots, from what they did, and from the application of general common-law principles to their acts. This does not depend upon state statute or local state law. The law which governs the case is the common law, on which this court has never acknowledged the right of the state courts to control our decisions, except, perhaps, in a class of cases where the state courts have established, by repeated decisions, a rule of property in regard to land titles peculiar to the state."

In Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 338, 341, 47 U. S. App. 36, 45, 51, 76 Fed. 296, 300, 304, which was a suit by a Kentucky corporation, it became necessary to determine the force and effect of a mortgage originating in a state statute of Ohio and certain *municipal ordinances [365] covering street easements in Cincinnati. The state court, in a suit to which the trustee in the mortgage was not a party, passed a decree declaring the scope, effect, and duration of contracts or ordinances under which the mortgage, easements, and franchises originated. It was insisted that the Federal court was bound to accept the views of the state court. But the circuit court of appeals, held by Judges Taft, Lurton, and Hammond, ruled otherwise. Judge Lurton, speaking for all the members of that court, made an extended review of the authorities, and observed that if the state decision was regarded as conclusive upon the parties, "the constitutional right of the complainant, as a citizen of a state other than Ohio, to have its rights as a mortgagee defined and adjudged by a court of the United States, is of no real value. If this court cannot for itself examine these street contracts and determine their validity, effect, and duration, and must follow the interpretation and construction placed on them by another court in a suit begun *after its rights as mortgagee had accrued, and to which it was not a party*, then the right of such a mortgagee to have a hearing before judgment and a trial before execution is a matter of form without substance. The better forum for a suitor so situated would be a court of the state. . . . The validity, effect, and duration of the street easements granted or claimed under these laws and ordinances is a question which this

complainant is entitled to have decided by the courts of the United States, and the opinion of the supreme court of Ohio, while entitled to the highest respect as a tribunal of exalted ability, can be given no greater weight or respect than its reasoning shall demand, where the contract rights of a citizen of another state are involved, who was neither a party nor privy to the suit in which that opinion was delivered. The special fact, therefore, which justifies us in determining for ourselves the true meaning and validity of the Ohio statutes and city ordinances out of which the rights of this complainant spring is the fact that 366] it is a citizen of *another state, and that the contract under which it has acquired an interest originated prior to the judicial opinion relied upon as foreclosing our judgment."

Upon the general question as to the duty of the Federal court to exercise its independent judgment where there had not been a decision of the state court on the question involved, before the rights of the parties accrued, *Carroll County v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539, and *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532, 548, 48 L. ed. 778, 787, 24 Sup. Ct. Rep. 576, are pertinent. In the first-named case the court was confronted with a question as to the validity under the state Constitution of a certain statute of the state. Mr. Justice Matthews, delivering the unanimous judgment of the court, said: "It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the state, by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one state, suing in another, the choice of resorting to a Federal tribunal. *Burgess v. Seligman*, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10." The other case—*Great Southern Fire Proof Hotel Co. v. Jones*—presented a controversy between citizens of different states. It was sought by the plaintiffs, citizens of Pennsylvania, to enforce a *mechanics' lien upon certain real property* in Ohio. The main question was as to the validity of a statute of Ohio under which the alleged lien arose. It was

contended that a particular decision of the state court, holding the statute to be a violation of the state Constitution, was conclusive upon the Federal court. But this court, following the rules announced in *Burgess v. Seligman*, rejected *that view by [367 a unanimous vote. It said: "If, prior to the making of the contracts between the plaintiffs and McClain, the state court had adjudged that the statute in question was in violation of the state Constitution, it would have been the duty of the circuit court, and equally the duty of this court, whatever the opinion of either court as to the proper construction of that instrument, to accept such prior decision as determining the rights of the parties accruing thereafter. But the decision of the state court, as to the constitutionality of the statute in question, having been rendered *after the rights of parties to this suit had been fixed by their contracts*, the circuit court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the statute here in question. In making this declaration we must not be understood as at all qualifying the principle that, in all cases, it is the duty of the Federal court to lean to an agreement with the state court, where the issue relates to matters depending upon the construction of the Constitution or laws of the state."

It has been suggested—and the suggestion cannot be passed without notice—that the views we have expressed herein are not in harmony with some recent utterances of this court, and we are referred to *East Central Eureka Min. Co. v. Central Eureka Min. Co.* 204 U. S. 266, 272, 51 L. ed. 476, 481, 27 Sup. Ct. Rep. 258. That case involved, among other questions, the meaning of a deed for mining property. This court, in its opinion, referred to a decision of the state court as to the real object of the deed, and expressed its concurrence with the views of that court. That was quite sufficient to dispose of the case. But in the opinion it was further said: "The construction and effect of a conveyance between private parties is a matter as to which we follow the court of the state"—citing *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 636, 24 L. ed. 858, 861; *De Vaughn v. Hutchinson*, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461. Even if the broad language just quoted seems to give some support to the contention of the defendant, it is to be observed that no reference is made in the opinion to the numerous *cases, [368 some of which are above cited, holding that the Federal court is not bound, in cases between citizens of different states, to follow the state decision, if it was rendered

after the date of the transaction out of which the rights of the parties arose. Certainly there was no purpose on the part of the court to overrule or to modify the doctrines of those cases; and the broad language quoted from *East Central Eureka Min. Co. v. Central Eureka Min. Co.* must therefore be interpreted in the light of the particular cases cited to support the view which that language imports. What were those cases and what did they decide?

Brine v. Hartford F. Ins. Co., one of the cases cited, was a suit in the Federal circuit court to foreclose a mortgage on real estate. A foreclosure and sale were had, and the decree, following the established rules of the Federal court, allowed the defendant to pay the mortgage debt in one hundred days; and if the debt was not paid within that time, then the master was ordered to sell the land for cash, in accordance with the course and practice of the Federal court. *When the mortgage was made*, there was in force in Illinois, and had been for many years, a statute which, if controlling, allowed the defendant in a foreclosure suit twelve months after sale to redeem the land sold. Thus, there was a conflict between the local statute and the rules and practice obtaining in the Federal court, and the question was whether the state statute or those rules governed the rights of the parties as to the time of redemption. This court held that the statute of the state, *being in force when the mortgage in question was executed*, entered into the contract between the parties and must control the determination of their rights. Speaking by Mr. Justice Miller, it said: "The legislature of Illinois has prescribed, as an essential element of the transfer by the courts in foreclosure suits, that there shall remain to the mortgagor the right of redemption for twelve months, and to judgment creditors a similar right for fifteen months, after the sale, before the right of the purchaser to the title becomes vested. 369] This *right, as a condition on which the title passes, is as obligatory on the Federal courts as on the state courts, because in both cases it is made a rule of property by the legislature, which had the power to prescribe such a rule. . . . At all events, the decisions of this court are numerous that the laws which prescribe the mode of enforcing a contract, *which are in existence when it is made*, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation, within the meaning of the Constitution of the United States. *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793. That this very right of redemption, after a sale

under a decree of foreclosure, is a part of the contract of mortgage, where the law giving the right exists when the contract is made, is very clearly stated by Mr. Chief Justice Taney, in the case of *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143. *De Vaughn v. Hutchinson*, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461, the other case cited, involved the construction of a will made in 1867, devising real estate in the District of Columbia, and the decision was based upon the law of Maryland as it had been often declared by the courts of Maryland to be while this District was part of that state,—indeed, as it was from the time Maryland became an independent state.

It thus appears that, in the *Brine* Case, the rights of the parties were determined in conformity with a valid local statute *in force when those rights accrued*; while in the *De Vaughn* Case, the decision was based upon the law of Maryland, while the District was a part of that state, evidenced by a series of decisions made by the highest court of Maryland, *before the rights of parties accrued*. Nothing in this opinion is opposed to anything said or decided in either of those cases. The question here involved as to the scope and effect of the writing given by Kuhn to Camden does not depend upon any statute of West Virginia, nor upon any rule established by a course of decisions made before the rights of parties accrued. So that the words above quoted from *East Central Eureka Min. Co. v. Central Eureka Min. Co.* must not be interpreted as applicable to "a case like the [370 one before us, nor as denying the authority and duty of the Federal court, when determining the effect of conveyances or written instruments between private parties, citizens of different states, to exercise its own independent judgment where no authoritative state decision had been rendered by the state court before the rights of the parties accrued and became fixed.

Without expressing any opinion as to the rights of the parties under their contract, we need only say that, for the reasons stated, the question sent to this court by the Circuit Court of Appeals is answered in the negative. It will be so certified.

Mr. Justice Holmes, dissenting:

This is a question of the title to real estate. It does not matter in what form of action it arises, the decision must be the same in an action of tort that it would be in a writ of right. The title to real estate in general depends upon the statutes and decisions of the state within which it lies. I think it a thing to be regretted if, while in the great mass of cases the state courts finally determine who is the owner of land,

how much he owns, and what he conveys by his deed, the courts of the United States, when by accident and exception the same question comes before them, do not follow what, for all ordinary purposes, is the law.

I admit that plenty of language can be found in the earlier cases to support the present decision. That is not surprising, in view of the uncertainty and vacillation of the theory upon which *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865, and the later extensions of its doctrine, have proceeded. But I suppose it will be admitted on the other side that even the independent jurisdiction of the circuit courts of the United States is a jurisdiction only to declare the law, at least, in a case like the present, and only to declare the law of the state. It is not an authority to make it. *Swift v. Tyson* 371] was justified on the ground *that that was all that the state courts did. But, as has been pointed out by a recent accomplished and able writer, that fiction had to be abandoned and was abandoned when this court came to decide the municipal-bond cases, beginning with *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520. Gray, *Nature & Sources of the Law*, §§ 535-550. In those cases the court followed Chief Justice Taney in *Ohio L. Ins. & T. Co. v. Debolt*, 16 How. 416, 14 L. ed. 997, in recognizing the fact that decisions of state courts of last resort make law for the state. The principle is that a change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of the law.

The cases of the class to which I refer have not stood on the ground that this court agreed with the first decision, but on the ground that the state decision made the law for the state, and therefore should be given only a prospective operation when contracts had been entered into under the law as earlier declared. *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Green County v. Conness*, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. Rep. 69. In various instances this court has changed its decision or rendered different decisions on similar facts arising in different states, in order to conform to what is recognized as the local law. *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544.

Whether *Swift v. Tyson* can be reconciled with *Gelpcke v. Dubuque*, I do not care to inquire. I assume both cases to represent settled doctrines, whether reconcilable or not. But the moment you leave those principles which it is desirable to make uniform throughout the United States, and which the decisions of this court tend to make uniform, obviously it is most undesirable for

the courts of the United States to appear as interjecting an occasional arbitrary exception to a rule that in every other case prevails. I never yet have heard a statement of any reason justifying the power, and I find it hard to imagine one. The rule in *Gelpcke v. Dubuque* gives no help when the contract or grant in question has not been made on the faith of a previous declaration of *law. I know of no authority [372] in this court to say that, in general, state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years. There were enough difficulties in the way, even in cases like *Gelpcke v. Dubuque*, but in them there was a suggestion or smack of constitutional right. Here there is nothing of that sort. It is said that we must exercise our independent judgment—but as to what? Surely, as to the law of the states. Whence does that law issue? Certainly not from us. But it does issue, and has been recognized by this court as issuing, from the state courts as well as from the state legislatures. When we know what the source of the law has said that it shall be, our authority is at an end. The law of a state does not become something outside of the state court, and independent of it, by being called the common law. Whatever it is called, it is the law as declared by the state judges, and nothing else.

If, as I believe, my reasoning is correct, it justifies our stopping when we come to a kind of case that, by nature and necessity, is peculiarly local, and one as to which the latest intimations, and, indeed, decisions, of this court are wholly in accord with what I think to be sound law. I refer to the language of the court, speaking through Mr. Justice Miller, in *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 24 L. ed. 858. To administer a different law "is to introduce into the jurisprudence of the state of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right." I refer also to the unanimous decision in *East Central Eureka Min. Co. v. Central Eureka Min. Co.* 204 U. S. 266, 272, 51 L. ed. 476, 481, 27 Sup. Ct. Rep. 258. It is admitted that we are bound by a settled course of decisions, irrespective of contract, because they make the law. I see no reason why we are less bound by a single one.

Mr. Justice White and Mr. Justice McKenna concur in this dissent.

373] *A. HENLEY, J. A. Henley, A. D. Mackey, J. D. Bowersock, and Mrs. Hornsby, Plffs. in Err.,

v.

E. E. MYERS, Receiver of the Consolidated Barbed Wire Company.

(See S. C. Reporter's ed. 373-385.)

Constitutional law — impairing contract obligations — stockholder's liability.

1. The obligation of the contract under which the stockholders in a Kansas corporation acquired their stock is not unconstitutionally impaired by Kan. Laws (Spec. Sess.) 1898, chap. 10, § 12, requiring, as a condition of a legal or binding transfer of stock, that a statement of such transfer shall be filed with the secretary of state by the president, secretary, or managing officer of the corporation, although, when the stock was acquired, the sole requirement of the

Kansas statutes in this regard was that corporate stock should be transferable only on the books of the corporation.

[For other cases, see Constitutional Law, 1450-1474, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — remedies — stockholder's liability.

2. The substitution for individual actions to enforce the statutory liability of stockholders in a Kansas corporation of a suit in equity by a receiver appointed after judgment against the corporation, which is made by Kan. Laws (Spec. Sess.) 1898, chap. 10, does not unconstitutionally impair the obligation of the contract under which the stockholders acquired their stock.

[For other cases, see Constitutional Law, 1557-1560, in Digest Sup. Ct. 1908.]

[No. 72.]

Submitted December 10, 1909. Decided January 3, 1910.

NOTE. — As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

That a state constitution is a law within the meaning of the clause of the Federal Constitution prohibiting laws impairing the obligation of contracts—see note to Franklin County Grammar School v. Bailey, supra.

That impairing the remedy impairs the obligation of the contract—see notes to Best v. Baumgardner, 1 L.R.A. 356; Louisiana ex rel. Ranger v. New Orleans, 26 L. ed. U. S. 132; and Phinney v. Phinney, 4 L.R.A. 348.

Impairment of contract obligations by changing mode of enforcing stockholders' liability.

With the exception of *Evans v. Nellis*, 101 Fed. 920 (necessarily overruled by *HENLEY v. MYERS*), and *Converse v. Aetna Nat. Bank*, 79 Conn. 603, 65 Atl. 1064, 1065, reversed in 212 U. S. 567, 53 L. ed. 654, 29 Sup. Ct. Rep. 691, statutory changes in the mode of enforcing stockholders' liability have uniformly been sustained as against the objection that the contract rights of stockholders who became such before the new enactments were thereby impaired.

Evans v. Nellis, supra, is a decision of the United States circuit court for the northern district of New York in which, considering the validity of the same statute upheld in *HENLEY v. MYERS*, a diametrically opposite conclusion was reached. The court held that the change in remedy impaired the obligation of the contract under which the stockholder acquired his

stock because (1) it deprived him of the right to avail himself of any defense he might have against the particular creditor pursuing him; (2) it subjected him to an action for the full amount of his stock, whether the corporate indebtedness was large enough to require so large a payment or not; (3) it compelled him to pay a part of the expenses of the receivership.

Besides being squarely in conflict with, and therefore necessarily overruled by, *HENLEY v. MYERS*, this decision is opposed to the great weight of authority.

The substitution of a proceeding by an assessment directly upon the stockholders of an insolvent bank, by its receivers, under the approval of the court, on due notice to the parties, to be made ratably on all stockholders liable therefor, in an amount sufficient to make up the probable deficiency, in place of the previous remedy by bill in equity by one or more shareholders in behalf of himself and all other shareholders, does not impair the obligation of the contract under which the stockholders acquired their stock. *Com. v. Cochituate Bank*, 3 Allen, 42.

The contract rights of stockholders are not unconstitutionally impaired by substituting a proceeding by trustees in behalf of all creditors, in equal ratio, after the corporate assets have been exhausted, in place of previously existing remedies by an action at law by any creditor, after the dissolution of the corporation, or by a bill in equity against all the stockholders, to recover from each their proportionate share of the amount necessary to discharge the debt. *Story v. Furman*, 25 N. Y. 214; *Walker v. Crain*, 17 Barb. 119; *Herkimer County Bank v. Furman*, 17 Barb. 116. But prior to such change, a court of equity could restrain any single creditor from prosecuting an action at law, and require the fund to be distributed ratably among the creditors in equity, so that no single

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Douglas County, in that state, in favor of the receiver of a corporation in an action to enforce the individual liability of stockholders. Affirmed.

See same case below, 76 Kan. 723, 17 L.R.A.(N.S.) 779, 93 Pac. 168, on rehearing, 76 Kan. 736, 17 L.R.A.(N.S.) 785, 93 Pac. 173.

The facts are stated in the opinion.

Mr. W. W. Nevison submitted the cause for plaintiffs in error. Messrs. George J. Barker, A. C. Mitchell, and S. D. Bishop were on the brief:

So much of Kan. Laws 1898, chap. 10, § 12, as provides that no transfer of stock in a corporation shall be legal and binding until a statement of the change of ownership thereof, made by the president and sec-

retary of such corporation, is filed with the secretary of state, is retroactive, impairs the obligations of the contracts of those who owned stock at the time of its enactment, and is therefore unconstitutional and void.

Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; 3 Thomp. Corp. p. 2183; Hope Mut. Ins. Co. v. Flynn, 38 Mo. 483, 90 Am. Dec. 438; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357; Goodale v. Fennell, 27 Ohio St. 426, 22 Am. Rep. 326; Intiso v. Metropolitan Sav. & L. Asso. 68 N. J. L. 588, 53 Atl. 206.

The portions of §§ 14, 15, of chap. 10, of the Laws of Kansas, 1898, which took effect January 11, 1899, and which substituted for individual actions against the stockholders of corporations, upon their stockholders' liability, a suit in equity by a receiver, to be appointed after a judgment against the

creditor would be allowed to acquire priority of, or exclusive payment of, his claim.

Contract rights of creditors or stockholders are not impaired by the substitution of an action by the receiver of an insolvent bank in place of an action by any creditor, on behalf of himself and all other creditors, unless such receiver refused, on request, to bring the action. Persons v. Gardner, 42 App. Div. 490, 56 N. Y. Supp. 822, 59 N. Y. Supp. 463.

The obligation of the contract under which a stockholder acquired his stock was not unconstitutionally impaired by the substitution in place of a suit in equity against the stockholder, in which he could compel contribution from other stockholders, of a proceeding by notice and motion, in the action in which judgment was rendered against the corporation, to enforce the payment of unpaid subscriptions to the company's capital stock. Hill v. Merchants' Mut. Ins. Co. 134 U. S. 515, 33 L. ed. 994, 10 Sup. Ct. Rep. 589, affirming 86 Mo. 466. The court said that the liability to pay the amount of notes which the stockholder had given for such unpaid subscriptions had no such connection with the liability of other stockholders as to exempt him from an action at law for the amount which he had agreed to pay.

The obligation of the contracts under which stockholders acquired their stock was not unconstitutionally impaired by Minn. Gen. Laws 1899, chap. 273, enacted to make more effectual the remedy to enforce the constitutional liability of stockholders for the debts of the corporation, because, while under the old law stockholders who could not be reached by personal service were immune from liability, under the new law they need not necessarily be served with process in the action in which the assessment is made, or because the expenses incident to the enforcement of the liability in other states and against other parties are taken into consideration in estimating the

amount of the assessment. Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755.

On the authority of this case, the Federal Supreme Court in Converse v. Minnesota Thresher Mfg. Co. (Converse v. Aetna Nat. Bank) 212 U. S. 567, 53 L. ed. 654, 29 Sup. Ct. Rep. 691, reversed the judgment of the supreme court of errors of Connecticut (79 Conn. 603, 65 Atl. 1064, 1065), in which, following 79 Conn. 163, 64 Atl. 341, 7 A. & E. Ann. Cas. 75, the court refused to enforce the liability of stockholders in a Minnesota corporation, prescribed by Minn. Laws 1899, chap. 272, on the ground that such statute impaired the obligations of the contracts under which the stockholders acquired their stock. The feature of the new law which the Connecticut court found repugnant to the contract clause of the Federal Constitution was that provision which increased the amount of the stockholders' assessment by an estimate of expenses to be incurred in prosecuting further actions. But the validity of this provision was upheld by the Federal Supreme Court, as we have seen, in Bernheimer v. Converse, supra, and the validity of the statute had previously been maintained by the Minnesota supreme court, as against the objection that, as to stockholders who became such before the passage of the law, it impaired contract obligations. Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36; London & N. W. American Mortg. Co. v. St. Paul Park Improv. Co. 84 Minn. 144, 86 N. W. 872.

The courts seem more tender of the rights of the corporate creditor than of those of the stockholders. At any rate, all the courts to which the question has been presented have united in declaring that a corporate creditor who became such while the earlier Kansas statute was in force could not be deprived of the right to proceed

corporation, are retroactive, impair the obligation of the contracts of not only the creditors but the stockholders of a corporation, and are therefore unconstitutional and void.

Von Hoffman v. Quincy, 4 Wall. 535, 550, 18 L. ed. 403, 408; Kendall v. Fader, 99 Ill. App. 104, affirmed in 199 Ill. 294, 65 N. E. 318; 3 Thomp. Corp. § 3035, p. 2182; Evans v. Nellis, 101 Fed. 920; Pusey & J. Co. v. Love (Del.) 11 L.R.A.(N.S.) 953, 66 Atl. 1013; Harrison v. Remington Paper Co. 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 385, 5 A. & E. Ann. Cas. 314; Myers v. Knickerbocker Trust Co. 1 L.R.A.(N.S.) 1171, 71 C. C. A. 199, 139 Fed. 111; Converse v. Aetna Nat. Bank, 79 Conn. 163, 64 Atl. 341; Second Ward Sav. Bank v. Schranck, 97 Wis. 250, 39 L.R.A. 569, 73 N. W. 31; Dexter v. Edmands, 89 Fed. 469; Western Nat. Bank v. Reckless, 96 Fed. 78.

Mr. E. E. Myers, *in propria persona*, submitted the cause for defendant in error. Mr. R. E. Melvin was on the brief:

Defendants, having entered into a contract by the very terms of which they agreed that the legislature might amend the law relating to their liability and the method of collecting the same, cannot, now that the legislature has done exactly what they contracted it might do, be heard to complain.

Sioux City Street R. Co. v. Sioux City, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226; Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961; Miller v.

thereunder by the enactment of the new law, without impairing the obligation of the creditor's contract. Evans v. Nellis, 101 Fed. 920; Webster v. Bowers, 104 Fed. 627; Harrison v. Remington Paper Co. 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 385, 5 A. & E. Ann. Cas. 314; Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331; Pusey & J. Co. v. Love (Del.) 11 L.R.A.(N.S.) 953, 66 Atl. 1013.

The soundness of any such distinction may well be doubted; and in fairness to the other courts it must be confessed that there is no reason to believe that they would have followed the lead of the Kansas supreme court in Henley v. Myers, 76 Kan. 723, 736, 17 L.R.A.(N.S.) 779, 785, 93 Pac. 168, 173, in upholding the validity of the later enactment when challenged by the stockholder. Indeed, in Evans v. Nellis, *supra*, the new statute was declared invalid both as to corporate creditors and stockholders.

In Myers v. Knickerbocker Trust Co. 1 L.R.A.(N.S.) 1171, 71 C. C. A. 199, 139 Fed. 111, the United States circuit court of appeals for the third circuit held that the contract rights of an existing corporate creditor were unconstitutionally impaired

New York, 15 Wall. 478, 21 L. ed. 98; Union P. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 496; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185; Memphis & C. R. Co. v. Gaines, 97 U. S. 697, 24 L. ed. 1091; Louisville Water Co. v. Clark, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346; McGowan v. McDonald, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; United States Trust Co. v. United States F. Ins. Co. 18 N. Y. 199; Re Gibson, 21 N. Y. 9; Re Reciprocity Bank, 22 N. Y. 9; Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335; South Bay Meadow Dam Co. v. Gray, 30 Me. 551; Ashuelot R. Co. v. Elliot, 58 N. H. 451; Tomlinson v. Jessup, 15 Wall. 454, 21 L. ed. 204; 2 Beach, Modern Law of Contr. § 1648; State v. Missouri P. R. Co. 33 Kan. 189, 5 Pac. 772; Moline Plow Co. v. Witham, 52 Kan. 185, 34 Pac. 751; Myers v. Wheelock, 60 Kan. 752, 57 Pac. 956; Phelps-Bigelow Windmill Co. v. North American Trust Co. 62 Kan. 529, 64 Pac. 63; Pine v. Western Nat. Bank, 63 Kan. 468, 65 Pac. 690; West v. Topeka Sav. Bank, 66 Kan. 536, 63 L.R.A. 137, 97 Am. St. Rep. 385, 72 Pac. 252; Leavenworth v. Leavenworth City & Ft. L. Water Co. 62 Kan. 643, 64 Pac. 66; Cooley, Const. Lim. 361; Merchants' Ins. Co. v. Hill, 12 Mo. App. 148, 86 Mo. 466; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755.

The argument of defendants as to the requirement of the law of 1898 that a statement of the sale and transfer of stock should be made to the secretary of state in order to

by the Maryland statute which attempted to change a law permitting individual creditors of a corporation to enforce their claims against individual stockholders, so as to provide one suit in equity in behalf of all creditors, to which all stockholders may become parties, and abate pending actions under the former law. This decision was followed in Knickerbocker Trust Co. v. Cremen, 140 Fed. 973.

Exactly the contrary was held by the Maryland court of appeals in Miners' & M. Bank v. Snyder, 100 Md. 57, 68 L.R.A. 312, 108 Am. St. Rep. 390, 59 Atl. 707. See also Persons v. Gardner, *supra*.

And the rights of existing creditors are not materially lessened by substituting for the seizure of the person or property of a stockholder on attachment and execution against the property, a new form of remedy by an action of debt against him, upon a judgment obtained against the corporation, saving the existing alternative remedy by suit in equity, and authorizing him, when so sued, either in equity or at law, to make any defense which the corporation might have made. Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757.

release the stockholder is aptly and fully answered by the opinion of the supreme court of Kansas in *Henley v. Myers*, 76 Kan. 734, 17 L.R.A. (N.S.) 779, 93 Pac. 168. See also 3 *Thomp. Corp.* § 3090.

It was entirely competent for the legislature, as a regulation of the business and affairs of the company, to give its creditors a new or additional remedy by which this undertaking could be enforced in their behalf, such remedy not increasing the debtor's liability.

Hill v. Merchants' Mut. Ins. Co. 134 U. S. 515, 33 L. ed. 994, 10 Sup. Ct. Rep. 589.

The legislature may alter and modify the remedy to enforce a contract without impairing its obligation. If a particular form of proceeding is prohibited, and another is left or is provided which affords an effective and reasonable mode of enforcing the right, the obligation of the contract is not impaired.

Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757.

378] *Mr. Justice Harlan delivered the opinion of the court:

The Federal question to be disposed of on this writ of error arises under the contract clause of the Constitution. The facts upon which this decision depends are not in dispute and may be thus summarized:

On the 3d day of August, 1887, the plaintiffs in error became respectively subscribers to and owners of capital stock in the Consolidated Barbed Wire Company, a Kansas corporation, engaged in the business of manufacturing wire. But, on the 15th day of January, 1899, they sold and transferred their stock, worth par, in good faith, to responsible parties, and thereafter had no interest in the company. The fact of such transfer was made to appear on the books of the company. On the same date the company sold all its property and the good will of its business, the proceeds of the sale being distributed among the defendants as stockholders in the proportion of the stock held by each. And on the day last named the company suspended and did not thereafter resume business.

In 1900, W. H. Stevenson obtained a judgment against the company upon which execution was issued and returned "no property found." In 1903, two other judgments—each of which, it is admitted, being based upon a cause of action sounding in tort—were recovered against the company, one by Briggs, administrator, and one by Maxwell. No execution was issued on either of those judgments.

In 1903, Myers, the defendant in error, 54 L. ed.

was appointed receiver of the wire company. As such receiver, and by authority of existing statutes, he brought an action in one of the Kansas courts against the present plaintiffs in error as stockholders, to recover the amount of the above judgments. Upon final hearing, the trial court gave judgments against the defendants, respectively, in certain amounts, to be paid by them in proportion to the stock owned by each. The case was carried to the supreme court of Kansas, and the judgment *was affirmed. A [379] rehearing was granted, but the judgment was again affirmed. 76 Kan. 736, 17 L.R.A. (N.S.) 785, 93 Pac. 173.

At the time the defendants became stockholders in the wire company certain constitutional and statutory provisions relating to corporations were in force in Kansas. Those referred to by counsel are given, for convenience, in the margin.† From an examination of those provisions it will be *seen that when the defendants be- [380] came the owners of stock in the company it was the law of Kansas: 1. That a stockholder *in any corporation other [381] than one for railroad, religious, or charitable purposes, should be liable for the dues of the *corporation to the ex- [382] tent of every unpaid subscription, and for an additional amount equal to the par value of the stock owned by him. 2. That if an execution against a corporation was returned "no property found," then execution could go, on the order of court and after written notice, against any stockholder, to the extent equal in amount to his stock, together with the amount, if any, unpaid thereon. 3. That when a corporation became insolvent a receiver could be appointed on application to the proper court, to close its affairs; and it was made the duty of such receiver to immediately institute proceedings against all stockholders to collect unpaid subscriptions, together with the additional liability of such stockholders, equal

† "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes." Kan. Const. art. 12, § 2.

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except

to the par value of the stock held by each; all such collections to be for the benefit of creditors. 4. That the stock of the corporation should be transferable only *on the books of the corporation* in such manner as the law prescribed.

By an act passed in 1899, and which went into effect January 11th, 1899, *before* the defendants sold their stock, the previous statute (Gen. Stat. 1868, chap. 23, § 24) was so amended as to make it the duty of the president and secretary or the managing officer of each corporation for profit doing business in the state (other than banking, insurance, and railroad corporations), as soon as any transfer, sale, or change of ownership of stock is made, as shown on its books, "to at once *file with the secretary of state* a statement of such change of ownership, giving the name and address of the new stockholder or stockholders, the number of shares so transferred, and the par value and the amount paid on such stock." The same statute provided that "no transfer of such stock shall be legal or binding until such statement is made as provided." Laws of Kan. Special Sess. 1898, chap. 10, § 12, p. 33. It is not claimed that the above statement had been made or filed with the company prior

to the sale by the defendants of their stock, or that it was ever filed; and the result is that the transfer made by the defendants of their stock (although the *fact of [383 such transfer may have been shown on the books of the wire company) was not legal or binding, if the statute was valid.

But the defendants insist that, as the statutes of Kansas did not, at the time they acquired their stock, require as a condition of its legal or binding transfer that a statement of such transfer should be filed with the secretary of state, by the president, secretary, or managing officer of the corporation, the subsequent statute imposing a condition of that kind impaired the obligation of the contract under which stockholders acquired their stock, in violation of the Constitution of the United States. The supreme court of Kansas rejected this view, and they were right.

In what way the transfer of the stock of a corporation shall be made and evidenced is a matter entirely within the governmental power of the state that creates the corporation, the state taking care that such power be not so exerted as to violate any right secured by the supreme law of the land. It was never contemplated by the framers of

upon an order of the court in which the action, suit, or other proceedings shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment." Kan. Gen. Stat. 1868, chap. 23, § 32; Id. 1889, ¶ 1192.

"A corporation is dissolved, first, by the expiration of the time limited in its charter; second, by a judgment of dissolution, rendered by a court of competent jurisdiction; but any such corporation shall be deemed dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation now so suspended from business shall, for three months after the passage of this act, fail to resume its usual and ordinary business." Kan. Gen. Stat. 1868, chap. 23, § 40, as amended by laws 1883, chap. 46, § 1, March 7; Id. 1889, ¶ 1200.

"If any corporation created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the de-

fendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable; and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved." Kan. Gen. Stat. 1868, chap. 23, § 44, Oct. 31; Id. 1889, ¶ 1204.

"No stockholder shall be liable to pay debts of the corporation, beyond the amount due on his stock, and an additional amount equal to the stock owned by him." Kan. Gen. Stat. 1868, chap. 23, § 46; Id. 1889, ¶ 1206.

By a statute passed in 1898, which took effect January 11th, 1899, the following section took the place of the above § 32:

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property upon which to levy such execution, such corporation shall be deemed to be insolvent; and upon application to the court from which said execution was issued, or to the judge thereof, a receiver shall be appointed, to close up the affairs of said corporation. Such receiver shall immediately institute proceedings against all stock-

the Constitution that the national authorities should supervise the action of a state upon such a subject, so long as the state did not transgress that instrument, but kept within the limits of its reserved power to enact such reasonable laws or regulations as, in its judgment, were necessary or conducive to the general good. We can well understand how the state might have concluded that the statutory requirement in force when the defendants acquired their stock, to the effect that transfers of the stock of corporations created by the state (except certain corporations) should be transferable only on the books of the corporation, was not effective or sufficient; particularly, because such books might not be easily or at all accessible. And we can also well understand how the state might have reasonably concluded, in the interest of the public, particularly of purchasers of stock, and of stockholders as well, that the evidence of such transfers should appear from the records of some public office, like that of the secretary of state. 384] Hence, *perhaps, the enactment of the statute which went into effect January 11th, 1899. Such a requirement as that in the act of 1899 did not increase, in any degree whatever, the liability of stockholders as

agreed to by them when becoming stockholders. On the contrary, it was in the interest of stockholders, as determining the fact of their ceasing to be stockholders on and after a particular date. Further, the statute did not forbid a sale of the stock upon such terms as might be agreed upon between a stockholder and any purchaser, the transfer, pursuant to such sale, being evidenced as prescribed by the statute. Nor, if sued as stockholders, did the act deprive defendants of any valid defense which they were entitled to make at the time they acquired their stock. It did nothing more than to prescribe, presumably in the interest of the parties immediately concerned and of the public, a rule under which a person owning and selling his stock in a corporation should be regarded as a stockholder, unless and until its sale and transfer were manifested by a statement of a particular kind, filed in a named public office. If it be said that the officers charged with the duty of making and filing that statement might fail or refuse to discharge the duty imposed upon them, the answer is that, if injury thereby came to the stockholder, those officers would be liable to him for such injury arising from neglect of duty. Besides, those officers could be com-

holders to collect unpaid subscriptions to the stock of such corporation, together with the additional liability of such stockholders, equal to the par value of the stock held by each. All collections made by the receiver shall be held for the benefit of all creditors, and shall be disbursed in such manner and at such times as the court may direct. Should the collections made by the receiver exceed the amount necessary to pay all claims against such corporation, together with all costs and expenses of the receivership, the remainder shall be distributed among the stockholders from whom collections have been made, as the court may direct; and in the event any stockholder has not paid the amount due from him, the stockholders making payment shall be entitled to an assignment of any judgment or judgments obtained by the receiver against such stockholder, and may enforce the same to the extent of his proportion of claims paid by them." Kan. Gen. Stat. 1868, chap. 23, § 32, as amended by Laws 1898, chap. 10, § 14. Id. Gen. Stat. 1901, ¶ 1302.

"The stockholders of every corporation, except railroad corporations or corporations for religious or charitable purposes, shall be liable to the creditors thereof for any unpaid subscriptions, and, in addition thereto, for an amount equal to the par value of the stock owned by them, such liability to be considered an asset of the corporation in the event of insolvency, and to be collected by a receiver for the benefit of all creditors. Kan. Gen. Stat. 1868, chap. 23, § 46, as amended in 1898, chap. 10, § 15.

When the defendants acquired their stock,

the statute that governed the transfer of stock in corporations was as follows:

"The stock of any corporation created under this act shall be deemed personal estate, and shall be transferable only on the books of the corporation, in such manner as the by-laws may prescribe; and no person shall, at any election, be entitled to vote on any stock, unless the same shall have been standing in the name of the person so claiming to vote, upon the books of the corporation, at least thirty days prior to such election; but no shares shall be transferred until all previous assessments thereon shall be fully paid." Kan. Gen. Stat. 1868, chap. 23, ¶ 27, as amended by Laws 1879, chap. 88, § 1; Id. 1889, ¶ 1184.

The above statute, which was in force on and after January 11th, 1899:

" . . . It shall also be the duty of the president and secretary of any such corporation, as soon as any transfer, sale, or change of ownership of any such stock is made, as shown upon the books of the company, to at once file with the secretary of state a statement of the new stockholder or stockholders, the number of shares so transferred, and the par value and the amount paid on such stock. No transfer of such stock shall be legal or binding until such statement is made as provided for in this act: provided, however, that no transfers of stock shall release the party so transferring from the liability of the laws of this state as to stockholders of corporations for profit, for ninety days after such transfer and the filing and recording thereof in the office of the secretary of state." Laws of Kansas, Special Session 1898, p. 33, § 12.

pelled by proper proceedings to perform the duty put upon them by the statute. We hold that the defendants acquired their stock subject, necessarily, to the power of the state, having due regard to the legal rights of parties, to regulate the transfer of stocks in its own corporations. In its first opinion in this case, the supreme court of Kansas well said: "Before the act [of 1899] was passed, one who had sold stock of a corporation, in order to relieve himself from liability for its debts, was obliged to see that the transfer was noted by its officer upon its books; the enactment merely imposed an additional duty to see that a similar notation was made [385] upon a public record. The change *imposed no restraint upon the transfer of the stock, but related only to the means by which it should be accomplished and the manner in which it might be evidenced. It is essentially a matter of method, of procedure, rather than of ultimate substantial rights." [76 Kan. 735, 17 L.R.A. (N.S.) 785, 93 Pac. 173.]

Equally without merit is the contention that the statute of 1899 impaired the obligations of the stockholder's contract, in that it substituted for individual actions against them a suit in equity by a receiver appointed after judgment against the corporation. In becoming stockholders, the defendants did not acquire a vested right in any particular mode of procedure adopted for the purpose of enforcing their liability as stockholders. It is a well-established doctrine that mere methods of procedure in actions on contract, that do not affect the substantial rights of parties, are always within the control of the state. It is to be assumed that parties make their contracts with reference to the existence of such power in the state.

Without expressing any opinion as to questions of a local character, we hold, for the reasons stated, that the statute of 1899 furnishes no valid basis for the contention that it impaired the obligation of the contract by which defendants acquired their stock. This is the only Federal question of a substantial character presented on this writ of error, and the judgment of the Supreme Court of Kansas must be affirmed.

It is so ordered.

386] *UNION PACIFIC RAILROAD COMPANY, Plff. in Err.,
v.

MORRIS HARRIS, Ralph Harris, Anna H. Arnett, and Nellie M. Daniels.

(See S. C. Reporter's ed. 386-391.)

Public lands — railroad land grants — what lands included — homestead entry.

The grant to the Union Pacific Railroad
246

Company by the act of July 3, 1866 (14 Stat. at L. 79, chap. 159), of a right of way through the "public lands," did not give that company the right to run its road through lands which, at the time of the passage of that act, were in the actual occupation of an entryman under the homestead laws.

[For other cases, see Public Lands, 184-188, in Digest Sup. Ct. 1908.]

[No. 19.]

Argued and submitted November 2, 1909.
Decided January 3, 1910.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Saline County, in that state, in favor of plaintiffs in an action to recover possession of a tract of land claimed by a railway company under a grant for its right of way. Affirmed.

See same case below, 76 Kan. 255, 91 Pac. 68.

Statement by Mr. Justice Brewer:

The admitted facts are that on April 22, 1861, Bernhard Blou settled upon and improved the northeast quarter of section 12, township 14 south, of range 3, in Saline county, Kansas, and on May 13, 1861, filed the declaratory statement required by the pre-emption laws. Blou, by occupation, cultivation, and improvements, preserved all his rights under the pre-emption until September 5, 1865, when, having made no payment or final proof, he changed his pre-emption entry to one under the homestead act of May 20, 1862. He continued in occupation, on December 8, 1870, made final proof under his homestead entry, and, on March 15, 1872, received a patent.

By the act of July 1, 1862, the general Union Pacific Railroad act (12 Stat. at L. 489, 494, chap. 120), the Leavenworth, Pawnee, & Western Railroad Company, whose name was changed to the Union Pacific Railroad Company, Eastern Division, *and [387 thereafter to the Kansas Pacific Railway Company, was granted a right of way 200 feet in width on each side of its road, through the public lands of the United States. The plaintiff in error, hereinafter called the defendant, has succeeded to the right, title, and interest of the Leavenworth Company. The route of the company, as prescribed by the act, ran from Missouri up the Kaw river until it reached the Republican river, and then north along the left bank of that river to intersect with the one hundredth merid-

NOTE.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

215 U. S.

ian in the territory of Nebraska. On July 17, 1862, the company filed its map of general route, and caused the lands within the limits of 15 miles thereof on either side of the proposed route to be withdrawn from sale. Under the amendatory act of July 2, 1864 (13 Stat. at L. 356, chap. 216), the company filed another map, designating the same general route. Neither of these routes came within 45 miles of the tract in controversy. Among the changes in the last named act is one providing in § 3 for the condemnation of a right of way 200 feet wide through land occupied by the owner or claimant. The act of July 3, 1866 (14 Stat. at L. 79, chap. 159), changed the route to extend westwardly towards Denver. Under this act the company located and constructed its road westwardly along the Snoky Hill river instead of northwestwardly along the Republican river, and, as located and constructed, the road passed through the quarter section which Blou was then seeking to acquire under the homestead law.

On January 20, 1873, Bernhard Blou executed and delivered to the Kansas Pacific Railway Company, the successor of the Leavenworth, Pawnee, & Western Railroad Company, a deed for a right of way through said quarter section, which deed the railway company accepted, and paid him the consideration named in it. The land in controversy is a strip 150 feet wide, lying immediately south of a line 50 feet south of the center of the track of the defendant through the quarter section. On November 10, 1882, Blou sold and conveyed to John Erickson, by warranty deed, all that part of the 388] *quarter section lying south of the railroad track, containing 101 acres. The defendants in error, hereinafter called the plaintiffs, derive title from Erickson. The plaintiffs and those under whom they claim had exclusive possession of the land in question from May, 1861, to August, 1902; broke and cultivated it, and paid all taxes assessed upon it since the issue of the patent. In August, 1902, the defendant fenced and took possession of the tract in controversy, whereupon this action to recover possession was commenced by the plaintiffs. The court found in their favor, and rendered judgment accordingly. This judgment was affirmed by the supreme court of the state (76 Kan. 255, 91 Pac. 68), and thereupon the case was brought here on error.

Mr. Maxwell Evarts argued the cause, and, with Mr. R. W. Blair, filed a brief for plaintiff in error:

Different considerations enter into the determination (1) of what falls within the grant of public land in aid of the construc-

tion of a railroad, and (2) of what land is deemed public land with reference to the grant of a right of way to a railroad company.

Jamestown & N. R. Co. v. Jones, 177 U. S. 125, 132, 44 L. ed. 698, 701, 20 Sup. Ct. Rep. 568; St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 429, 26 L. ed. 578, 579; Kindred v. Union P. R. Co. 94 C. C. A. 112, 168 Fed. 653.

The mere preliminary steps to acquiring land under the homestead or pre-emption laws do not take such land out of the category of public land, which the government may dispose of as it believes for its interest, without regard to the effect of such disposition on the interest of the entryman.

Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; Yosemite Valley Case (Hutchins v. Low) 15 Wall. 77, 21 L. ed. 82; Union P. R. Co. v. Douglass County, 31 Fed. 540; Northern P. R. Co. v. Smith, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794; Jamestown & N. R. Co. v. Jones, supra.

Mr. T. F. Garver submitted the cause for defendants in error. Mr. Z. C. Millikin was on the brief:

The patent, when issued, related back to the date of Blou's pre-emption settlement.

Shepley v. Cowan, 91 U. S. 337, 23 L. ed. 426; Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 662; Flint & P. M. R. Co. v. Gordon, 41 Mich. 420, 2 N. W. 648; Sturr v. Beck, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350; Johnson v. Bridal Veil Lumbering Co. 24 Or. 182, 33 Pac. 528; Lilienthal v. Southern California R. Co. 56 Fed. 701; 26 Am. & Eng. Enc. Law, p. 255.

The Blou land was not public land on July 1, 1862, and therefore a right of way was not granted through it.

Northern Lumber Co. v. O'Brien, 71 C. C. A. 598, 139 Fed. 614; United States v. Oregon & C. R. Co. 75 C. C. A. 66, 143 Fed. 771; Burlington, K. & S. W. R. Co. v. Johnson, 38 Kan. 150, 16 Pac. 125; 2 Copp, Public Lands, 861; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; Bardon v. Northern P. R. Co. 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856; United States v. Union P. R. Co. 61 Fed. 149; United States v. Turner, 54 Fed. 228; Whitney v. Taylor, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796.

Right of way and land grants do not differ in respect as to what are or are not public lands, or the effect of existing claims.

Oregon Short Line R. Co. v. Fisher, 26 Utah, 179, 72 Pac. 931; Enid & A. R. Co. v. Kephart, 19 Okla. 1, 91 Pac. 1049; Larsen v. Oregon R. & Nav. Co. 19 Or. 240, 23

Pac. 974; *Slaght v. Northern P. R. Co.* 39 Wash. 576, 81 Pac. 1062; *Red River & L. of W. R. Co. v. Sture*, 32 Minn. 95, 20 N. W. 229; *California Northern R. Co. v. Gould*, 21 Cal. 255; *Burlington, K. & S. W. R. Co. v. Johnson*, 38 Kan. 142, 16 Pac. 125; *Doughty v. Minneapolis, St. P. & S. Ste. M. R. Co.* 15 N. D. 290, 107 N. W. 971.

Occupation by a homesteader, with the intention of taking the benefit of a homestead law, constitutes a claim.

Nelson v. Northern P. R. Co. 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302.

A qualified settler who enters upon and improves a tract of public land, with the intention of obtaining a title thereto under the pre-emption laws, is a claimant.

Northern P. R. Co. v. McCormick, 36 C. C. A. 560, 94 Fed. 939.

Mr. Justice **Brewer** delivered the opinion of the court:

The grant of the right of way was "through the public lands." What is meant by "public lands" is well settled. As stated in *Newhall v. Sanger*, 92 U. S. 761, 763, 23 L. ed. 769, 770: "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." See also *Barker v. Harvey*, 181 U. S. 481-490, 45 L. ed. 963-968, 21 Sup. Ct. Rep. 690; *Minnesota v. Hitchcock*, 185 U. S. 373-391, 46 L. ed. 954-964, 22 Sup. Ct. Rep. 650. If it is claimed in any given case that they are used in a different meaning, it should be apparent either from the context or from the circumstances attending the legislation. While the power of Congress over lands which an individual is seeking to acquire under either the pre-emption or the homestead law remains until the payment of the full purchase price required by the former law or the full occupation prescribed by the [389] latter, *yet, under the general land laws of the United States, one who, having made an entry, is in actual occupation under the pre-emption or homestead law, cannot be dispossessed of his priority at the instance of any individual. *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 363, 364, 33 L. ed. 363, 366, 367, 10 Sup. Ct. Rep. 112. In other words, one who has taken land under the pre-emption or homestead law acquires an equity of which he cannot be deprived by any individual under the like laws. Now, at the time of the passage of the act of July 3, 1866, Blou was, and had been for several months, in actual occupation under the homestead law. Did Congress intend by its legislation to deprive him of that equity which he had under the general land laws as against anyone proceeding under those laws?

Any possible rights of the railroad company in this land commence with the act of July 3, 1866, for while the acts of 1864 and 1866 were in amendment of the act of 1862, yet the route prescribed by the acts of 1862 and 1864 was far to the east of this land, and only by the act of 1866 was the company authorized to construct a road through or near it. True, as held in *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578; *Bybee v. Oregon & C. R. Co.* 139 U. S. 663, 679, 35 L. ed. 305, 308, 11 Sup. Ct. Rep. 641; *Northern P. R. Co. v. Hasse*, 197 U. S. 9, 10, 49 L. ed. 642, 643, 25 Sup. Ct. Rep. 305, the grant of the right of way is absolute, and taking effect as of the date of the grant. But that date must be found in an act prescribing the finally adopted route.

A case much relied upon by the railroad company, as showing the intent of Congress in its grant of the right of way to the Union Pacific Railroad Company and its tributaries, is *Union P. R. Co. v. Douglass County*, 31 Fed. 540. In it it was held:

"It was the evident intention of Congress by the act of July 1, 1862 (12 Stat. at L. 491, chap. 120), giving a right of way to the Union Pacific Railroad Company, to grant such right of way through those lands which, by surveys, should be found to be sections 16 and 36, the school sections which it intended to give to the future state of Nebraska, pursuant to the provisions of the *organic act of 1854 (10 Stat. at [390] L. 283, chap. 59), creating the territory of Nebraska."

In other words, it was held that although Congress had, in 1854, created the territory of Nebraska, with the provision that when the lands within it were surveyed, sections 16 and 36 in each township should be reserved for school purposes, it meant by the act of 1862 to grant a right of way to the railroad company through lands which should thereafter be found to be those sections. But that decision does not reach to the precise question here presented, and many of the reasons which led to it are inapplicable here. It was well known that a large part of western Nebraska was, at the time of the passage of the act of 1862, not only unoccupied, but unsurveyed. The speedy construction of the railroad to the Pacific was desired, and nothing was said about a condemnation of the right of way. By the amendatory act of 1864, however, provision was made for such condemnation through land occupied by an owner or claimant. In *Washington & I. R. Co. v. Osborn*, 160 U. S. 103, 40 L. ed. 356, 16 Sup. Ct. Rep. 219, it appeared that Osborn was a settler upon unsurveyed public land, and had placed improvements thereon, and in-

tended when the surveys were made to pre-empt the same under the pre-emption laws of the government. The railroad company was vested by the act of March 3, 1875 (18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568), with a right of way through the public lands of the United States, subject to the exception of "lands within the limits of any military park or Indian reservation, or other lands specially reserved from sale." Osborn did not come within the terms of this exception. The act of March 3, 1875, authorized the legislature of any territory to provide the manner in which private lands and possessory claims of lands of the United States might be condemned, and further, that when no provision should have been made, such condemnation might be made in accordance with § 3 of the act of July 2, 1864, *supra*. And upon this the court, sustaining Osborn's claim of payment for the right of way, said (p. 109):

391] **"It must, therefore, be conceded that Osborn did not, by maintaining possession for several years and putting valuable improvements thereon, preclude the government from dealing with the lands as its own, and from conferring them on another party by a subsequent grant.*

"On the other hand, it would not be easy to suppose that Congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers."

It is true, as suggested in *Western P. R. Co. v. Tevis*, 41 Cal. 489, 493, that the condemnation proceedings named by the act of July 2, 1864, were in territorial courts, whereas Kansas at that time was a state. But undoubtedly the thought of Congress was the protection of an owner or claimant by condemnation proceedings, and not in what courts those proceedings should be had.

Further, "this right of way through school sections had been accepted without challenge for twenty years." This indicated the general understanding, and was significant. The contrary appears here. The railway company not only did not disturb the possession of the settler for nearly forty years, but, on the other hand, purchased and paid him for a right of way through the tract.

We are of opinion that the case in 160 U. S. 103, is, as respects the case at bar, inconsistent with that in the 31st Fed. and must be held to have, to that extent, overruled it. We do not think that it would be profitable to cite the many other cases which touch the question before us more or

less closely, or to seek to point out the differences between them and this, or to notice all the general expressions which are to be found in them.

We are of opinion that the Supreme Court of Kansas did not err, and its judgment is affirmed.

*KOMADA & COMPANY, Petitioner, [392
v.

UNITED STATES.

(See S. C. Reporter's ed. 392-398.)

Duties — on sake — similitude clause — administrative construction — adoption by Congress.

The Japanese beverage "sake" is properly classified under the similitude clause of the tariff act of July 24, 1897 (30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626), § 7, as similar to still wine, in view of the uniform customs administrative construction under which, on a protest by an importer in 1894 against classification by similitude to distilled liquor, sake was classified by similitude to still wine, which ruling has uniformly been followed, and has received at least a qualified approval by Congress in enacting such tariff act without modifying the provisions of the earlier act upon which such ruling was based.

[For other cases, see Duties, III. b. 3; Statutes, II. e, 2, IV., in Digest Sup. Ct. 1908.]

[No. 220.]

Argued November 29, 30, 1909. Decided January 3, 1910.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which, reversing the decisions of the Circuit Court for the Northern District of California and the Board of General Appraisers, sustained the ruling of the collector at the port of San Francisco, classifying sake by similitude to still wine. Affirmed.

Statement by Mr. Justice Brewer:

This case is before us on a writ of certiorari to the United States circuit court of appeals for the ninth circuit. The question is the proper classification, under the tariff act of July 24, 1897 (30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626), of a Japanese beverage known as "sake." "Sake" is not named in that act, but § 7 (p. 205), frequently spoken of as "the similitude section," reads as follows:

"That each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any arti-

ele enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall **393**] be levied on such nonenumerated *article the same rate of duty as is chargeable on the article which it resembles, paying the highest rate of duty."

In November, 1904, petitioner imported some sake at the port of San Francisco, and, following prior rulings, the collector, under the similitude section, held it similar to still wine containing more than 14 per cent of absolute alcohol, and dutiable accordingly at 50 cents per gallon, under paragraph 296 (p. 174). The petitioner protested and claimed that it was either a nonenumerated manufactured article, dutiable at 20 per cent ad valorem, under § 6 (p. 205), or, by reason of similitude to ale, porter, or beer, at 20 cents per gallon under paragraph 297 (p. 174). Both the board of general appraisers and the circuit court sustained the protest, feeling themselves constrained by the decision of the circuit court for the southern district of New York (*Nishimiya v. United States*, 131 Fed. 650), and that of the circuit court of appeals for the second circuit (*United States v. Nishimiya*, 69 C. C. A. 588, 137 Fed. 396). On appeal, the United States circuit court of appeals for the ninth circuit reversed the decision of the circuit court and sustained the classification made by the collector.

Messrs. Thomas Fitch and W. Wickham Smith argued the cause, and, with Mr. John M. Thurston, filed a brief for petitioner:

Findings of fact by the board of appraisers, which, on additional evidence, were sustained by the United States circuit court, will not be reversed by the appellate courts.

United States v. Hahn, 91 Fed. 755; *Apgar v. United States*, 24 C. C. A. 113, 46 U. S. App. 625, 78 Fed. 334; *Re White*, 53 Fed. 787; *Re Steiner*, 66 Fed. 726; *White v. United States*, 18 C. C. A. 541, 38 U. S. App. 239, 72 Fed. 251; *Re Van Blankensteyn*, 5 C. C. A. 579, 11 U. S. App. 687, 56 Fed. 474.

It is only when a finding of fact by the board of appraisers is wholly without evidence to support it, or when it is clearly contrary to the weight of evidence, that it should be disregarded.

Re Van Blankensteyn, supra; *Ralli v. United States*, Treasury Dec. No. 26,921.

The similitude of one article to another under the import duty act must be substantial.

Arthur v. Fox, 108 U. S. 125, 27 L. ed. 675, 2 Sup. Ct. Rep. 371; *Murphy v. Arnson*, 96 U. S. 131, 24 L. ed. 773.

In cases of doubtful classification of articles, the construction is to be in favor of the importer.

Powers v. Barney, 5 Blatchf. 202, Fed. Cas. No. 11,361; *Adams v. Bancroft*, 5 Sumn. 384, Fed. Cas. No. 44; *Hartranft v. Wiegmann*, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240; *American Net Twine Co. v. Worthington*, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; *United States v. Wigglesworth*, 2 Story, 369, Fed. Cas. No. 16,690; *United States v. Davis*, 4 C. C. A. 251, 12 U. S. App. 47, 54 Fed. 147; *Matheson v. United States*, 18 C. C. A. 143, 38 U. S. App. 25, 71 Fed. 394; *Hempstead v. Thomas*, 122 Fed. 538; *United States v. Nishimiya*, 69 C. C. A. 588, 137 Fed. 396.

While the highest rate of duty will be imposed where the similitude is equal, yet, in determining whether there is or is not an equality, the doubt will be resolved in favor of the importer.

Tiffany v. United States, 50 C. C. A. 419, 112 Fed. 672; *Re Guggenheim Smelting Co.* 50 C. C. A. 374, 112 Fed. 517; *United States v. Dana*, 39 C. C. A. 590, 99 Fed. 433; *Re Herter Bros.* 4 C. C. A. 107, 20 U. S. App. 254, 53 Fed. 913; *Mandel v. Seeberger*, 39 Fed. 760.

The original material from which an article is made is a controlling factor in determining its classification for customs purposes.

Von Bernuth v. United States, 76 C. C. A. 638, 146 Fed. 61; *Arthur v. Fox*, supra; *Hahn v. United States*, 40 C. C. A. 622, 100 Fed. 635; *United States v. Dana*; *Tiffany v. United States*; *Re Herter Bros.*; and *Mandel v. Seeberger*,—supra.

In determining similitude, process of manufacture may be considered.

Weilbacher v. Merritt, 37 Fed. 85; *Greenleaf v. Goodrich*, 1 Haskell, 586, Fed. Cas. No. 5,778, affirmed in 101 U. S. 278, 25 L. ed. 845.

Mr. W. Wickham Smith also filed a separate brief for petitioner:

Neither the court of appeals nor the Supreme Court will disturb the findings of fact in the circuit court, unless they are wholly without evidence to support them, which is not pretended here.

Hathaway v. First Nat. Bank, 134 U. S. 494, 498, 33 L. ed. 1004, 1006, 10 Sup. Ct. Rep. 608; *Lehnen v. Dickson*, 148 U. S. 71, 73, 37 L. ed. 373, 374, 13 Sup. Ct. Rep.

481; *Martinton v. Fairbanks*, 112 U. S. 670, 28 L. ed. 862, 5 Sup. Ct. Rep. 301; *Union P. R. Co. v. United States*, 116 U. S. 154, 157, 29 L. ed. 584, 585, 6 Sup. Ct. Rep. 325; *The Francis Wright*, 105 U. S. 381, 387, 26 L. ed. 1100, 1101; *The Columbia*, 41 C. C. A. 150, 100 Fed. 995; *The Gladestry*, 63 C. C. A. 198, 128 Fed. 591; *Metropolitan Nat. Bank v. Rogers*, 3 C. C. A. 666, 3 U. S. App. 411, 53 Fed. 776; *West Virginia Northern R. Co. v. United States*, 67 C. C. A. 220, 134 Fed. 202; *American Bridge Co. v. Camden Interstate R. Co.* 68 C. C. A. 131, 135 Fed. 331; *Morris v. Canda*, 20 C. C. A. 128, 52 U. S. App. 182, 80 Fed. 739; *Buckingham v. Estes*, 63 C. C. A. 20, 128 Fed. 587; *Re Antigo Screen Door Co.* 59 C. C. A. 248, 123 Fed. 254; *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.* 43 C. C. A. 511, 104 Fed. 244; *Wolff v. Wells, F. & Co.* 52 C. C. A. 626, 115 Fed. 34; *Gaffner v. Pigott*, 54 C. C. A. 641, 116 Fed. 487; *Lilienthal v. McCormick*, 54 C. C. A. 475, 117 Fed. 97; *American Sales Book Co. v. Bullivant*, 54 C. C. A. 287, 117 Fed. 260; *Moore v. Moore*, 58 C. C. A. 19, 121 Fed. 738; *Eureka County Bank v. Clarke*, 64 C. C. A. 571, 130 Fed. 326; *Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co.* 66 C. C. A. 299, 131 Fed. 587.

The similitude clause was not properly applicable to the merchandise in question at all.

Stuart v. Maxwell, 16 How. 150, 14 L. ed. 883; *Fisk v. Arthur*, 103 U. S. 431, 434, 26 L. ed. 520, 521; *Arthur v. Fox*, 108 U. S. 125, 129, 27 L. ed. 675, 677, 2 Sup. Ct. Rep. 371; *Herrman v. Arthur* (*Herrman v. Miller*) 127 U. S. 363, 32 L. ed. 186, 8 Sup. Ct. Rep. 1090.

The similarity or resemblance which will justify the application of the similitude clause must be substantial.

Stuart v. Maxwell; *Arthur v. Fox*; and *Fisk v. Arthur*,—*supra*.

The mere fact that an article resembles another article more than it resembles anything else will not justify the invocation of the similitude clause.

Murphy v. Arnson, 96 U. S. 131, 24 L. ed. 773.

Questions of doubt must be decided in favor of the importer.

American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55.

The word "quality" is used in the similitude clause to indicate degree of excellence; relative goodness; grade.

Arthur v. Fox, *supra*; *Herrman v. Arthur* (*Herrman v. Miller*) 127 U. S. 364, 32 L. ed. 187, 8 Sup. Ct. Rep. 1090.

Under the decision of this court, depart-
54 L. ed.

mental practice as a principle of construction for the interpretation of statutes can be invoked only when that practice has been long continued.

Merritt v. Cameron, 137 U. S. 542, 549, 34 L. ed. 772, 774, 11 Sup. Ct. Rep. 174; *United States v. Johnson*, 173 U. S. 363, 377, 43 L. ed. 731, 736, 19 Sup. Ct. Rep. 427.

And a decision, to be regarded as an authority, must have been made in a case in which the very point in controversy was argued and decided. This court has itself decided that where a decision has been made upon a point not argued and in controversy, it would not regard even its own decision as a controlling precedent.

Cross v. Burke, 146 U. S. 82, 87, 36 L. ed. 896, 898, 13 Sup. Ct. Rep. 22.

Mr. J. C. McReynolds argued the cause, and, with Attorney General Wickersham, filed a brief for respondent:

The action of the collector is presumptively correct. The burden is upon the protesting importers to establish their contention.

Arthur v. Unkart, 96 U. S. 118, 24 L. ed. 768; *Earnshaw v. Cadwalader*, 145 U. S. 247, 262, 36 L. ed. 693, 698, 12 Sup. Ct. Rep. 851; *Erhardt v. Schroeder*, 155 U. S. 124, 39 L. ed. 94, 15 Sup. Ct. Rep. 45; *United States v. Ranlett*, 172 U. S. 133, 146, 43 L. ed. 393, 398, 19 Sup. Ct. Rep. 114.

The settled interpretation and practice of the executive officers since 1894 has been to classify sake by similitude to still wine. This was not challenged until 1902; and with full knowledge of it the tariff act of 1897 was passed. Since 1894 sake has been imported in view of the practice, and of course, it has been sold by importers with the duty added. Accordingly no unexpected hardship has been imposed upon petitioner; nobody has been misled; and, in a broad sense, what importers now ask is wholly inequitable.

United States v. Cerecedo Hermanos y Compañia, 209 U. S. 337-339, 52 L. ed. 821, 822, 28 Sup. Ct. Rep. 532; *Robertson v. Downing*, 127 U. S. 607, 32 L. ed. 269, 8 Sup. Ct. Rep. 1328; *United States v. Healey*, 160 U. S. 136, 40 L. ed. 369, 16 Sup. Ct. Rep. 247; *United States v. Falk*, 204 U. S. 143, 51 L. ed. 411, 27 Sup. Ct. Rep. 191; *Hill Bros. Co. v. United States*, 81 C. C. A. 14, 151 Fed. 476; *Morningstar v. United States*, 159 Fed. 287.

The purpose of the similitude clause is to subject like articles to the same taxation.

Stuart v. Maxwell, 16 How. 150, 160, 14 L. ed. 883, 887; *Arthur v. Fox*, 108 U. S.

125, 128, 27 L. ed. 675, 676, 2 Sup. Ct. Rep. 371.

Similarity is the question of fact.

Herrman v. Arthur (Herrman v. Miller) 127 U. S. 363, 370, 32 L. ed. 186, 188, 8 Sup. Ct. Rep. 1090.

It must be substantially in one (but only one) of the particulars enumerated,—material, quality, texture, or possible use.

United States v. Roessler & H. Chemical Co. 70 C. C. A. 346, 137 Fed. 773; Greenleaf v. Goodrich, 101 U. S. 278, 283, 25 L. ed. 845, 846; Arthur v. Fox, *supra*; Weilbacher v. Merritt, 37 Fed. 85; Mandel v. Seeburger, 39 Fed. 760; Keary v. Magone, 40 Fed. 873; Re Herter Bros. 4 C. C. A. 107, 20 U. S. App. 254, 53 Fed. 913; United States v. Dana, 39 C. C. A. 590, 99 Fed. 433; Hahn v. United States, 40 C. C. A. 622, 100 Fed. 635; Tiffany v. United States, 50 C. C. A. 419, 112 Fed. 672; Re Guggenheim Smelting Co. 50 C. C. A. 374, 112 Fed. 517; Waddell v. United States, 124 Fed. 301; Rich v. United States, 172 Fed. 293.

Mr. Justice Brewer delivered the opinion of the court:

Something can be said on both sides of the question of similarity, and, if the case turned simply upon that question, it might be difficult to reach a satisfactory conclusion. In such a case the construction given by the department charged with the execution of the tariff acts is entitled to great weight. As said by Mr. Justice McKenna, delivering the opinion of the court in *United States v. Cerecedo Hermanos y Compañia*, 209 U. S. 337, 339, 52 L. ed. 821, 822, 28 Sup. Ct. Rep. 532, 533:

"We have said that when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution. *Robertson v. Downing*, 127 U. S. 607, 32 L. ed. 269, 8 Sup. Ct. Rep. 1328; *United States v. Healey*, 160 U. S. 136, 40 L. ed. 369, 16 Sup. Ct. Rep. 247. And we have decided that the re-enactment by Congress, without change, of a statute which had previously received long-continued executive construction, is an adoption by Congress of such construction. *United States v. Falk & Bros.* 204 U. S. 143, 152, 51 L. ed. 411, 414, 27 Sup. Ct. Rep. 191."

In the decision of this case, Mr. Justice White and Mr. Justice Peckham concurred solely because of the prior administrative construction.

Prior to 1894, sake was classified by similitude to distilled liquor, and subjected to a duty of \$2.50 per proof gallon, under paragraph 329, act 1890 (26 Stat. at L. 567, 569, chap. 1244), and \$2, under schedule A,

act, 1883 (22 Stat. at L. 488, 494, chap. 121, U. S. Comp. Stat. 1901, p. 2247).

*In July, 1894, Y. Woozens protested [397 against this classification, claiming the liquor was dutiable under the act of 1890 by similitude to still wine. He was sustained by the board of general appraisers in opinion dated October 4, 1894 (T. D. 15,392, G. A. 2786). The Treasury Department acquiesced, and has acted accordingly until the present time; no protest against the practice was entered until March, 1902. Three years after the ruling in the Woozens Case, Congress passed the tariff act of 1897, which in no way modified the provisions upon which the appraisers had previously based their decision. This in effect confirmed their action. In March, 1902, Hackfeld & Company, Honolulu, protested against the classification of 'sake' by similitude to still wine, but the prior ruling was sustained by the appraisers and the importer acquiesced in the decision. In the tariff act of 1909, sake is specially enumerated with still wine (paragraph 307):

"Still wines, including ginger wine or ginger cordial, vermouth, and rice wine or sake, and similar beverages not specially provided for in this section . . . if containing more than fourteen per centum of absolute alcohol, sixty cents per gallon." 36 Stat. at L. 11, 40, U. S. Comp. Stat. Supp. 1909, p. 693.

In April, 1903, Nishimiya imported some sake at New York, and protested against the classification by similitude to still wine. The board of appraisers sustained the collector, but, on appeal to the circuit court for the southern district of New York, the circuit judge thought that sake was not sufficiently like either wine or beer to be classified by similitude, and held it to be a nonenumerated manufactured article. This conclusion was sustained by the circuit court of appeals for the second circuit. *United States v. Nishimiya*, *supra*.

Thus it appears that, prior to 1894, sake was classified by similitude to distilled liquor, and then, on a protest by an importer, it was classified by similitude to still wine, and that ruling has been followed from that time to the present, receiving in the meantime at least a qualified approval by Congress. It was accepted without [398 challenge until 1902. Then, a protest against it having been overruled, it remained unchallenged for another year. After this, and in the latest tariff act, Congress has in terms put sake in the category with still wines.

Under these circumstances, we think the intent of Congress in respect to the classification of sake is clearly manifested, and the judgment of the Court of Appeals is affirmed.

ARTURO M. ELIAS, Appt.,

v.

EDUARDO RAMIREZ.

(See S. C. Reporter's ed. 398-409.)

Extradition — evidence — sufficiency of.

1. The evidence is sufficient to justify commitment in extradition proceedings on a charge of forgery of railway wheat certificates purporting to show the true weight of car loads of wheat shipped from the United States to Mexico, where the accused was a member of a firm of customs brokers which presented to the Mexican customs authorities certificates showing weights much less than the true weight; that the Mexican government was thereby defrauded of a large amount of import duties; that the accused was the principal, if not the only, beneficiary of the fraud, and that, instead of reparation or explanation, resort was had to flight.

[For other cases, see Extradition, IV. a, in Digest Sup. Ct. 1908.]

Extradition — evidence — unsworn statements.

2. Unsworn statements certified by the United States ambassador and the *chargé d'affaires* to be authenticated properly and legally so as to be received for similar purposes by tribunals of the country from which the accused has fled are, by the express terms of the act of August 3, 1882 (22 Stat. at L. 215, chap. 378, U. S. Comp. Stat. 1901, p. 3593), admissible in evidence in extradition proceedings.

[For other cases, see Extradition, IV. a, in Digest Sup. Ct. 1908.]

[No. 30.]

Submitted November 5, 1909. Decided January 3, 1910.

APPEAL from the Supreme Court of the Territory of Arizona to review a judgment discharging, on habeas corpus, a person committed in extradition proceedings. Reversed.

See same case below (Ariz.) 90 Pac. 323. The facts are stated in the opinion.

Mr. A. C. Baker submitted the cause for appellant.

Mr. William Herring submitted the cause for appellee.

Mr. Justice McKenna delivered the opinion of the court:

Appellee was arrested as a fugitive from justice in pursuance of the provision of a treaty of extradition between Mexico and the United States [31 Stat. at L. 1818], and, after a hearing before John H. Camp-

bell, judge of the district court of the first judicial district of Arizona, sitting as a commissioner in extradition proceedings, he was committed, on the charge of forgery and the utterance of forged papers, to the custody of the United States marshal for Arizona, to abide the order of the President of the United States in the premises. Upon his petition to the supreme court of the territory for habeas corpus, he was discharged from custody, and from the judgment of the court the case is here on appeal.

The court decided that the offense charged is within the terms of the treaty between the United States and Mexico, "that the committing magistrate had jurisdiction of the subject-matter and the accused," and that the complaint was sufficient. The court, however, held that there was not sufficient legal evidence to establish the fact of forgery, and that therefore "the judge of the district court exceeded his jurisdiction in holding the petitioner (appellee) for extradition." This ruling constitutes the question in the case.

The complaint, summarized, is that Ramirez forged certain railroad wheat certificates, which purported to have been issued by the Southern Pacific Company to show the true weight of certain car loads of wheat shipped from the United States to Mexico, and had the further purpose to show the amount of custom duties to be paid to Mexico. The certificates, in order to appear authenticated, it is alleged, purported and were intended to show that they were signed or sealed or stamped by the railroad company with a seal or stamp containing the words "gross weight, tare, net weight," and that the true gross, tare, and net weight of the wheat in each of 400 the cars were inserted by the company after those words, and that the certificates were initialed with the letters "G. W. B."

It is alleged that the certificates were not so authenticated by the company or anyone in its employ, and did not show the weight of the wheat, but showed that there was much less than the true weight. It is alleged also, with the usual repetition, that Ramirez forged the stamp and seal and the initials "G. W. B.," and did "use and utter" the certificates, and presented them "to the customhouse of the government of Mexico and the officials thereof," at the town of Nogales, "as true and genuine wheat certificates of the said railroad company, and as showing the true weight contained in the said cars."

There were two importations of wheat from Nogales, Arizona, to Nogales, Mexico, in the name of E. Ramirez. The manifest or request for importation was made to the proper officers at Nogales, Mexico, in

NOTE.—On practice and procedure in extradition proceedings—see notes to Cook v. Hart, 36 L. ed. U. S. 934, and Whitten v. Tomlinson, 40 L. ed. U. S. 406.

54 L. ed.

the name of and for E. Ramirez. It was the duty of the Mexican inspectors of customs to inspect and weigh the wheat, in order to compute the proper amount of duties. One of the importations was inspected by one Manuel Rosas, the other by one Francisco Enriquez, both of whom were implicated in the prosecution in Mexico for the crimes of fraud against the federal treasury and forgery of private seals.

Rosas testified that he examined the interior of the cars in a superficial manner, "satisfying himself by opening a sack that said cars contained the merchandise represented." He did not weigh the merchandise, because it came billed in car-load lots, and "did not come designated as to so many bundles, and also because the customhouse lacked the proper scale facility." He testified that "the railroad of Sonora issued to the applicants a ticket with the seal of the office, without any signature, bearing thereon, indicated in lead pencil writing, the number of the respective cars, the net weight, and the gross weight. It was so done 401] in this case; *that he compared the data upon the tickets with reference notes with those presented by the customs agent, and, finding them to correspond with each other, he had no objection in authorizing, over his own signature, the correctness of the same, and ordered it 'despatched.'" As soon as the tickets, he further testified, are compared with the applications, they are destroyed, and that he did not know what had become of them in this case. He further testified that the applications were delivered to him by the customhouse collector, which applications manifested the weight of the merchandise to be imported, and, "this being done, the manifest passed into the possession of the revisers, who solicit the railroad ticket from the interested parties for the purpose of verifying the respective comparisons." The person of whom he "asked for the tickets was Mr. Manuel Ramirez, who was in charge of the customs department of the house." Further testifying, he said that he did not know the origin of the tickets "by their form of writing;" that he did not find in any of them any erasures nor any trace of alteration, and could not tell "even vaguely the name of the employees who wrote the tickets;" that he did not know whether any person was present "when the corresponding tickets were delivered to him;" that he had no knowledge, from "private sources or otherwise, of Mr. Cerilo Ramirez's connection with the customs agency that operates under his name." He recognized, from the books of the railroad exhibited to him, the seals to be the same used by the company to express the weight, not recollecting hav-

ing personally seen the books. Explaining how he "erred," he testified that it was because he did not go personally to the offices of the railroad to compare the true weight at those offices, but instead relied on the tickets presented by Manuel Ramirez, "which were forged, in the sense that the said Ramirez personally, or in accord with some employee of the railroad," forged the tickets, "making use of the seals of the railroad."

Francisco Enriquez testified substantially to the same *effect, though in some [402 parts more fully. He testified that the tickets came approved by Mr. G. W. Bowman, chief of the station of the Sonora Railroad. He, however, did not know, he said, the handwriting of Bowman "to the extent of being able to identify the same to a certainty," because "the tickets in question only bring numbers, made in great haste, setting forth the number of the car, the gross weight, the net weight, and the tare, calculated in pounds," of which he "made the computation into kilos."

Ignacio Alleo testified that he was a private employee of the firm under investigation, and served for five years as freighter for the firm or house; that his duty was to receive the loose freight from the American side, delivered to him at Nogales, Arizona, to place the same in the cars which convey it south; that in doing so he takes note of the number of bundles, marks, countermarks, weights, and other memoranda which serve to form the applications for shipment; that said data are made on loose papers, which he delivers to Manuel Ramirez, who makes out the applications for shipment; that "Ramirez is also occupied in making the applications for exportation, reimportation, more properly exportation;" that he, the witness, had no other connection with the direct importation than to copy some applications for shipment; that when he came to the house, five years ago, Manuel Ramirez had been serving the house for a long time, and that Ramirez had "personal charge of the dealings with the employees of the customhouse, all relative to importations;" that the head person in charge of the office "was Eduardo Ramirez, who had full power to act from the owner of the business, Cerilo Ramirez; that up to three years ago, Alberto Masarenas kept the accounts of the house, since then he did not know who had, but that the cash accounts, he understands, were kept by Mr. Escobara."

Ignacio Escobara had testified before, but he would not ratify his former testimony in all respects, he said, because it was given "under the belief that his gratitude towards his *employer compelled him to [403

do so," and that, after mature consideration, he realized that he was not required "to tell an untruth in a proceeding which may stain his honor, and for that reason he was disposed to tell the truth." And he testified that from the beginning of the proceeding against Messrs. Campello he noticed the greatest uneasiness, excitement, and fear in Eduardo Ramirez, Luis Bartning, and Cerilo Ramirez; from that time they began to prepare themselves, "fearing to become involved in the same manner as Messrs. Campello and associates; that he plainly noticed the attitude of the above gentlemen and the danger in which they were." He further testified that "he saw and noticed their conduct, as well as listening to their conversation," and that "the manner of preparing themselves consisted in making up packages of correspondence and documents carefully selected and packed in a wooden box which stood in a patio or court during the day and disappeared at night without" his knowing what became of it; that he was under the impression that it was taken to the American side, not being able to tell "from whom he heard it in the office of the firm," but he believed that he "heard it said there in conversation."

He further testified that the books of account and the copy books of statement of expenses "appeared and disappeared successively, being carried to and fro by Bartning personally, who was the bookkeeper;" that, at the beginning of Campello's investigation, Alleo confessed to him that the house was very much involved in the same manner as were Messrs. Campello; that the person in charge of all transactions was Manuel Ramirez; that Bartning is the brother-in-law of Ramirez, "with whom he is strongly tied in business; the head of the institution is Cerilo Ramirez, who commands as supreme principal and owner of the establishment, and as such daily attends said office, watching carefully the affairs and progress of the house; during the absence of Cerilo his brother Eduardo directs the house, and is recognized by all as second chief; and as Cerilo was tried for smuggling, and his signature is not *accepted in customhouse dealings, all official documents are signed by Eduardo Ramirez in his own name, or through an agent representing himself in the documents as a customhouse broker." He testified further that he "was told from the beginning that the cause of fear of Cerilo Ramirez and his associates in the present case proceeded from a fraud committed by them upon the federal treasury in like manner as that committed by Messrs. Campello,—that is, by false and forged manifests of the weight of car loads of

wheat imported by said house one year ago."

The record shows that Cerilo Ramirez, "being present for the purpose of undergoing a supplementary confrontation with Ignacio Eseobara," and with "that of said Ramirez," referring apparently to some deposition or statement made by himself, which is not in the papers, stated that he was "absent from Nogales, living in Lower California, and for that reason could not have been present after the detention of Campello," and stated further that he was "therefore ignorant of what disposition had been made of the books of account, correspondence, and documents of the establishment of 'C. Ramirez,' to which Eseobara" referred. He denied that he was recognized as agent of the house, and said that "if he left the name of C. Ramirez in the business, it was with the object of not impairing the credit of the house, and on account of his brother being concerned . . . which business he transferred to his brother Eduardo, without executing in this case any special instrument." And he denied having had "previous knowledge of the fraud upon the federal treasury."

Manuel Ramirez was also put in "supplementary confrontation" with Eseobara, whose testimony was read to him, as was that of C. Ramirez, and being "apprised of the discrepancies of both depositions," said that what Eseobara said was "not exact" when he said that he, Ramirez, was "in collusion with the other Messrs. Ramirez, in trying to conceal the books and correspondence of the business." The rest of his testimony is as follows: "He does not know where they (the books and *correspondence) are, [405 and says that their chief was Mr. Eduardo Ramirez, ignoring (?) to date if the payment has been made in full of the duties upon the importation of wheat, because his duties were only to draw the papers for the importation through the customhouse."

He was called upon a second time to testify, and he was asked if he personally copied the tickets or memoranda of the weight of the cars of wheat from the sheets in which the employees of the railroad noted the weight of bundles. He answered that sometimes he did, but not in the present case, he did not remember; that his brother, Eduardo Ramirez, attended to the loading and giving of weights, but that he, in his brother's absence, would sometimes attend to this branch. And further, that he could not explain the discrepancy between the weights of the bundles in question and those shown in the respective books of the railroad company.

It appears that the frauds upon the revenue charged to E. Ramirez amounted to

\$11,944.95. The depositions were taken in proceedings instituted in Mexico under its laws as the basis for an application for the extradition of Eduardo Ramirez, and were attested by the officers of the tribunal to whom the case was assigned, and that tribunal, after citing the applicable law and its conclusion, and considering that "the *corpus delicti* of fraud against the federal treasury and undue use of private seals" had been proved, and that it constituted forgery under the laws of Mexico, and was within the provisions of the treaty between that country and the United States, concluded as follows: "Let a petition issue with the proper evidence to the Secretary of State and Foreign Affairs, so that, through the conduct of the diplomatic agents accredited in the neighboring Republic, steps be taken for the extradition of Eduardo Ramirez, and obtaining the same, to place at the disposal of this tribunal."

Appellant was commissioned by the Mexican ambassador as a proper person to present to the authorities of the United States of America a copy of the warrant of arrest rest in the *United States of Mexico, and of the depositions upon which the warrant was issued, and, as agent of Mexico, to "receive the said Eduardo Ramirez from the proper authorities of the United States of America." We shall not further quote the papers, as there is no question but that requisition had been duly made for the extradition of Ramirez. The evidence before the district judge consisted of the depositions, together with oral testimony that they would be admissible in evidence in the courts of Mexico, and, in addition, the ambassador to Mexico and the *chargé d'affaires* certified that they were "properly and legally authenticated, so as to entitle them to be received for similar purpose by tribunals of Mexico, as required by the act of Congress of August 3, 1882." [22 Stat. at L. 215, chap. 378, U. S. Comp. Stat. 1901, p. 3593.] There is also in the record a paper headed, "Statement of the weight of the ear loads of wheat imported by Eduardo Ramirez, made by this federal tribunal by virtue of the data shown in the books of the railroads," and a large number of exhibits.

The district judge committed Ramirez to the custody of the United States marshal for the territory of Arizona, to abide "the order of the President of the United States of America in the premises." The writ of habeas corpus under review was then issued by the supreme court of the territory and appellee discharged from custody. It was ordered, however, that if an appeal

should be taken to this court, he should be remanded to the custody of the marshal, to be released upon giving bail in the sum of \$25,000, under the provisions of rule 34. Bail was subsequently given and the appellee discharged from custody.

The supreme court of the territory expressed the view that the writ of habeas corpus could not be made to perform the office of a writ of error, and that, therefore, if the district judge had jurisdiction of the subject-matter and of the accused, and the offense charged was within the terms of the treaty of extradition, and there was before him "competent legal evidence on which to exercise his judgment as to whether *the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on habeas corpus." [90 Pac. 323.] The court cited *Ornelas v. Ruiz*, 161 U. S. 502, 508, 40 L. ed. 787, 789, 11 Sup. Ct. Rep. 689, and *Bryant v. United States*, 167 U. S. 104, 42 L. ed. 94, 17 Sup. Ct. Rep. 744. And considering further the extent of a court's power of review over the judgment of the committing magistrate upon the facts, said, "but such court is not to inquire whether the legal evidence of facts before the commission was sufficient or insufficient to warrant his conclusion," citing *Re Stupp*, 12 Blatchf. 501, Fed. Cas. No. 13,563; *Ornelas v. Ruiz*, supra; and *Terlinden v. Ames*, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484. The cases cited establish the propositions expressed by the court, but the learned court's application of them to the facts of this record is challenged. The court expressed the opinion that all of the conditions of commitment were established, except that there "was no competent legal evidence of the fact of forgery itself of the documents in question." That is, that there was no legal evidence of the forgery of what are called in the complaint "railroad wheat certificates" and "tickets" in the depositions of the witnesses. We are unable to agree to this conclusion. They were either forged or issued by mistake, and the supposition of a mistake is precluded by the evidence. The books of the railroad showed the true weights; the mistake or forgery was in the certificates or tickets. Exclude the former and forgery is established. If a mistake was made, it is certainly strange that it should have escaped notice until the Mexican treasury had been defrauded of \$11,944.94. Besides, the reparation for a mistake was payment of the amount in default, not by flight from the accusation of forgery and crime. Then, too, ample opportunity was given in Mexico to explain the certificates, but explanation was

not attempted. It was not attempted in Arizona; and from these negative circumstances, as well as from the positive testimony of the witnesses, it certainly cannot be said that there was substantially no evidence to justify the judgment of the commissioner that a crime had been committed, 408] and as little can it *be said that there was not probable cause to believe that the accused had committed it. We have set out the evidence somewhat fully. It shows that the Mexican treasury was defrauded by the "House of Ramirez" of \$11,944.94, and that appellee was "second chief" of the house, and the one to whom C. Ramirez had transferred it. It appears, therefore, that he was the principal, if not the only, beneficiary of the fraud. It is true that Manuel Rosas and Francisco Enriquez, the customhouse revisers, stated that they received the "tickets" from Manuel Ramirez; but, from the testimony of the latter and other evidence, it may be reasonably concluded that accused acted in conjunction with him, in fact, prepared and directed the whole affair. It is certainly not out of the bounds of reason to suppose that he who was benefited by the fraud contrived and executed it, and not his subordinate or employee. It is, however, objected that there is no evidence in the record "tending in any way to prove that any of the alleged certificates were forged or altered or changed by any person whatsoever." Indeed, it is asserted by the appellee "that the evidence, so far as it proves or tends to prove anything, proves that the certificates were genuine certificates, issued by G. W. Bowman, chief of the station of the Sonora Railroad." To complete these contentions a reference is made to the complaint, in which it is alleged that the certificates, in order to appear authenticated, purported to show that they were signed, sealed, or stamped by the railroad, containing the words "gross weight, tare, net weight," and initialed with the letters "G. W. B.," and, if so worded and initialed, would have been so authenticated as to have shown true weight of the wheat in the cars. There is no evidence, it is said, of these allegations, or that it was the duty of the customhouse officer to accept any so-called weight certificates as evidence of the true weight of the wheat to be imported. It is probable that the supreme court of the territory yielded to these contentions, and that they were the basis of its decision that there was no legal evidence before the commission of "facts 409] tending *to prove the commission of the offense charged; to wit, the crime of forgery."

We, however, cannot concur in these contentions, and, without going over the evidence

dence to show a precise or technical adaptation of it to the allegations, it is enough to say that we think the evidence shows not only that a crime was committed, but shows its character and by whom committed with sufficient certainty and strength to satisfy the statute, and to justify the order of the commissioner committing the accused to await the action of the executive department.

It is further contended that the statements of Rosas and Enriquez were unsworn to, and because unsworn to were not admissible in evidence; that "under the common law and the law of Arizona the unsworn statement of no witness is competent upon a preliminary hearing before a committing magistrate," and would not justify a commitment for trial in Arizona. It is hence contended that it was not sufficient to justify the extradition of the appellee. *Re Ezeta*, 62 Fed. 972; *Re McPhun*, 24 Blatchf. 254, 30 Fed. 57; *Benson v. McMahon*, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240, are adduced to sustain the contention. The answer to the contention is that the statute providing for extradition makes the depositions receivable in evidence, and provides that their sufficiency to establish the crime shall be such as to create a probability of the commission by the accused of the crime charged against him. This is the principle announced by the cases cited by the appellee.

Other contentions are made, but we do not think that they need special mention.

Order reversed and the cause remanded with directions to proceed in accordance with this opinion.

*MARCELO TIGLAO, Plff. in Err. [410
and Appt.,

v.
INSULAR GOVERNMENT OF PHILIPPINE ISLANDS et al.

(See S. C. Reporter's ed. 410-417.)

Appeal — mode of review — proceeding for land registration.

1. Writ of error, and not appeal, is the proper proceeding to obtain a review in the Federal Supreme Court of a judgment of the supreme court of the Philippine Islands, affirming a judgment of the court of land registration, which denied registration of a tract of land.

[For other cases, see Appeal and Error, II. b, in Digest Sup. Ct. 1908.]

NOTE.—On distinction between appeal and writ of error—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

Private land claims — in Philippine Islands — grant by subordinate Spanish officials.

2. A grant of public land in the Philippine Islands, made by subordinate Spanish officials, receives no support from the decree of the Spanish Cortes of January 4, 1813, where the conditions of that decree were not fulfilled.

[For other cases, see *Private Land Claims*, I. a, 3, in *Digest Sup. Ct. 1908*.]

Adverse possession — public lands — void agreement.

3. A wholly unauthorized grant of public land in the Philippine Islands by subordinate Spanish officials, showing its invalidity on its face, cannot serve as the basis of a prescriptive title under the Spanish royal decree of June 25, 1880, under which a prescriptive right can be founded on possession for ten years under just title and in good faith.

[For other cases, see *Adverse Possession*, 113-118, in *Digest Sup. Ct. 1908*.]

[No. 37.]

Submitted November 30, 1909. Decided January 3, 1910.

IN ERROR to, and APPEAL from, the Supreme Court of the Philippine Islands to review a judgment affirming a judgment of the Court of Land Registration, which denied registration of a tract of land. Appeal dismissed. Judgment affirmed on writ of error.

See same case below, 7 Philippine, 80.

The facts are stated in the opinion.

Messrs. **Aldis B. Browne, Alexander Britton, J. H. Blount, and Evans Browne** submitted the cause for plaintiff in error and appellant.

Solicitor General **Bowers** and Mr. **Paul Charlton** submitted the cause for defendants in error and appellees.

Mr. Justice **Holmes** delivered the opinion of the court:

This case comes by writ of error and appeal from a judgment of the supreme court of the Philippine Islands, affirming a judgment of the court of land registration, which denied registration of a tract of land. It is admitted that the facts as found by the two courts may be assumed to be true (*Reavis v. Fianza*, 215 U. S. 16, ante, 72, 30 Sup. Ct. Rep. 1); but apart from the concurrence of the courts below, the proper proceeding in a case of this kind is by writ of error, and therefore the appeal is dismissed (*Cariño v. Insular Government*, 212 U. S. 449, 53 L. ed. 594, 29 Sup. Ct. Rep. 334). So much being established, the grounds on which the plaintiff in error can claim title may be stated in a few words. On July 13, 1873, the gobernadoreillo and principales

of the town of Mabalacat, in the province of Pampanga, Luzon, executed an instrument, marked O. K. by the parish priest, purporting to grant the land, with qualifications not needing to be noticed, to one Rafael Laeson, under whom the plaintiff in error claims. Possession was held until 1885, and since then has been abandoned. The land was public land. The questions brought here were whether the original grant was valid, or, if not, whether the possession that followed it without interruption for ten years and more conferred title by prescription under the royal decree of June 25, 1880. This decree states the rule of prescription in the usual terms of the civil law. It confers ownership on those who shall establish that they have possessed the lands in question for the requisite time under just title and in good faith. See Civil Code, arts. 1957, 1952, 1953.

*As we understand the later briefs [415 filed in behalf of the plaintiff in error, the vain attempt to justify the grant under the *Recopilación de Leyes de las Indias*, bk. 4, title 12, law 1, is given up, and therefore we shall spend no time upon that. There is, however, an effort to support it under a decree of January 4, 1813. 1 Reynolds, Spanish & Mexican Land Laws, 83. This was a scheme of the Cortes to reduce public and Crown lands to private ownership, after reserving one half for the public debt. When certain preliminaries had been accomplished, as to which we have no information, the other half was to be allotted in the first place to retired officers and soldiers who had served in the present war, etc., as a patriotic reward. Of the remaining land, there was to be given, gratuitously and by lot, to every resident of the respective towns who applied, a tract, under certain limitations. The proceedings on these grants were to be had by the constitutional common councils, and the provincial deputations were to approve them. Although this decree purported to apply to Crown lands "in the provinces beyond the sea" as well as to those in the Peninsula, it would seem, on the face of it, to have been intended for Spaniards, and to have had but doubtful reference to the natives of conquered territory.

But there are other answers to the suggestion that are free from doubt. The decree has been said to have been repealed in the following year. *United States v. Clarke*, 8 Pet. 436, 455, 8 L. ed. 1001, 1008; *Hall*, Mexican Law, 48. But compare *United States v. Vallejo*, 1 Black, 541, 17 L. ed. 232; *Hayes v. United States*, 170 U. S. 637, 653, 654, 42 L. ed. 1174, 1180, 1131, 18 Sup. Ct. Rep. 735. But even if it be assumed, as it is by the argument for the

plaintiff in error, that either that or later legislation to similar effect instituted a working system in the Philippines,—a large assumption,—it is admitted that the conditions of the supposed gratuity were not fulfilled. Our attention has not been called to any law giving authority to the ill-defined body that attempted to make the grant. The land was not distributed by lot, and the 416] essential requirement of approval *by a higher authority was wholly neglected. In view of the admission to which we have referred, we find it unnecessary to follow the learned and able argument of the Solicitor-General. There is a hint, to be sure, that the grant may be presumed to have satisfied native custom, and may be sustained upon that ground. But such a notion would be a mongrel offspring of Spanish law and ignorance, and no reason is given for making the presumption other than a guess. Unauthorized grants of public lands by subordinate officials seem to have been a noticeable feature in other Spanish colonies. *Whitney v. United States*, 181 U. S. 104, 114, 115, 45 L. ed. 771, 775, 776, 21 Sup. Ct. Rep. 565. The real object of the reference to the decree of 1813 is to found a claim of prescription by showing a just title for the possession which is proved to have been maintained for ten years.

Lacson, the original grantee, held the land until 1881, when he conveyed it to Pedro Carrillo and his wife. Possession was abandoned in 1885 without further change of title. Therefore the only "just title" to which the possession can be referred is the original grant. The phrase *justo titulo* is explained to mean a title such as to transfer the property,—*Schmidt*, Civil Law of Spain and Mexico, 289, 290; see *Partidas*, l. 18, t. 29, p. 3; or, as it is defined in the Civil Code of a few years later than the decree of 1880, "that which legally suffices to transfer the ownership or property right, the prescription of which is in 'question.'" § 1952. Of course, this does not mean that the *titulo* must have been effective in the particular case, for then prescription would be unnecessary. We assume, for instance, that if a private person in possession of Crown lands, seeming to be the owner, executed a formally valid conveyance under which his grantee held, supposing his title good, possession for ten years might create an indisputable right. But if the public facts known by the grantees showed that the conveyance to him was void, we understand that it would not constitute a starting point for the running of time, and that 417] the grantee's actual belief *would not help his case. Indeed, in such a case he would not be regarded as holding in good faith, within the requirement of the decree, 54 L. ed.

because a man is not allowed to take advantage of his ignorance of law. The subject is fully expounded in *Hayes v. United States*, 170 U. S. 637, 650, et seq., 42 L. ed. 1174, 1179, 18 Sup. Ct. Rep. 735.

All that was done to give Lacson a lawful title was insufficient on its face. Therefore, on the facts known to him he was chargeable with knowledge that he had acquired no legal rights, and it was impossible that the period of prescription should begin to run from the date of the instrument under which he claimed. The possession of Carrillo and his successors, after the conveyance to him in 1881, was not maintained for ten years, and therefore the claim of the plaintiff in error must fail.

Judgment affirmed.

CITY OF MINNEAPOLIS, Appt.,
v.
MINNEAPOLIS STREET RAILWAY COMPANY.

(See S. C. Reporter's ed. 417-437.)

Constitutional law — impairing contract obligation — reducing street railway fares.

1. The contract right of a street railway company to charge 5-cent fares, secured against impairment "during the term of its charter" by a municipal ordinance ratified by Minn. act of March 4, 1879, extends for fifty years, where the company undertook to organize for that period, under Minn. Laws 1866, chap. 34, tit. 1, and in its certificate of incorporation stated that its corporate life was to be for that term, and has continued to act as a corporation since the expiration of the thirty years which would

NOTE.—As to what laws are void as impairing the obligation of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L.R.A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 20; and *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

That a state Constitution is a law within the meaning of the clause of the Federal Constitution prohibiting laws impairing the obligation of contracts—see note to *Franklin County Grammar School v. Bailey*, supra.

That impairing the remedy impairs the obligation of contract—see notes to *Best v. Baumgardner*, 1 L.R.A. 356; *Louisiana ex rel. Ranger v. New Orleans*, 26 L. ed. U. S. 132; and *Phinney v. Phinney*, 4 L.R.A. 348.

As to reserved power to alter, amend, or repeal corporate charters—see notes to *Greenwood v. Union Freight R. Co.* 26 L. ed. U. S. 961, and *Omaha Water Co. v. Omaha*, 77 C. C. A. 281.

have been its corporate life, if organized, as the municipality contends it should have been, under tit. 2 of such chapter.

[For other cases, see Constitutional Law, IV. g, in Digest Sup. Ct. 1908.]

Municipal corporations — street railway franchise — extending beyond corporate life.

2. A municipal ordinance granting a franchise to a street railway company is not invalid because the term of such franchise may extend beyond the limit of the corporate life of such company.

[For other cases, see Municipal Corporations, 51-55, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligation — invalid municipal ordinance — curative act.

3. The contract right of a street railway company to charge the rate of fare permitted by a municipal ordinance vests in such company, secure against impairment by subsequent legislation, when ratified by a valid legislative act, notwithstanding the want of power of the city to adopt the ordinance.

[For other cases, see Constitutional Law, IV. g, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligation — reducing street railway fares — effect of accepting new franchise.

4. Existing contract rights of a street railway company to charge 5-cent fares, secured against impairment by subsequent legislation, were not abandoned by accepting an ordinance authorizing a change of motive power from horse power to electricity, although the original franchise named only animal or pneumatic power, where it also provided that no propelling power should be used after it should be proved a public nuisance, and that the company might connect with other street railways upon which power was used similar to that authorized to be used by street railways by the city council, but that steam-power cars, such as were in common use, should not be used upon the city tracks unless specially authorized.

[For other cases, see Constitutional Law, IV. g, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligation — reducing street railway fares — effect of accepting transfer ordinance.

5. The acceptance of a municipal ordinance requiring a street railway company to issue transfers does not abrogate an existing contract right secured against impairment by subsequent legislation to charge a 5-cent fare for one continuous passage not exceeding 3 miles in length.

[For other cases, see Constitutional Law, IV. g, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligation — reducing street railway fares — reserved power to control.

6. The right of future control, reserved to the municipality in a street railway franchise, as respects the "construction, maintenance, and operation" of the line of a street railway company, does not include

the power to reduce fares below the rate prescribed in an existing contract between the municipality and the company, but such provision has reference only to the manner of carrying on the business of the road, the laying of its tracks, the use of its streets, the keeping up of the equipment, the safety of the passengers and the public, and similar matters not involving the right to charge fares.

[For other cases, see Municipal Corporations, 51-55, in Digest Sup. Ct. 1908.]

[No. 46.]

Argued December 2, 3, 1909. Decided January, 3, 1910.

APPEAL from the Circuit Court of the United States for the District of Minnesota to review a decree enjoining a municipality from reducing street railway fares. Modified by holding that the company had a contract right to charge 5-cent fares for fifty years from the date of its incorporation, and, as modified, affirmed.

See same case below, 155 Fed. 989.

The facts are stated in the opinion.

Mr. William A. Lancaster argued the cause, and, with Messrs. Frank Healy and John F. McGee, filed a brief for appellant:

A street railway limited in the means of propulsion to animal or pneumatic power is a horse or pneumatic railway, and cannot be construed to be anything else.

Omaha Horse R. Co. v. Cable Tramway Co. 30 Fed. 324; Indianapolis Cable Street R. Co. v. Citizens' Street R. Co. 127 Ind. 369, 8 L.R.A. 539, 24 N. E. 1054, 26 N. E. 893; Denver & S. R. Co. v. Denver City R. Co. 2 Colo. 673; People ex rel. Third Ave. R. Co. v. Newton, 48 Hun, 477, 1 N. Y. Supp. 197, 112 N. Y. 396, 3 L.R.A. 174, 19 N. E. 831; Teachout v. Des Moines Broad-Gauge Street R. Co. 75 Iowa, 722, 38 N. W. 145; North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788.

Legislative grants of privileges in the nature of monopolies are strictly construed.

Bridge Proprs. v. Hoboken Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571; Perrine v. Chesapeake & D. Canal Co. 9 How. 172, 13 L. ed. 92; Charles River Bridge v. Warren Bridge, 11 Pet. 422, 9 L. ed. 775; Stein v. Bienville Water Supply Co. 34 Fed. 145, 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892; Saginaw Gaslight Co. v. Saginaw, 28 Fed. 529; Slidell v. Grandjean, 111 U. S. 412, 438, 28 L. ed. 321, 330, 4 Sup. Ct. Rep. 475; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Home Teleph. & Teleg. Co. v.

Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50.

Promises or obligations on behalf of municipalities are not to be spelled out by inference from the language of ordinances.

Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531.

A special statutory exemption does not pass to a new corporation which succeeds others by consolidation or purchase, in the absence of express direction to that effect, and this rule is equally applicable to a case where several companies are held and operated by one of them, under authority of the legislature.

People's Gaslight & Coke Co. v. Chicago, 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. Rep. 520. See also Minneapolis & St. L. R. Co. v. Gardner, 177 U. S. 332, 44 L. ed. 793, 20 Sup. Ct. Rep. 656; Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

All provisions in grants and contracts made by municipalities with reference to reservation of power are to be liberally construed in favor of such municipalities.

Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Danville v. Danville Water Co. 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118; Fath v. Tower Grove & L. R. Co. 105 Mo. 537, 13 L.R.A. 74, 16 S. W. 913; Chicago General R. Co. v. Chicago, 176 Ill. 253, 66 L.R.A. 959, 68 Am. St. Rep. 188, 52 N. E. 880.

If the Minneapolis Street Railway Company accepted the grant, it necessarily accepted it with all the conditions imposed.

Southern Bell Teleph. & Teleg. Co. v. Richmond, 98 Fed. 671, 44 C. C. A. 147, 103 Fed. 31.

Any party claiming under a public grant from the state or a municipality must make out the rights contended for by terms which clearly and unequivocally convey them; it is enough to deny the privileges contended for, if, upon considering the grant, the mind rests in doubt and uncertainty as to whether they are intended to be conferred or not.

Blair v. Chicago, 201 U. S. 487, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co. 24 Fed. 306; Com. v. Erie & N. E. R. Co. 27 Pa. 339, 67 Am. Dec. 471; Pennsylvania R. Co. v. Canal Comrs. 21 Pa. 22; Farrell v. Winchester Ave. R. Co. 61 Conn. 127, 23 Atl. 757; Endlich, Interpretation of Statutes, § 354; Long v. Duluth, 49 Minn. 281, 32 Am. St. Rep. 547, 51 N. W. 913; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 54 L. ed.

29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Fanning v. Gregoire, 16 How. 530, 14 L. ed. 1045; Richmond County Gaslight Co. v. Middletown, 59 N. Y. 229; Minturn v. Larue, 23 How. 435, 16 L. ed. 574; Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403; Olcott v. Fond du Lac County, 16 Wall. 678, 21 L. ed. 382; Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 5 L.R.A. 546, 22 N. E. 381; Indianapolis Cable Street R. Co. v. Citizens' Street R. Co. supra; Elliott, Roads & Streets, 2d ed. § 736; Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116, 51 L. ed. 399, 27 Sup. Ct. Rep. 202.

Mr. M. B. Koon argued the cause, and, with Mr. N. M. Thygeson, filed a brief for appellee:

Appellee was made a corporation to endure for fifty years by virtue of the ratifying and legalizing act, chap. 299 of the Special Laws of Minnesota, 1879.

Louisville Trust Co. v. Cincinnati, 22 C. C. A. 351, 47 U. S. App. 36, 76 Fed. 296; Nash v. Lowry, 37 Minn. 261, 33 N. W. 787; Morawetz, Priv. Corp. §§ 20, 319; Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 646; Robertson v. Rockford, 21 Ill. 451; Citizens' Water Co. v. Bridgeport Hydraulic Co. 55 Conn. 1, 10 Atl. 170; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 388, 120 Am. St. Rep. 581, 108 N. W. 261, 8 A. & E. Ann. Cas. 1047; Almand v. Atlanta Consol. Street R. Co. 108 Ga. 417, 34 S. E. 6; Clark v. Janesville, 10 Wis. 136; Re Prospect Park & C. I. R. Co. 67 N. Y. 371; Blair v. Chicago, 201 U. S. 455, 50 L. ed. 824, 26 Sup. Ct. Rep. 427; City R. Co. v. Citizen's Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Cooley, Const. Lim. 4th ed. p. 474; Chesapeake & P. Teleph. Co. v. Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; 1 Clark & M. Priv. Corp. pp. 117, 119, 217; People ex rel. Atty. Gen. v. Detroit, G. H. & M. R. Co. 157 Mich. 144, 121 N. W. 815; 1 Abbott, Mun. Corp. § 281; Society for Propagation of the Gospel v. Pawlett, 4 Pct. 480, 7 L. ed. 927; People v. Perrin, 56 Cal. 345; Noyes, Intercorporate Relations, 2d ed. § 20; McAuley v. Columbus, C. & I. C. R. Co. 83 Ill. 348; New York & N. E. R. Co. v. New York, N. H. & H. R. Co. 52 Conn. 276; Des Moines City R. Co. v. Des Moines, 151 Fed. 857; Koch v. North Ave. R. Co. 75 Md. 222, 15 L.R.A. 377, 23 Atl. 463; Boston & P. R. Corp. v. New York & N. E. R. Co. 13 R. I. 275; McCartney v. Chicago & E. R. Co. 112 Ill. 612; Virden v. Allan, 107 Ill. 505; Joyce, Electric Law, § 370; Andes v. Ely, 158 U. S. 312-322, 39 L. ed. 996-1002, 15 Sup. Ct.

Rep. 954; *Campbell v. Kenosha*, 5 Wall. 194, 18 L. ed. 610; *Booth, Street Railways*, § 14; 28 Cyc. Law & Proc. p. 376, ¶ 10; 6 Am. & Eng. Enc. Law, p. 941; *Bohmer v. Haffen*, 22 Misc. 565, 50 N. Y. Supp. 857; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 131; *O'Brian v. Baltimore County*, 51 Md. 24; *State ex rel. Atty. Gen. v. Miller*, 66 Mo. 342; *Ashland v. Wheeler*, 88 Wis. 614, 60 N. W. 818; *Boone County v. Burlington & M. R. Co.* 139 U. S. 693, 35 L. ed. 322, 11 Sup. Ct. Rep. 687; *Wisconsin v. Torinus*, 26 Minn. 1, 37 Am. Rep. 395, 49 N. W. 259; *State v. Deffes*, 45 La. Ann. 658, 12 So. 841; *People v. Brooklyn, F. & C. I. R. Co.* 89 N. Y. 75; *Brown v. Atlanta R. & P. Co.* 113 Ga. 462, 39 S. E. 71.

The word "charter" meant the articles of incorporation.

Bergman v. St. Paul Mnt. Bldg. Asso. No. 1, 29 Minn. 278, 13 N. W. 120; *Conyngton, Corporate Management*, § 18; *Thomp. Corp.* 2d ed. §§ 172, 370; *Purdy's Beach, Priv. Corp.* §§ 47, 72; *Morawetz, Priv. Corp.* § 318; *Elliott, Railroads*, § 34; *Cook, Corp.* § 2; *Joyce, Franchises*, §§ 41, 42, 45; *Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265.

Both the street railway and the city were corporations, and their powers could be enlarged without violating any constitutional provision.

Duluth v. Duluth Street R. Co. 60 Minn. 178, 62 N. W. 267.

The rule of strict construction applies only where the reason for the rule exists. It does not apply to reservations which destroy the original grant, to provisions in favor of the public, or to the language of the grantor.

Blair v. Chicago, 201 U. S. 400, 411, 50 L. ed. 801, 806, 26 Sup. Ct. Rep. 427; *Cleveland Electric R. Co. v. Cleveland*, 204 U. S. 116, 51 L. ed. 399, 27 Sup. Ct. Rep. 202; *Detroit Citizens' Street R. Co. v. Detroit*, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 640; *United States v. Hartwell*, 6 Wall. 395, 18 L. ed. 832; *Church of the Holy Trinity v. United States*, 143 U. S. 457-472, 36 L. ed. 226-232, 12 Sup. Ct. Rep. 511; *Kelly v. New York City R. Co.* 192 N. Y. 97, 84 N. E. 569; 3 *Abbott, Mun. Corp.* p. 2022; *Northwestern Teleph. Exch. Co. v. Minneapolis*, 81 Minn. 158, 53 L.R.A. 175, 83 N. W. 527, 86 N. W. 69; *Romer v. St. Paul City R. Co.* 75 Minn. 217, 74 Am. St. Rep. 455, 77 N. W. 825; *Joyce, Electric Law*, § 42, p. 93; 9 Cyc. Law & Proc. p. 590; *Thomp. Corp.* 2d ed. § 326, p. 362; 3 *Thomp. Corp.* § 2875, p. 790; *Duluth v. Duluth Street R. Co.* 60 Minn. 182, 62 N. W. 267; 1 *Lewis's Sutherland, Stat. Constr.* p. 444.

The rule of strict construction is, therefore, not within the reason, and hence has no application to change of motive power.

Romer v. St. Paul City R. Co. supra; 3 *Abbott, Mun. Corp.* pp. 2022, 2024.

Within all sense and authority, the rule of liberal construction should be applied so as to authorize the street railways to adopt new kinds of power to enable the street railway companies to carry out to the fullest extent any benefit they may confer upon the public.

Nellis, Street Surface Railroads, p. 199; *United States v. Denver & R. G. R. Co.* 150 U. S. 1, 37 L. ed. 975, 14 Sup. Ct. Rep. 11; 1 *Thomp. Corp.* § 309; *Lonergan v. La Fayette Street R. Co.* (C. C. Ind.) 3 Am. Electrical Cas. 282; 10 Am. & Eng. Enc. Law, p. 881; 3 *Thomp. Corp.* 2d ed. pp. 790, 801, §§ 2875, 2882, note. 136.

Even should it be found that the change in motive power was unauthorized, that has no bearing on the right to reduce fare.

People v. Brooklyn Heights R. Co. 187 N. Y. 48, 79 N. E. 838; *Shreveport Traction Co. v. Kansas City, S. & G. R. Co.* 119 La. 759, 44 So. 457; *Detroit City R. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007; *Potter v. Saginaw Union Street R. Co.* 83 Mich. 285, 10 L.R.A. 176, 47 N. W. 217; *Southern P. R. Co. v. Orton*, 6 Sawy. 157, 32 Fed. 471; *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400, 24 Am. Rep. 585; *Crolley v. Minneapolis & St. L. R. Co.* 30 Minn. 541, 16 N. W. 422; *St. Paul Gaslight Co. v. Sandstone*, 73 Minn. 225, 75 N. W. 1050; *Howley v. Central Valley R. Co.* 5 A. & E. Ann. Cas. 55, note; 3 *Abbott, Mun. Corp.* pp. 2023, 2024, 2031, note 805; *Williams v. Citizens' R. Co.* 130 Ind. 71, 15 L.R.A. 64, 30 Am. St. Rep. 201, 29 N. E. 408; *Old Colony Trust Co. v. Wichita*, 123 Fed. 762; *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 312.

The words, "and all other ordinances hereafter adopted," refer to legal ordinances, such ordinances as are not in violation of the Constitution, or which do not violate the laws of the state, or which the city has authority to pass.

Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 44.

The ordinance of September 19, 1890, itself is incomplete as a franchise ordinance. It does not cover all the subjects covered by the original franchise ordinance, and does not come within the doctrine of the cases holding that a subsequent statute or a subsequent contract covering the entire subject acts as an implied repeal or an implied substitution or merger of the later or latest statutory provision of the latest

contract, in place of the prior statute or the prior contract.

Nicol v. St. Paul, 80 Minn. 415, 83 N. W. 375.

If the original ordinance has been repealed, it is by implication. That repeals by implication are not favored hardly needs the citation of authorities.

Moore v. Minneapolis, 43 Minn. 418, 45 N. W. 719; *McQuillin*, Mun. Ord. § 203; *Duluth v. Duluth Teleph. Co.* 84 Minn. 491, 87 N. W. 1127; *State ex rel. Seng v. Peter*, 101 Minn. 462, 112 N. W. 866; *Lewis's Sutherland*, Stat. Constr. §§ 244, 247, 276, 277; *Uhlig v. Barnum*, 43 Neb. 584, 61 N. W. 749; *Anderson v. English*, 121 Ala. 272, 25 So. 748; *Shulze v. Shea*, 37 Colo. 337, 86 Pac. 117; *Manning v. Seaboard Paint Co.* 87 N. Y. Supp. 232; *Boyes v. Ramsden*, 34 Or. 253, 55 Pac. 538.

If the reservation in the ordinance of September 19, 1890, has the effect claimed for it, it destroys the grant or contract as to fares, and is void.

Duluth v. Duluth Street R. Co. supra; *State ex rel. Patterson v. Bates*, 96 Minn. 113, 113 Am. St. Rep. 612, 104 N. W. 709; *State v. Twin City Teleph. Co.* 104 Minn. 270, 116 N. W. 835; *Endlich*, Interpretation of Statutes, §§ 183-185; *Kansas P. R. Co. v. Wyandotte County*, 16 Kan. 587; *Sams v. King*, 18 Fla. 557; *Sutherland*, Stat. Constr. § 350; *Yarmouth v. Simmons*, L. R. 10 Ch. Div. 518; *McCormick v. West Duluth*, 47 Minn. 272, 50 N. W. 128; *Dickerson v. Nelson*, 4 Ind. 280; *State ex rel. Wilson v. Williams*, 8 Ind. 191; *Dennison v. Taylor*, 15 Abb. N. C. 439; *Daniel v. Veal*, 32 Ga. 589; *Shoenberger v. Lyon*, 7 Watts & S. 184; *Banks v. Marksberry*, 3 Litt. (Ky.) 276; *Penick v. High Shoals Mfg. Co.* 113 Ga. 592, 38 S. E. 973; *Cummings v. People*, 211 Ill. 406, 71 N. E. 1031; 26 Am. & Eng. Enc. Law, 2d ed. p. 681; *Benning v. Atlantic Coast Line R. Co.* 78 S. C. 42, 12 L.R.A. (N.S.) 1217, 125 Am. St. Rep. 768, 58 S. E. 988; *Southgate v. Goldthwaite*, 1 Bail. L. 367; *United States v. Dickson*, 15 Pet. 141, 10 L. ed. 689; *The Irresistible*, 7 Wheat. 551, 5 L. ed. 520; 4 Current Law, pp. 1543-1548; *Black*, Constr. & Interpretation of Law, § 44; *Farmers' Bank v. Halc*, 59 N. Y. 59.

There can be no repeal by a subsequent ordinance unless there is a specific repealing provision, or unless the subsequent ordinance covers the entire subject.

Henderson's Tobacco, 11 Wall. 652, 20 L. ed. 235; *United States v. Greathouse*, 166 U. S. 601, 605, 41 L. ed. 1130, 1131, 17 Sup. Ct. Rep. 701; *United States v. Healey*, 160 U. S. 136, 40 L. ed. 369, 16 Sup. Ct. Rep. 247; *Cope v. Cope*, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; *United* 54 L. ed.

States v. Matthews, 173 U. S. 381, 43 L. ed. 738, 19 Sup. Ct. Rep. 413.

The reservations contained in § 8 of the ordinance of September 19, 1890, do not authorize the city to pass the assailed ordinance, or authorize the city to regulate the fares of the company save and except as provided in § 8 of the original ordinance.

Old Colony Trust Co. v. Atlanta, 83 Fed. 44, 32 C. C. A. 125, 59 U. S. App. 230, 88 Fed. 859; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25; *Owensboro v. Owensboro Waterworks Co.* 191 U. S. 358, 370, 48 L. ed. 217, 224, 24 Sup. Ct. Rep. 82; *Detroit v. Ft. Wayne & B. I. R. Co.* 95 Mich. 456, 20 L.R.A. 79, 35 Am. St. Rep. 580, 54 N. W. 958; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 384, 46 L. ed. 606, 22 Sup. Ct. Rep. 410; *Northwestern Teleph. Exch. Co. v. Minneapolis*, 81 Minn. 148, 53 L.R.A. 175, 83 N. W. 527, 86 N. W. 69; *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 579, 44 L. ed. 886, 895, 20 Sup. Ct. Rep. 736; *Missouri & K. I. R. Co. v. Olathe*, 156 Fed. 624; *Cleveland City R. Co. v. Cleveland*, 94 Fed. 396; *Com. ex rel. Bell Teleph. Co. v. Warwick*, 185 Pa. 623, 40 Atl. 93; *Baltimore Trust & G. Co. v. Baltimore*, 64 Fed. 159; *Africa v. Knoxville*, 70 Fed. 729; *Citizens' Street R. Co. v. Memphis*, 53 Fed. 715; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Detroit Citizens' Street R. Co. v. Detroit City R. Co.* 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 647; *Pittsburgh's Appeal*, 115 Pa. 4, 7 Atl. 778; *Atlantic City Waterworks Co. v. Consumers' Water Co.* 44 N. J. Eq. 427, 15 Atl. 581.

An amended ordinance must be considered as one ordinance, as if the ordinance had been originally enacted in the amended form.

Blair v. Chicago, 201 U. S. 475, 50 L. ed. 832, 26 Sup. Ct. Rep. 427; *Holbrook v. Nichol*, 36 Ill. 163; *Farrell v. State*, 54 N. J. L. 423, 24 Atl. 725; *Dexter & L. Pl. Road Co. v. Allen*, 16 Barb. 15; *Drew v. West Orange Twp.* 64 N. J. L. 483, 45 Atl. 787; *McKibben v. Lester*, 9 Ohio St. 627; *Ely v. Holton*, 15 N. Y. 595; 1 *Lewis's Sutherland*, Stat. Constr. p. 444.

If the section had been originally drawn with the reservation in it, there is no doubt but the construction now contended for by the city necessarily would have been rejected. It violates the rule which provides that a proviso which destroys the grant must be rejected as void.

Duluth v. Duluth Street R. Co. supra; 3 *Thomp. Corp.* §§ 326, 2875; *State ex rel. Patterson v. Bates*, supra.

The surrender of the existing contract of

1875 should not rest in surmise and speculation or doubtful construction.

New Orleans v. Great Southern Teleph. & Teleg. Co. 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533.

The rule of strict construction does not apply against the company as to said reservation.

Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116, 51 L. ed. 399, 27 Sup. Ct. Rep. 202; 9 Cyc. Law & Proc. p. 590; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 388, 46 L. ed. 603, 22 Sup. Ct. Rep. 410.

Messrs. M. B. Koon and M. D. Munn also filed a brief for appellee:

The words "during the term of its charter," as used in the ordinance, cannot be misunderstood; they mean the term of existence specified in the articles of incorporation.

Thomp. Corp. §§ 172, 330; Purdy's Beach, Priv. Corp. §§ 47, 72; Morawetz, Priv. Corp. 2d ed. § 318; Elliott, Railroads, § 34, note 3; Cook, Corp. § 2.

The ratifying act of 1879 is complete in itself, and cures any possible defect which may have existed, not only in the passage of the ordinance of July 9, 1875, but also in the incorporation of the company.

Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; Nash v. Lowry, 37 Minn. 261, 33 N. W. 787; Society for Propagation of the Gospel v. Pawlett, 4 Pet. 480, 7 L. ed. 927; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736.

Having entered into a contract with it, the city is now estopped from questioning the charter period and corporate existence of the company, under the policy of our law, as declared by the supreme court of the state.

Columbia Electric Co. v. Dixon, 46 Minn. 464, 49 N. W. 244; Minnesota Gaslight Economizer Co. v. Denslow, 46 Minn. 171, 48 N. W. 771; French v. Donohue, 29 Minn. 111, 12 N. W. 354.

The act of the legislature ratifying the ordinance of 1875 was not only equivalent to a specifically delegated power to the city to make this contract, with all of its provisions, but was also a direct grant from the legislature of the state on this same subject, and brings this case clearly within the doctrine of unmistakable legislative authority to enter into contracts.

Los Angeles v. Los Angeles City Water Co. supra; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 369, 46 L. ed. 595, 264

22 Sup. Ct. Rep. 410; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; Cleveland v. Cleveland Electric R. Co. 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. Rep. 513; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50.

The rule of street construction is limited to the grant itself, and does not apply to the secondary provisions necessary to carry out the purposes of the grant.

Romer v. St. Paul City R. Co. 75 Minn. 217, 74 Am. St. Rep. 455, 77 N. W. 825.

Where one of two constructions will give force and effect to the legislative act and intent, and the other makes it absurd or void, the court will always adopt that construction which gives the act force and effect.

Joyce, Franchises, § 233; Oates v. First Nat. Bank, 100 U. S. 244, 25 L. ed. 582; Lau Ow Bew v. United States, 144 U. S. 59, 36 L. ed. 344, 12 Sup. Ct. Rep. 517.

The company never understood that it was surrendering its rights under the ordinance of 1875, so far as the rate of fare is concerned, and if the city intended to secure such surrender it should have done so in such clear and unambiguous terms as would have notified the company of its intention.

McNeil v. Chicago City R. Co. 61 Ill. 153.

The reservation in the ordinance of September 19, 1890, did not give the city the right to reduce fares.

Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 372, 46 L. ed. 598, 22 Sup. Ct. Rep. 410; New Orleans v. Great Southern Teleph. & Teleg. Co. 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533; Baltimore Trust & G. Co. v. Baltimore, 64 Fed. 159; Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 44; Pittsburgh's Appeal, 115 Pa. 4, 7 Atl. 778; Old Colony Trust Co. v. Atlanta, 83 Fed. 39; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 570, 41 L. ed. 1114, 1118, 17 Sup. Ct. Rep. 653.

Messrs. M. B. Koon, M. D. Munn, and N. M. Thygeson also filed a brief for appellee:

Under the decisions of the supreme court of Minnesota, the legislature had full constitutional power and authority to extend the corporate period of an existing corporation, or to grant to an existing corporation, by special act, rights, franchises, and privileges, notwithstanding the constitutional provision prohibiting the creation of corporations by special act.

Green v. Knife Falls Boom Co. 35 Minn.

155, 27 N. W. 924; *Ames v. Lake Superior & M. R. Co.* 21 Minn. 241; *First Div. St. Paul & P. R. Co. v. Parcher*, 14 Minn. 297, Gil. 224.

The ratifying act of 1879 ratifies and makes valid every feature of the ordinance and contract of July 9, 1875.

Citizens' Water Co. v. Bridgeport Hydraulic Co. 55 Conn. 1, 10 Atl. 170; *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 98 Minn. 388, 120 Am. St. Rep. 581, 108 N. W. 261, 8 A. & E. Ann. Cas. 1047; *Almand v. Atlanta Consol. Street R. Co.* 108 Ga. 417, 34 S. E. 6; *Clark v. Janesville*, 10 Wis. 136; *Re Prospect Park & C. I. R. Co.* 67 N. Y. 371; *Blair v. Chicago*, 201 U. S. 455, 50 L. ed. 824, 26 Sup. Ct. Rep. 427; *Robertson v. Rockford*, 21 Ill. 451.

The city has repeatedly construed this contract as still in force since 1903, the time it now claims the contract expired. This construction by the parties should be given great weight.

Chicago v. Sheldon, 9 Wall. 50-54, 19 L. ed. 594-597; *Topliff v. Topliff*, 122 U. S. 131, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1057; *Knox County v. Ninth Nat. Bank*, 147 U. S. 100, 37 L. ed. 96, 13 Sup. Ct. Rep. 267; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 81 Fed. 919; *St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co.* 32 C. C. A. 284, 60 U. S. App. 675, 89 Fed. 657; *District of Columbia v. Gallaher*, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; *Steinbach v. Stewart*, 11 Wall. 567, 20 L. ed. 56.

It was the intention to grant a franchise for a street railway, and not for a horse railway.

City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Govin v. Chicago*, 132 Fed. 848; *Blair v. Chicago*, *supra*; *Sparks v. Philadelphia & C. R. Co.* 212 Pa. 110, 61 Atl. 881.

Mr. Justice Day delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the district of Minnesota, enjoining the city [421] *of Minneapolis from enforcing, as against the Minneapolis Street Railway Company, appellee, a certain ordinance of the city of Minneapolis, passed February 9, 1907, prescribing the rate of fare for the transportation of passengers over any street railway line, or lines, of the company in the city of Minneapolis.

The case was tried upon amended bill and answer. The ground alleged for injunction in the amended bill was in substance that the ordinance of February 9, 1907, violated the terms of a previous and subsisting contract, prescribing the rates of fare to be

charged by the company in the city of Minneapolis. It appears in the record that the railway company was organized on July 1, 1873, and that its alleged contract arises from an ordinance of the city of Minneapolis passed July 9, 1875, ratified by an act of the legislature of the state of Minnesota passed March 4, 1879. We shall have occasion later on to deal more specifically with this ordinance and ratifying act.

It is sufficient for the present purpose to say that it is the contention of the company that, by the ordinance of July 9, 1875, and the ratifying act, it became the owner of an irrevocable contract for the term of fifty years from the date of its organization, by the terms of which it had the right to charge a fare not exceeding 5 cents for each person carried on any continuous line which might be designated by the city council of the city, such continuous line, however, not to exceed 3 miles in length. The contract, it is alleged, is violated by the ordinance of February 9, 1907, requiring the sale of six tickets for 25 cents.

The existence of the alleged contract is denied by the city upon several grounds. It is urged that the complainant company was so organized that its charter, and consequently its corporate life, expired thirty years after the date of its incorporation,—that is, on July 1, 1903; and therefore its contract rights ceased and terminated at that time. This contention is based upon the incorporation of the company, which, *it is insisted, could only be under title [422 4 of the laws of Minnesota, which includes transportation and other lawful business, and limits corporations organized thereunder to a continuation for not more than thirty years. *Bissell's Stat. (Minn.) 1873*, p. 443.

It is the contention of the company that it was organized under title 1 of the laws of Minnesota (*Bissell's Stat. 1873*, p. 419), for a term of fifty years. Title 1 is headed, "Of Corporations Empowered to Take Private Property for Public Uses," and includes corporations "for the purpose of building, improving, and operating railways, . . . and all works of internal improvement which require the taking of private property or any easement therein." Pertinent provisions of title 1 as to incorporation are given in the margin.†

†Title 1.

Of Corporations Empowered to Take Private Property for Public Uses.

Sec. 1. Any number of persons, not less than five, may associate themselves and become incorporated for the purpose of building, improving, and operating railways, tel-

423] *Title 4 is, "Of Corporations for Pecuniary Profit Other Than Those Named in Title 1." The pertinent parts of that title are given in the margin.†

424] *Much of the elaborate briefs of counsel in this case is devoted to a discussion of the question of the organization of this corporation, and as to whether it was under

the one title or the other. This is not a proceeding in quo warranto, and the jurisdiction of the Federal court rested upon the contention that the company has a contract right, protected from impairment by a legislative act of the state. It is only necessary to examine the question of the incorporation and organization of the company so far as

egraphs, canals or slack-water navigation upon any river or lake, and all works of internal improvement which require the taking of private property or any easement therein.

Sec. 2. They shall organize by adopting and signing articles of incorporation, which shall be recorded in the office of the register of deeds of the county where the principal place of business is to be, and also in the office of the secretary of state, in books kept for such purposes.

Sec. 3. . . .

Said articles shall contain:

First. The name of the corporation, the general nature of its business, and the principal place, if any, of transacting the same.

Second. The time of commencement and the period of continuance of said corporation.

Third. The amount of capital stock of said corporation, and how to be paid in.

Fourth. The highest amount of indebtedness or liability to which said corporation shall at any time be subject.

Fifth. The names and places of residence

of the persons forming such association for incorporation.

Sixth. The names of the first board of directors, and in what officers or persons the government of the corporation and the management of its affairs shall be vested, and when the same are elected.

Seventh. The number and amount of the shares in the capital stock of said corporation. . . .

Sec. 4. When articles are filed, recorded, and published, as aforesaid, the persons named as incorporators therein become a body corporate [provisions follow in this section as to management of business, amendment of articles of incorporation, etc.].

Sec. 5. No such corporation shall be formed to continue more than fifty years in the first instance, but it may be renewed from time to time for periods not longer than fifty years: Provided, that three fourths of the votes cast at any regular election for the purpose are in favor of such renewal, and those desiring a renewal purchase the stock of those opposed thereto at its current value.

†Title 4. (This title is title 2 of chapter 34 of the Statutes of 1866.)

Of Corporations for Pecuniary Profit Other Than Those Named in Title 1.

Sec. 98 (45, as amended by act of March 10, 1873). Any number of persons, not less than three, who have or shall, by articles of agreement in writing, associate according to the provisions of this title under any name assumed by them, for the purpose of engaging in and carrying on the business of mining, smelting, or manufacturing iron, copper, or other minerals, or for producing the precious metals, or for quarrying and marketing any kind of ore, stone, slate, or other mineral substances, or for constructing, leasing, or operating docks, warehouses, elevators, or hotels, or as a mutual savings fund, loan, or building association, manufacturing gas, or for any kind of manufacturing, lumbering, agricultural, mechanical, mercantile, chemical, transportation, or other lawful business, and who have or shall comply with the provisions of this title, shall, with their associates, successors, and assigns, constitute a body corporate and politic under the name assumed by them in their articles of agreement; provided, no company shall take a name previously assumed by any other company. Any mutual saving fund, loan, or building association, as authorized to loan funds and to secure such loans by mortgage or other security, and any premiums taken by any such asso-

ciation for the preference or priority of such loans, shall not be deemed interest within the meaning of § 1 of chapter 23 of the general statutes. Any such association is authorized and empowered to purchase at any sheriff's or other judicial sale, or at any other sale, public or private, any real estate upon which such association may have or hold any mortgage, judgment, or lien, or other encumbrance, or in which such association may have an interest, and the real estate so purchased, to sell, convey, lease, or mortgage at pleasure, to any person or persons whatsoever.

Sec. 99 (46, as amended by act of February 28, 1870). The provisions of §§ 2, 3, 4, 7, 8, 9, 10, 11, 42, and 44 of title 1 shall apply to and be observed by corporations organizing under this title.

Sec. 100 (47 . . .) The amount of capital stock in any such corporation shall in no case be less than \$10,000 nor more than \$500,000, and shall be divided into shares of not less than \$10 nor more than \$50 each, except that the capital stock of mutual building and loan associations may be divided into shares of \$200 each, but the capital stock and number of shares may be increased at any regular meeting of the stockholders; provided, the capital stock, when so increased, shall not exceed \$500,000.

Sec. 105 (52). No corporation shall be formed under this title to continue more than thirty years.

is required to determine whether or not this alleged contract right exists, and whether it has been violated by the ordinance of the city of Minneapolis, attacked in the amended bill.

There can be no question that the attempted incorporation of this company was under title 1 of the statutes already referred to. It was incorporated by five persons. It states the business for which it was formed, 425] "to construct and operate *railways in the streets and highways of the city of Minneapolis and its suburbs in the county of Hennepin, state of Minnesota." It states the time of the commencement of the corporation to be the 1st of July, 1873, and the period of continuance thereof to be fifty years thereafter. The shares of capital stock are twenty-five hundred at \$100 each.

Under title 4 the corporate life is limited to not more than thirty years, and the shares of capital stock are to be not less than \$10 or more than \$50 each.

The corporation has continued to act since the expiration of the thirty years which would have been its corporate life had it been organized under title 4. There have been no proceedings, so far as the record shows, to inquire into its corporate existence since the expiration of the thirty years, and this record discloses that a number of ordinances have been passed by the city of Minneapolis since July 1, 1903, requiring of the corporation the construction of additional lines of railway upon certain of the streets of the city of Minneapolis, and to otherwise discharge its duties as a continuing corporation.

This record therefore shows that the company undertook to organize under title 1, for the period of fifty years, has continued to act as such corporation, and was so acting at the time of the passage of the ordinance of February 9, 1907.

We proceed to examine the question, Did the ordinance of July 9, 1875, together with the ratifying act of 1879, make a contract between the city of Minneapolis and the street railway company which would endure for the period of fifty years? Section 1 of the ordinance of July 9, 1875, provides:

"Sec. 1. That the Minneapolis Street Railway Company be and is hereby granted, during the term of its charter, the exclusive right and privilege of constructing and operating a single or double track for a passenger railway line, with all necessary tracks for turnouts, side tracks, and switches, in such streets of said city, as the city council may deem suited to street railways, subject to the terms, conditions, and forfeitures hereinafter contained; provided, that the city council reserves the 426] *right to limit the said company to 54 L. ed.

the construction of a single track upon such street or streets as it may deem proper."

Section 8 of the same ordinance provides:

"Sec. 8. The said company may regulate and establish, from time to time, such rates of fare for the transportation of passengers and freight over its lines of railway as it may deem proper; provided, that the charge for carrying a person, including hand baggage, from one point to another within the city limits, whether by one or more lines operated by the same company, shall not exceed 5 cents on any one line; provided, further, that the city of Minneapolis hereby reserves the right to alter and regulate the rate to be charged by the said companies, their successors and assigns, for the transportation of passengers and freight at the expiration of five years from the approval of this ordinance, and every five years thereafter, fixing the same at such rates as the city council of said city may deem just and reasonable; provided, that the city shall not reduce the passenger's fare below 5 cents, over any one continuous line, and what shall be considered a continuous line may be designated by the city council of the said city, but that said council shall not designate any such continuous line to be more than 3 miles in length."

Section 17 of the ordinance provides:

"Sec. 17. Within thirty days from the publication of this ordinance said company shall file with the city clerk a written acceptance of the grants hereinabove made, with the conditions, regulations, and limitations above expressed, signed by the president and secretary of said company, and, when so accepted, this ordinance shall operate as a contract between the city and said company, and upon failure to file such acceptance, as aforesaid, then the above grant shall not become operative to vest any rights, privileges, or franchises whatsoever."

It also appears that the city filed its acceptance in writing of the ordinance on August 18, 1875.

*In considering the terms of this ordinance and what it undertook to accomplish on its face, we are to bear in mind that public grants of this character are not to be extended by implication, and that all that is granted must be found in the plain terms of the act. This principle has been so frequently and recently announced in this court that it is unnecessary to cite the cases which have established it. Recognizing this principle, it must also be remembered that grants of the character of the one under consideration here, when embodying the terms of a contract, are protected by the Federal Constitution from impairment by subsequent state legislation, and notwithstanding the principle of strict construction, what-

ever is plainly granted cannot be taken from the parties entitled thereto by such legislative enactments. Statutes and ordinances of this character are not to be extended by construction, nor should they be deprived of their meaning, if it is plainly and clearly expressed.

Examining this ordinance in the light of these principles, there is no ambiguity in § 8, which gives to the city the right to regulate the fares to be charged, provided the same are not reduced below 5 cents for each passenger over any one continuous line, to be designated by the city, of not more than 3 miles in length. By § 1 of the same ordinance, the right and privilege of constructing and operating a railway line subject to the terms, conditions, and forfeitures named in the ordinance is granted to the street railway company "during the term of its charter."

What did this mean? The company had undertaken to organize, and filed its certificate of incorporation,—which is its charter under the laws of Minnesota,—and had therein stated its term of existence to be for fifty years from the 1st day of July, 1873. There was a positive requirement of the law that this period of duration should be stated in the certificate filed for the purpose of procuring incorporation, and it was there found, and was duly filed, recorded, and published as required by law.

428] *It is unreasonable to suppose that the city and the company at that time entered into any inquiry or controversy as to whether the company could lawfully incorporate for more than thirty years. The charter referred to in the ordinance could not have been anything else than the certificate of incorporation required by law. Of this the city was bound to take notice; and when it granted the privileges "during the term of the charter," it could have meant nothing less than during the period named in the charter. As was declared by the supreme court of Minnesota in *Duluth v. Duluth Gas & Water Co.* 45 Minn. 210, 47 N. W. 781, a case involving the extent of rights conferred upon a water company by a city ordinance, "The council must be held, when dealing with defendant, to know its character, its purposes and powers, as disclosed by its articles of incorporation."

We come now to the terms of the ratifying act of March 4, 1879. This act is as follows:

An Act to Confirm the Grant of the City of Minneapolis to the Minneapolis Street Railway Company.

Be it enacted by the legislature of the state of Minnesota:

Sec. 1. That whereas the city of Minneapolis did, by an ordinance entitled, "An Ordinance Authorizing and Regulating Street Railways in the City of Minneapolis," passed by the city council of said city on the ninth (9th) day of July, one thousand eight hundred and seventy-five (1875), and approved by the mayor of said city on the seventeenth (17th) day of July, one thousand eight hundred and seventy-five (1875), and by an ordinance passed July third (3d), one thousand eight hundred and seventy-eight (1878), and amended July eighth (8th), one thousand eight hundred and seventy-eight (1878), and approved July tenth (10th), one thousand eight hundred and seventy-eight (1878), grant to the Minneapolis Street Railway Company the right to construct and maintain a street railway through the streets of *said city, [429 with certain rights and privileges in said ordinance particularly set forth. Now the said right to construct and maintain said street railway through the streets of said city, with the rights and privileges as set forth and qualified in said ordinance, is hereby legalized and granted to said company.

Sec. 2. This act shall take effect and be in force from and after its passage.

The ordinances of July, 1878, referred to in the ratifying act, concerned certain streets in the city of Minneapolis, and are not important to be considered in this connection.

It has not been suggested in the elaborate briefs presented by the learned counsel for the city, that the state legislature at that time had not the constitutional right to pass this ratifying act.

In *Green v. Knife Falls Boom Corp.* 35 Minn. 155, 27 N. W. 924, the supreme court of Minnesota sustained a special law conferring new and independent franchises and enlarged powers upon the boom company, a corporation organized under title 4, and originally not having the power of eminent domain, nor to take tolls, nor to obstruct the navigable portions of the St. Louis river.

By the special act the corporation was given power over the navigation and use of the river as respects the passage of logs, the power to exercise the right of eminent domain was conferred upon it, the right to charge toll upon all logs passed through their works, and to receive and take entire charge and control of timber which might run or be driven through the same, and to boom, scale, and deliver such timber, as provided in the act, with a lien upon all such logs, which might be enforced by sale.

It was held that, by a long course of legislation and practical construction, such legislation was justified and ought not to be disturbed. The constitutional amendment of 1881, it was said, made such legislation impossible thereafter, because the legislature is therein prohibited from enacting any special *or private laws in the following cases: “. . . For granting corporate powers or privileges, except to cities.” In this case the court referred to *Ames v. Lake Superior & M. R. Co.* 21 Minn. 241, in which it seems to be held that, under the former Constitution, prohibiting the formation of corporations, except for municipal purposes, under special acts, such special acts stopping short of creating new corporations might be passed by the legislature. See opinion upon rehearing, pages 284, 285.

Looking to the terms of the act of March 4, 1879, we find that the right to construct and maintain the street railway upon the streets of the city, with the rights and privileges as set forth and qualified in the ordinance, is “legalized and granted to said company.” Language could scarcely be plainer, and, if we are correct in construing the ordinance as granting the right and privilege of maintaining railways in the streets of Minneapolis for the charter term of fifty years, upon the terms therein mentioned, a vital part of which concerns the right of the company to charge a certain fare for passengers carried, it follows that this privilege, with the others, was vested in the company by the legislature of the state of Minnesota.

We may note in this connection that the mere fact that a contract may extend beyond the term of the life of a corporation does not destroy it. This principle was recognized by this court in *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, in which it was held that a city ordinance granting the use of the streets of the city for a term which would extend the grant for sixteen years beyond the life of the corporation did not invalidate it. It was held that the limitation upon the corporate life of the company did not prevent it from taking franchises, or other property, the title to which would not expire with the corporation itself; and further, that, at the end of its corporate life, if such property were still in existence, it would be an asset divisible among the shareholders after the payment of debts, or it **431]** might, if *assignable, be transferred to any other person or company competent to hold it.

The ratifying act, being within the power of the legislature, vested this contract right in the company, notwithstanding the want of power in the city to make it at the time **54 L. ed.**

it was entered into. *Nash v. Lowry*, 37 Minn. 261, 33 N. W. 787.

The principle is well stated by Morawetz in his work on *Private Corporations*, vol. 1, § 319, 2d ed.:

“Where the legislature, by statute, recognizes and acquiesces in the existence of a corporation which was formed by the corporators without the proper authority, it thereby invests the association with the right of continuing to act in a corporate capacity for the purposes and in the manner that it publicly assumed to act. And if rights or franchises are conferred upon an association claiming to be incorporated, it thereby becomes authorized to exercise the powers expressly conferred, and such others as the legislature appears to have imputed to it.”

See, as to the effect of validating acts, *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Blair v. Chicago*, 201 U. S. 400, 454, 50 L. ed. 801, 823, 26 Sup. Ct. Rep. 427.

But, it is contended, if a contract is found to exist, its rights were lost by virtue of the ordinance of September 19, 1890, authorizing the street railway company to change its mode of operation from the use of horse power to electricity. It is insisted that, by the acceptance of the electrical-power ordinance, the company abandoned any rights it had under the ordinance of 1875 and the ratifying act of 1879; and, furthermore, that, by the express terms of the ordinance of September 19, 1890, the right to control the future rates of fare was thereby vested in the city to an extent unlimited except by constitutional inhibitions against confiscatory legislation.

As to the termination of the rights of the company by reason of the substitution of electricity for horse power, is there such abandonment of the rights originally secured that they no longer exist? It is contended that the original ordinance *was **[432]** limited to the right to operate street railways by horse or pneumatic power, and that when the ordinance of September 19, 1890, was passed conditions were entirely changed, and a new and different mode of operation was substituted, and rights existing under the original ordinance were terminated and abandoned.

Let us see if the ordinance of 1875 was limited to the use of animal or pneumatic power. Section 4 of that ordinance provides:

“Sec. 4. The cars to be used upon such tracks shall be propelled with either animal or pneumatic power, as the said company deem advisable, provided that no propelling power or machinery of any sort shall be used after it shall prove to be a public

nuisance, and said company may connect with any other railway upon which power is used similar to that authorized to be used on street railways by the city council; but no locomotive, freight or passenger car, such as are usually run over the general railways of this state for the transportation of freight and passengers, shall be used upon any of said tracks, unless authorized by the city council; provided, that the said Minneapolis Street Railway Company, and any other street railway company which the council may charter under § 3 of this ordinance, shall each allow the other to connect with and jointly use such portions of the track belonging to each as the convenience of the traveling public may require, upon such equitable terms as may be agreed upon by the said companies, or as may be determined by the district court of Hennepin county."

There can be no doubt that, in the then state of the art, the use of electric power as the means of operating the cars of the company was not specifically in contemplation. While pneumatic power is also suggested, there does not seem to be any means of operation by that method. That the use of other motive power might be developed in the progress of street railway operation, we think, was clearly indicated in the ordinance itself. For while animal or 433] pneumatic power is *named, it is provided that no propelling power shall be used after it shall be proved a public nuisance, and that the company might connect with other street railroads upon which power is used similar to that authorized to be used by street railways by the city council, but steam-power cars, such as are in common use, should not be used upon the city tracks, unless so authorized by the city council.

In these terms of the ordinance it is evident that the parties had in mind that other propelling power might be developed, and it was the purpose of the city council to keep control of its use, so as to prevent it from becoming a public nuisance in the streets. There was no positive limitation to animal power, and the possible progress and improvement in the means of propelling cars, contemplated by the parties, was carried into effect when the city passed, and the company accepted, the ordinance of September 19, 1890. By that ordinance the railway company was authorized to operate all its existing lines, and all its lines to be thereafter constructed in the city, by electricity as the motive power.

Section 8 of that ordinance provides:

"Sec. 8. In the construction, maintenance, and operation of said lines of street railway, said Minneapolis Street Railway Company, its successors and assigns, shall at all times

be subject to all the conditions and limitations and other provisions of an ordinance entitled, 'An Ordinance Authorizing and Regulating Street Railways in the City of Minneapolis,' passed July 9, 1875, and approved July 17, 1875, as the same has been amended and is now in force, and all other ordinances of said city now in force or hereafter adopted, so far as applicable."

It is the contention of the city that, by the terms of this ordinance, the street railway company became subject to regulation by the ordinances of the city then in force, or thereafter adopted, including the right to regulate and control the amount to be charged for fares for the transportation of passengers.

*In construing this section we must [434 bear in mind that the company then had, as we have heretofore said, a contract upon the subject of fares, which limited the city in its right to regulate the same to a reduction not below 5 cents per passenger upon any one continuous line. It needs no argument to demonstrate that the right to charge passenger fares is of the very essence of the contract, essential to the operation and success of the enterprise. *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 384, 46 L. ed. 592, 606, 22 Sup. Ct. Rep. 410.

In § 6 of the ordinance of September 19, 1890, it is provided:

"Sec. 6. Passenger cars on all said lines shall run between extreme limits on all extensions to or near the intersection of Washington avenue with Hennepin avenue, without change to passengers traveling thereon, and after November 1, 1890, said street railway company shall issue transfer checks at the junction of said lines at Washington and Hennepin avenues, to any passenger on any of said lines who shall pay one full fare, which transfer check shall entitle passenger so receiving the same to a continuous passage on either of said connecting lines; provided, that no passenger shall be entitled to more than one transfer check for one fare; and provided further, that said transfer check shall be used only by the person receiving the same for a continuous passage, and shall be used on the next car departing on the connecting line upon which it is to be used. And, if any of the lines of said railway do not connect at said Washington and Hennepin avenues, transfer checks shall be given at the point nearest to the crossing of Washington and Hennepin avenues, where such lines do connect with a line reaching said junction point at Washington and Hennepin avenues."

This is the only section which mentions the subject of fares, and it is therein provided that transfer checks may be issued at certain points to persons paying "one full

fare," the transfer check to be used only by the person receiving the same, for one continuous passage.

435] *The rate of fare had been fixed in the ordinance of July 9, 1875, and, if it was intended to change it, it would seem clear that the parties would have entered into new negotiations concerning it, and would have adopted, if that was desirable, some definite measure concerning it. The ordinance of July 9, 1875, was not attempted to be repealed, and is referred to in § 8 of the ordinance of September 19, 1890, "as the same as has been amended, and as now in force," and adopted, "so far as applicable," concerning the things mentioned in § 8.

It is true that by the ordinance of July 9, 1875, there was no right to reduce the passenger fare below 5 cents over any one continuous line not more than 3 miles in length, to be designated by the city council. By the terms of the ordinance of September 19, 1890, transfers were to be allowed, so that, for one full fare, a passenger might receive a continuous trip very considerably exceeding 3 miles in length,—it is stated in one of the briefs to include a trip of 11 miles. But we do not understand that the acceptance of this regulation had the effect to abrogate the contract as to the right to charge a fare of 5 cents over one continuous line, that is, for one continuous passage. Acquiescence in a regulation which may not have been deemed injurious, and may have been deemed wise and expedient, does not preclude a contest against the enforcement of regulations which are injurious and violative of contract rights. *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 579, 44 L. ed. 886, 895, 20 Sup. Ct. Rep. 736.

The right to future control under § 8 was to include the "construction, maintenance, and operation" of the lines of the street railway company. Did this undertaking have the effect to abrogate the contract right already existing, and to subject the company for the future, as to the right to charge fares, to the discretion of the city council? Or do the terms "construction, maintenance, and operation" have reference to the manner of carrying on the business of the road, the laying of its tracks, the use of its streets, the 436] keeping up of *the equipment, the safety of the passengers and the public, and similar matters not involving the right to charge fares? We think these terms refer to the latter class of rights and privileges. Such is the import of the words used, and the subject of rates of fare is not mentioned. The case already referred to, *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, is an 54 L. ed.

instructive one upon this point. In that case it was held that a street railway company having a valid contract giving it the right to charge 5 cents for the transportation of each passenger did not lose that right by accepting the terms of an ordinance reserving the right to make such further rules, orders, and regulations as to the city council may seem proper. 184 U. S. 399.

We therefore reach the conclusion that when the ordinance complained of, that of February 9, 1907, was enacted by the city council, the company was the owner of a valuable contract right secured to it by the ordinance of July, 1875, ratified by the enactment of the legislature of the state of Minnesota on March 4, 1879, which secured to the company for fifty years from July 1, 1873, the contract right to charge 5 cents per passenger for one continuous trip. We think that the requirement of the ordinance, that the company should operate its roads by the sale of tickets six for a quarter, as required by the ordinance of February 9, 1907, was an enactment by legislative authority which impaired the obligation of the contract thus held and owned by the complainant company. We therefore reach the conclusion that the decree of the circuit court enjoining the execution of the ordinance, for the reasons stated, should be affirmed.

An examination of the decree, however, shows that it goes beyond the necessities of the case in specifically decreeing that the complainant company is a corporation organized under title 1 of chapter 34 of the Statutes of Minnesota for the year 1866, with charter rights as alleged in the amended bill. It also decrees that the contract under the ordinances of July 9, 1875, and July 18, 1878, as ratified by the act of *March 4, 1879, constituted a con- [437 tract for and during the term of complainant's charter, as alleged in the amended bill. In the amended bill it is alleged that the charter rights of the company were extended to March 1, 1937; this is undoubtedly averred because of the amendment to the charter which appears in the record, extending the term of the company's corporate life until that time. The decree as it stands might be construed as establishing a contract to endure until March, 1937.

All that was necessary to adjudge was that the company, by virtue of the ordinance of July 9, 1875, as amended in July, 1878, as ratified and confirmed by the act of the legislature of the state of Minnesota of March 4, 1879, constituted a valid contract for the term of fifty years from July 1, 1873, which is still so far in force as to prevent the city council from reducing the rate of fare below the sum of 5 cents for

each passenger for one continuous passage, and enjoining the city from publishing and enforcing the ordinance of February 9, 1907, because the same impaired the obligation of the subsisting contract aforesaid.

The decree of the Circuit Court should be modified so as to meet these requirements, and, so modified, affirmed.

MECHANICAL APPLIANCE COMPANY,
Plff. in Err.,
v.
BENJAMIN T. CASTLEMAN.

(See S. C. Reporter's ed. 437-446.)

Error to circuit court — jurisdiction below — service of process.

1. The contention that there was no valid service of process upon a foreign corporate defendant in a suit removed by it from a state to a Federal court, because the corporation was not doing business in the state, and the person attempted to be served was not its agent at that time, involves the jurisdiction of the latter court as a Federal court, so as to sustain a direct review of the judgment of that court, under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, by writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 908-911, in Digest Sup. Ct. 1908.]

Error to circuit court — jurisdiction below — how question raised.

2. The question of the jurisdiction of the Federal circuit court must be regarded as fairly presented, so as to sustain a writ of error from the Federal Supreme Court, under the act of March 3, 1891, § 5, despite the indefiniteness of the allegations of the plea to the jurisdiction, where the certificate below states that the defendant raised by such plea the objections that it was a foreign corporation not doing business in the state, and that the person attempted to be served was not its agent at the time, and shows that the court did not consider the affidavits which the bill of exceptions states were filed, but overruled the plea on the sole ground that the facts stated in the return of the sheriff to the summons were

conclusive, and also recites that when the case was filed for trial the same objection was made and overruled for the same reason.

[For other cases, see Appeal and Error, 895-914, in Digest Sup. Ct. 1908.]

Removal of causes — question open in Federal court — service of process.

3. The validity of the service of process upon a foreign corporate defendant is open in a Federal circuit court after the cause has been removed to that court from a state court, on the petition of such defendant.

[For other cases, see Removal of Causes, IX., in Digest Sup. Ct. 1908.]

Writ and process — service on foreign corporation.

4. A foreign corporation can be served with process within the state only when it is doing business therein, and such service must be upon an agent who represents the corporation and its business.

[For other cases, see Writ and Process, 47-77, in Digest Sup. Ct. 1908.]

Writ and process — service — conclusiveness of return — effect of removal to Federal court.

5. The return of the sheriff of the state court is not conclusive upon the question of the validity of service of process, where the cause has been removed to a Federal circuit court by a defendant who raises by plea to the jurisdiction the objection that it was a foreign corporation not doing business within the state, and that the person served with process was not its agent at that time.

[For other cases, see Writ and Process, IV.; Removal of Causes, IX., in Digest Sup. Ct. 1908.]

Federal courts — following state laws and decisions.

6. In cases which concern the jurisdiction of the Federal courts, notwithstanding the provisions of the so-called conformity act, U. S. Rev. Stat. § 914, U. S. Comp. Stat. 1901, p. 684, neither the statutes of the state nor the decisions of its courts are conclusive upon the Federal courts.

[For other cases, see Courts, V. e, 8; V. e; VII. c, in Digest Sup. Ct. 1908.]

Federal courts — evidence — affidavits filed but not offered in evidence.

7. Affidavits filed in connection with a plea to the jurisdiction, whether actually offered to be read in evidence or not, should

NOTE. — On direct review in Federal Supreme Court of judgments of circuit and district courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

As to service of process on foreign corporation—see notes to *Foster v. Charles Betcher Lumber Co.* 23 L.R.A. 491; *Eldred v. American Palace-Car Co.* 45 C. C. A. 3; and *Cella Commission Co. v. Bohlinger*, 78 C. C. A. 473.

As to service of process upon foreign corporation not doing business within the state, as basis of judgment *in personam*—see notes to *Pinney v. Providence Loan & Invest. Co.* 50 L.R.A. 591, and *Cella Com-*

mission Co. v. Bohlinger, 8 L.R.A. (N.S.) 538.

As to state decisions and laws as rules of decision in Federal courts—see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553; *Griffin v. Overman Wheel Co.* 9 C. C. A. 548; *Elmendorf v. Taylor*, 6 L. ed. U. S. 290; *Jackson ex dem. St. John v. Chew*, 6 L. ed. U. S. 583; *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490; *Clark v. Graham*, 5 L. ed. U. S. 334; *Forepaugh v. Delaware, L. & W. R. Co.* 5 L.R.A. 508; and *Mitchell v. Burlington*, 18 L. ed. U. S. 351.

be considered by a Federal circuit court in deciding the question raised by a plea to the jurisdiction, setting up the objection that the defendant was a foreign corporation not doing business in the state, and that the person attempted to be served with process was not its agent at that time.

[Practice and Procedure in Federal courts, see Courts, V. e, in Digest Sup. Ct. 1908.]

[No. 48.]

Argued and submitted December 3, 1909.
Decided January 3, 1910.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment overruling a plea to the jurisdiction, setting up the objection that the defendant, on whose petition the cause was removed from a state court, was a foreign corporation not doing business in the state, and that the person attempted to be served with process was not its agent at that time. Reversed and remanded with directions to dismiss the cause for want of jurisdiction.

The facts are stated in the opinion.

Mr. Lee W. Grant argued the cause, and, with Mr. P. B. Kennedy, filed a brief for plaintiff in error:

This appeal is brought to this court because of the constitutional question necessarily involved in its decision, and also because it involves the question of the jurisdiction of the court below; the Supreme Court alone has the power to review the decision upon this question.

Davis v. Cleveland, C. C. & St. L. R. Co. 84 C. C. A. 453, 156 Fed. 775; Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740; United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; St. Louis Cotton Compress v. American Cotton Co. 60 C. C. A. 80, 125 Fed. 196.

Whatever may be the rule in Missouri, where the cause is removed to the United States circuit court, the principles which would be applied to test the validity of the service must be such as are approved by the Supreme Court of the United States. For even though sitting in the same state, the United States courts and the state courts derive their authority from different governments.

Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

The Federal courts will not give effect to a judgment in a state court unless the state court has lawfully acquired jurisdiction of the defendant, even despite recitals in the judgment of the state court of facts which, if true, would have given it jurisdiction.

54 L. ed.

Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897.

This exact state of facts has come before this court only once; and it was there held, despite the return of the officer, that the cause must be dismissed because there was no service in fact.

Wabash Western R. Co. v. Brow, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126.

The decision just cited was entirely in line with the previous decisions of this court. Everything that could be said on such a subject had already been fully and thoroughly discussed in other cases.

Goldey v. Morning News, supra; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Fitzgerald & M. Constr. Co. v. Fitzgerald, 137 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36; Re Hohorst, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221. See also Gottschalk Co. v. Distilling & Cattle Feeding Co. 50 Fed. 681; Forrest v. Union P. R. Co. 47 Fed. 1; United States v. American Bell Teleph. Co. 29 Fed. 17.

Mr. Benjamin T. Castleman, *in propria persona*, submitted the cause for defendant in error. Messrs. Rassieur, Selnurmacher, & Rassieur were on the brief:

The certificate of the question to this court shows affirmatively the question is not jurisdictional, but is an issue of fact on a question of agency, raised by plea, which does not involve the jurisdiction of the circuit court, as a Federal court, but is simply matter of abatement at common law, and this court has no jurisdiction of this writ of error.

Ex parte Crane, 5 Pet. 199, 205, 8 L. ed. 96, 98; Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; Louisville Trust Co. v. Knott, 191 U. S. 232-235, 48 L. ed. 161-163, 24 Sup. Ct. Rep. 119; United States v. Larkin, 208 U. S. 338, 52 L. ed. 519, 28 Sup. Ct. Rep. 417; Mexican C. R. Co. v. Eckman, 187 U. S. 432, 47 L. ed. 246, 23 Sup. Ct. Rep. 211.

The affidavits set out in the transcript were simply filed, could not become a part of the record until made so by bill of exceptions, were never offered in evidence, and it was never insisted that the court should give them due effect as evidence, and they are not now before this court.

Baltimore & P. R. Co. v. Sixth Presby. Church, 91 U. S. 127, 130, 23 L. ed. 260, 261; England v. Gebhardt, 112 U. S. 505, 506, 28 L. ed. 811, 812, 5 Sup. Ct. Rep. 287; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; McDonald v. Smalley, 1 Pet. 620, 7 L. ed. 287; Duncan v. Atchison, T. & S. F. R. Co. 19 C. C. A. 202, 44 U. S. App. 427, 72 Fed. 812; Evans v. Stettinisch, 149

U. S. 607, 37 L. ed. 867, 13 Sup. Ct. Rep. 931; *Stewart v. Wyoming Cattle Ranch Co.* 128 U. S. 390, 32 L. ed. 442, 9 Sup. Ct. Rep. 101; *Noble v. United States*, Dev. Ct. Cl. 83; *Quinn v. Rawson*, 5 Ill. App. 130; *Patterson v. Fagan*, 38 Mo. 70.

There is an attempt to confer jurisdiction on this court by a pretended constitutional question; this cannot be done, because the result did not depend thereon; no right claimed under the Constitution was either raised, appears on the record, or is assigned as error; such a question must be controlling, presented to the court, and, of course, determined by the court and considered by it.

Defiance Water Co. v. Defiance, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. Rep. 63; *Lefkowitz v. Foster Hose Supporter Co.* 161 Fed. 376; *Carey v. Houston & T. C. R. Co.* 150 U. S. 181, 37 L. ed. 1044, 14 Sup. Ct. Rep. 63; *World's Columbian Exposition v. United States*, 6 C. C. A. 71, 18 U. S. App. 42, 56 Fed. 654; *Ansbro v. United States*, 159 U. S. 697, 698, 40 L. ed. 310, 311, 16 Sup. Ct. Rep. 187.

Following the rule of the state courts, a Federal court of Pennsylvania will not receive extrinsic evidence to impeach the return of a marshal which is good on its face, in support of a motion to set it aside.

Trimble v. Eric Electric Motor Co. 89 Fed. 52; *Wilson v. Hurst*, Pet. C. C. 441, Fed. Cas. No. 17,809; *United States v. Lotridge*, 1 McLean, 246, Fed. Cas. No. 15,628.

The law in Indiana is that a sheriff's return is conclusive. The Federal courts sitting in Indiana are bound by this law of the state.

Joseph v. New Albany Steam Forge & Rolling Mill Co. 53 Fed. 180.

The Federal courts sitting in Missouri have followed this law of the state.

Board of Trade v. Cella Commission Co. 76 C. C. A. 28, 145 Fed. 28.

This is the undisputed law of Missouri and of the Supreme Court of the United States as well.

Walker v. Robbins, 14 How. 584, 585, 14 L. ed. 552; *Smoot v. Judd*, 184 Mo. 520, 83 S. W. 481.

Removal is a change of venue, not an appeal.

Davis v. St. Louis & S. F. R. Co. 25 Fed. 788.

Whatever belongs to the three categories of practice, pleading, and forms and mode of procedure, must conform to the state law and the practice of the state courts, except when Congress itself has legislated upon the particular subject and prescribed a rule. There can be no doubt, we think, that the mode of service of process is within the categories named in the act. It is

part of the practice and mode of proceeding in a suit.

Amy v. Watertown, 130 U. S. 304, 32 L. ed. 947, 9 Sup. Ct. Rep. 530; *Hat-Sweat Mfg. Co. v. Davis Sewing-Mach. Co.* 31 Fed. 294; *Van Dresser v. Oregon R. & Nav. Co.* 48 Fed. 205.

The courts of the United States upon removed cases have no wider jurisdiction than have the courts of the state from which they were removed. The removal simply transfers the hearing from the state to the national tribunal, but does not enlarge the right of the court to hear the cause.

Swift & Co. v. Philadelphia & R. R. Co. 4 Inters. Com. Rep. 633, 58 Fed. 861; *Fidelity Trust Co. v. Gill Car Co.* 25 Fed. 741; *Elliott v. Shuler*, 50 Fed. 457; *Rosenbaum v. Council Bluffs Ins. Co.* 37 Fed. 9; *Bills v. New Orleans & G. R. Co.* 13 Blatchf. 227, Fed. Cas. No. 1,409.

Mr. Justice Day delivered the opinion of the court:

This case comes here under § 5 of the court of appeals act (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), upon a certificate from the circuit court of the United States for the eastern district of Missouri, presenting a question of the jurisdiction of that court to entertain a suit brought by Benjamin T. Castleman, defendant in error, against the Mechanical Appliance Company, plaintiff in error, to recover for the breach of a certain alleged contract concerning the making and delivery of massage motors.

The action was originally brought in the circuit court of the city of St. Louis, in the state of Missouri, and the Mechanical *Appliance Company, a foreign corpo- [439] ration, then defendant, removed the case to the circuit court of the United States for the eastern district of Missouri upon the ground of diverse citizenship. After the case reached the United States circuit court, the bill of exceptions shows that a motion to quash the summons and certain affidavits were withdrawn, and a plea to the jurisdiction was filed.

The original service of summons in the state court had been made by the sheriff, who returned the summons as follows:

"Served this writ at the city of St. Louis, Missouri, on the within named defendant, the Mechanical Appliance Company (a corporation), this 29th day of December, 1906, by delivering a copy of the writ and petition furnished by the clerk to Dudley Shaw, agent of the said defendant corporation, he being in said defendant's usual business office and in charge thereof. The president or other chief officer of said defendant could

not be found in the city of St. Louis at the time of service."

In the plea to the jurisdiction, in the circuit court of the United States, the plaintiff in error set up:

"1. That it is a corporation organized under the laws of the state of Wisconsin; that it has never taken out a license to do business in the state of Missouri; and that at the time of the alleged service of the writ of summons herein as set out in the return of the sheriff, to wit, 29th day of December, 1906, the defendant did not have any agent, office, or place of business in the city of St. Louis or in the state of Missouri.

"2. That the person upon whom service was attempted to be had by the sheriff, and to whom a copy of the summons and petition was delivered, to wit, Dudley Shaw, was not and had not been for some time prior thereto an officer, agent, or employee of this defendant. That said Dudley Shaw was not, at the time of the delivery of the summons herein to him by the sheriff, in charge of defendant's usual business office, or in defendant's usual business office in the city of St. Louis, for the reason that this defendant had, at said time, no business 440] *office nor any other office in the city of St. Louis, state of Missouri."

Certain affidavits are set out in the bill of exceptions, and it is therein stated that they were filed. Two affidavits appear to have been filed in support of the plea to the jurisdiction, and one, by the plaintiff, in opposition thereto. In the certificate the learned circuit judge states:

"I hereby certify that in this cause the following question of jurisdiction arose; the defendant filed a plea to the jurisdiction of the court on the ground that it was a corporation organized under the laws of the state of Wisconsin, that it has no office, place of business, or agent in, and was not doing business in, the state of Missouri at the time of the service of summons herein, and that the person served with the process herein was not the agent of the defendant at the time of said service. Defendant filed affidavit in support of the plea. I overruled the plea on the ground that the facts stated in the return of the sheriff to the summons were conclusive on the defendant and could not be controverted by it. When the cause was called for trial, the same objection was made by the defendant, and overruled for the same reason. The question only of jurisdiction of the court is, therefore, hereby certified to the Supreme Court of the United States for its decision thereon."

It is settled that a question of this character involves the jurisdiction of the circuit court as a Federal court, and may be 54 L. ed.

brought here by writ of error under § 5 of the court of appeals act of 1891. *Remington v. Central P. R. Co.* 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577.

It is contended by the defendant in error that the plea to the jurisdiction did not definitely state that the corporation defendant was not doing business in the state of Missouri at the time of the attempted service; and, furthermore, that the affidavits were not shown to have been offered in evidence, although the bill of exceptions states that the same were filed. The certificate of the judge, which is required by statute in *order to bring the case to [441 this court, states that the defendant raised, by plea to the jurisdiction, the grounds of objection that it was a foreign corporation, having no office, place of business, or agent in, and was not doing business in, the state of Missouri at the time of the service of summons, and that the person served with the process was not the agent of the defendant at the time of said service.

The certificate shows that the court did not consider the affidavits, and overruled the plea on the sole ground that the facts stated in the return of the sheriff to the summons were conclusive, and could not be controverted by the defendant. It is also stated in the certificate that, when the case was called for trial, the same objection was made and overruled for the same reason. In the light of this certificate and the statements of the bill of exceptions, we think it must be regarded that the question was fairly before the court, notwithstanding the somewhat meager allegations of the plea in this respect, and presented the question, which it is certified was decided, upon plea and objections attacking the jurisdiction of the court, because the corporation was not doing business in the state of Missouri, and the person attempted to be served was not its agent at that time.

In a memorandum opinion it is indicated that the learned judge in the court below followed a previous ruling in the same court; and it is stated that it is the law of Missouri, as held by its highest court, that, in a case of this kind, a return of this character is conclusive upon the parties. But it is well settled that, after removal from the state to the Federal court, the moving party has a right to the opinion of the Federal court, not only upon the question of the merits of the case, but as to the validity of the service of process. *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 278, 41 L. ed. 431, 434, 17 Sup. Ct. Rep. 126.

It is equally well settled in the Federal jurisdiction that a foreign corporation can be served with process within the state only when it is doing business therein, and that

such service must be upon an agent who represents the corporation *in its business. This subject underwent extensive consideration in the case of *Goldney v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559, and the rule is there stated by Mr. Justice Gray, speaking for the court, as follows:

"Service of mesne process from a court of a state, not made upon the defendant or his authorized agent within the state, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the circuit court of the United States after the removal of the case into that court, pursuant to the acts of Congress, unless the defendant can be held, by virtue of a general appearance or otherwise, to have waived the defect in the service, and to have submitted himself to the jurisdiction of the court."

In view of the principles thus determined, we think the return of the sheriff of the state court was not conclusive upon the question of service. For when the question was raised in the circuit court of the United States, the jurisdiction of the court would fail if it appeared that the corporation attempted to be served was not doing business in the state of Missouri, and the attempted service was not upon one of its agents. *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Peterson v. Chicago, R. I. & P. R. Co.* 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513; *Green v. Chicago, B. & Q. R. Co.* 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595.

Defendant in error cites the case of *Smoot v. Judd*, 184 Mo. 508, 83 S. W. 481, in which it was held that where a sheriff's return recited a personal service of process which was false, the remedy of the unserved defendant against whom judgment by default had been taken, in the absence of fraud on the part of the plaintiff in the suit, was in an action on the sheriff's bond for damages for the false return, and not by a suit to set aside the sheriff's sale and deed made in pursuance of the default judgment. It is to be noted, in this connection, that the attack upon the service in that case was made after judgment, and not, as in the present case, by a motion to set aside [443] the *service of summons, or a plea to the jurisdiction over the person. Moreover, in cases which concern the jurisdiction of the Federal courts, notwithstanding the so-called conformity act (Revised Stat. § 914, U. S. Comp. Stat. 1901, p. 684), neither the statutes of the state nor the decisions of its courts are conclusive upon the Federal courts. The ultimate determination of such

questions of jurisdiction is for this court alone. *Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co.* 210 U. S. 368, 369, 52 L. ed. 1101, 1102, 28 Sup. Ct. Rep. 720; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859.

Defendant in error also relies upon the cases of *Walker v. Robbins*, 14 How. 584, 14 L. ed. 552, and *Knox County v. Harshman*, 133 U. S. 152, 33 L. ed. 586, 10 Sup. Ct. Rep. 257. Neither of these cases controls the one under consideration. In *Walker v. Robbins* a bill in equity was filed to enjoin enforcement of a judgment at law, entered upon a false return of a marshal in the circuit court of the Mississippi district. This court held that a bill in equity would not lie for such purpose, and further, that the return was not false, and, if it were, the defendant Walker waived the want of service by pleading to the merits of the action. It was there said by Mr. Justice Catron, delivering the opinion of the court: "In cases of false returns affecting the defendant, where the plaintiff at law is not at fault, redress can only be had in the court of law where the record was made; and, if relief cannot be had there, the party injured must seek his remedy against the marshal."

The case was decided upon the grounds which we have stated, and the language quoted and relied upon by the defendant in error is very far from indicating that a party might not appear specially and object to service of summons, and move to set aside the same, and to dismiss the action upon the grounds which are involved in the case at bar.

In *Knox County v. Harshman*, a bill in equity was filed for an injunction against the prosecution of a writ of mandamus to enforce the levy of a certain tax against the county. The bill alleged that neither the county court nor any of the judges thereof had any notice of the suit until after the end of the *term at which judgment was rendered, and that no service of summons was made upon Frank P. Hall, the county clerk, as was stated in the marshal's return. This court, in an opinion by Mr. Justice Gray, held that a court of equity would not interfere with the judgment, under the circumstances shown, and as to the officer's return of service of copy of the summons on the clerk, if false, no fraud having been charged or proved against the petitioner, redress must be sought in an action at law, and not by a bill in equity; and that, if the questions of fact could be considered as open in the case, the proof at the hearing showed that service had, in fact, been made.

Neither of these cases involved the right

of the defendant to appear upon attempted service in an action at law, and by motion, or plea for that purpose, raise the question of jurisdiction over his person. The case of *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126, is much closer in its analogy to the case at bar. In that case suit was commenced in the state court, in Michigan, against the Wabash Western Railway Company, to recover in an action for damages. The service of summons and copy of the declaration was made upon one Hill, as agent of the company. The case was removed to the Federal court for the eastern district of Michigan. The railroad company thereupon appeared and moved to set aside the declaration and rule to plead, upon the ground of want of jurisdiction, and filed an affidavit showing that Hill, upon whom the service had been attempted, was the freight agent of the Wabash Railroad Company, a corporation which owned and operated a railroad from Detroit to the Michigan state line, and was not an agent of the Wabash Western Railway Company, the defendant in the suit; and, at the time of the attempted service, the defendant did not own, operate, and control any railroad in the state of Michigan, had no place of business therein, and was not doing business within the state. The action was overruled by the circuit court, the objection to the jurisdiction was renewed when the defendant filed its *plea and before trial in the case, which resulted in a verdict and judgment in favor of Brow.

The court of appeals for the sixth circuit held that the filing of the petition for removal, in general terms, had effected the appearance of the Wabash Western Railway Company to the action. This court, in an opinion by Mr. Chief Justice Fuller, held that the record disclosed that the corporation, at the time of the attempted service, was neither incorporated nor doing business, nor had any agent nor property, within the state of Michigan, and that the individual upon whom service had been attempted was not the agent or an officer of the corporation, and therefore no jurisdiction was acquired over the person of the defendant by the attempted service; and, further, that the petition for removal did not effect an appearance in the case, consequently reversing the judgment of the circuit court of appeals, and remanding the case to the circuit court, with directions to grant a new trial, and to sustain the motion to set aside the service and dismiss the action.

The circuit court should have considered the question upon the issues of fact raised, as to the presence of the corporation in Missouri and the authority of the
54 L. ed.

agent upon whom service had been attempted. It is true, as suggested by the defendant in error, that the affidavits appearing in the bill of exceptions are stated to have been filed, and there is no definite statement that they were offered to be read in evidence, but we think it is apparent that they were filed for that purpose. No objection appears in the record to the filing of the affidavits; on the other hand, it appears that the plaintiff below also filed an affidavit. These affidavits are made part of the record by a bill of exceptions and we think they should have been considered upon the question of jurisdiction.

As we have already indicated, the learned circuit court was in error in holding that the return of the sheriff in the state court concluded the parties, and had it considered the affidavits exhibited in the bill of exceptions, as, in our view, it should have done, the conclusion would have been reached that the *weight of the testimony disclosed [446] that the defendant corporation was not doing business in the state of Missouri at the time of the attempted service of process, and that the person named in the return of the sheriff was not at that time the duly authorized agent of the defendant corporation.

Holding these views, the judgment of the Circuit Court is reversed, and the cause remanded to that court with directions to dismiss the case for want of jurisdiction.

Reversed.

JOHN F. HAFFNER, Appt.,
v.
MICHAEL DOBRINSKI and Henry Schultz.

(See S. C. Reporter's ed. 446-452.)

Specific performance — unfair contract — remedy at law.

Specific performance of an oral contract for the sale of real property, partly performed, is properly refused to the vendee, where the contract is unreasonable, if not unconscionable, and the petition discloses on its face that the vendee has in his possession money belonging to the vendor which is more than adequate to cover any possible damages resulting from the vendor's refusal to convey.

[For other cases, see *Specific Performance*, 17-19, 49-58, in *Digest Sup. Ct. 1908*.]

[No. 35.]

Submitted November 12, 1909. Decided January 10, 1910.

NOTE. — As to specific performance of inequitable contract—see note to *De Sollar v. Hanscome*, 39 L. ed. U. S. 956.

APPEAL from the Supreme Court of the Territory of Oklahoma to review a decree which affirmed a decree of the District Court of Kingfisher County in that Territory, dismissing a suit for the specific performance of an oral contract for the sale of real property. Affirmed.

See same case below, 17 Okla. 438, 88 Pac. 1042.

Statement by Mr. Chief Justice **Fuller**:

The supreme court of Oklahoma, from whose judgment affirming the decree of the district court of Kingfisher county this appeal was prosecuted, stated the case as follows (17 Okla. 438, 88 Pac. 1042):

"This action was brought on the 13th day 447] of May, 1902, *by the plaintiff in error, John F. Haffner, against the defendants in error for the specific enforcement of an oral contract for the sale of real estate. Thereafter, on January 14, 1903, upon the application of the plaintiff in error therefor, a restraining order was issued against the defendant in error Dobrinski, restraining him from prosecuting certain actions of forcible entry and detainer which he had brought against Haffner in the probate court of Kingfisher county after the filing of the petition in this case, and which involved the land in controversy herein. This order was made conditional upon Haffner giving bond in the sum of \$500, which amount was later increased to \$1,000. On March 9, 1903, the court overruled a motion to dissolve this restraining order, and, upon the hearing of a demurrer filed by Dobrinski to Haffner's petition, granted leave to the plaintiff in error to amend. On March 18, 1903, by leave of the court, Haffner filed an amended petition, upon which the case was heard, which, in substance, is as follows:

"That on and prior to September 4, 1901, Dobrinski was the owner in fee of the east half and lots 3 and 4 of sec. 31, twp. 17, range 9, west of the Indian meridian, in Kingfisher county, Oklahoma, and also 1,668 bushels of wheat and 30 bushels of oats. That on said date Haffner and Dobrinski entered into a verbal contract for the sale and purchase of said land and personal property, for a total consideration of \$3,820, of which \$920 was for the oats and wheat. A payment of \$1,020 was to be made on or before January 1, 1902, \$600 of which was to be applied by Dobrinski on a mortgage then on the premises, and a warranty deed executed by Dobrinski to the plaintiff in error, Haffner. At the same time Haffner, upon the execution of said deed, was to execute to Dobrinski his note for \$2,800, bearing 5 per cent interest per annum, payable in ten years, Haffner to bind himself to apply upon the said indebtedness all of the proceeds

arising from the crops raised upon said land, over and above cost of raising the same. That, in pursuance of said oral *con- [448 tract, Haffner paid Dobrinski \$50.20, and on the day following, September 5, 1901, took peaceable possession of the premises and personal property, made minor improvements about the farm, planted about \$60 worth of trees, and sowed 100 acres of the land to wheat and 10 acres to oats.

"The petition then alleges that Dobrinski, on November 30, 1901, conveyed the premises by warranty deed to one John A. Webber, for the consideration of \$1,700, and that Webber later on, for a consideration unknown to the plaintiff Haffner, at the instance of Dobrinski, deeded the land to the defendant in error Schultz. Schultz, however, is alleged to have quitclaimed back to Dobrinski, and to have held in the interim in trust for Dobrinski. The petition then recites that prior to the 1st of January, 1902, at which time the payment of \$1,020 was to be made, Haffner notified Dobrinski that he was ready and willing to make payment, and that he was at that time and ever since has been ready, willing, and able to pay said sum, less the payment of \$50.20 theretofore made, but that Dobrinski refused and still refuses to accept the same. That Haffner has at all times been able, ready, and willing to comply with his contract, and offers to bring into court the said \$1,020, less \$50.20 paid, and to execute to Dobrinski his note for \$2,800, secured by first mortgage on the real estate, and, in addition thereto, to bring into court the sum of \$458.76, which it is alleged is the proceeds of the farm, over and above outlay for help, while Haffner has held the same. Continuous possession of the premises on the part of Haffner since September 5, 1901, is then alleged, and the petition concludes in this language: 'That no just, fair, or adequate assessment of damages could be made, and that the defendant Michael Dobrinski is not financially responsible for any adequate amount of damages, and that the plaintiff has no plain and adequate remedy at law,' followed by a prayer for an order directing Dobrinski to execute a warranty deed in accordance with the terms of the contract.

"*To this amended petition, Schultz [449 filed what is in effect a disclaimer. After various delays, occasioned by motions to strike out portions of the first answer, Dobrinski filed an amended answer in two paragraphs, and later withdrew the second paragraph, and stood upon the first alone. This paragraph of Dobrinski's amended answer admits his ownership of the premises and personal property on September 5, 1901, and admits that Schultz held the land in trust for him,

and then contains a verified general denial as to all the other allegations in the amended petition. At the trial, Dobrinski objected to the introduction of any evidence, 'for the reason,' as the record recites, 'that the petition did not state facts sufficient to constitute a cause of action against the defendant, and in favor of the plaintiff.' This objection was by the court sustained, exception saved, motion for a new trial filed and overruled, and the case brought here for review.

"Error is predicated upon the sustaining of the objection to the introduction of evidence, and also upon the refusal of the court below to make perpetual the restraining order above referred to, and because of the fact that plaintiff in error was required to give bond when the order was obtained. In their brief, counsel for plaintiff in error enter into an extended argument to sustain their contentions, first, that oral contracts in general, relative to the sale of real estate, are not absolutely inhibited by our statute of frauds, and, second, that if the statute applies, the contract declared upon and sought to be enforced in this action is not within its scope, by reason of part performance thereof."

Messrs. **Watson E. Coleman, D. W. Buckner**, and **I. Q. H. Alward** submitted the cause for appellant. Messrs **Nagle & Blair** were on the brief:

Except that the contract was in parol, there was nothing unusual about it. Appellant had agreed to pay the price asked, and, it may be assumed, accepted the terms offered. He made a small payment in cash. This, however, is not deemed material.

Cheney v. Libby, 134 U. S. 68, 33 L. ed. 818, 10 Sup. Ct. Rep. 498.

The objection that the contract sought to be enforced is inequitable and unconscionable resolves itself into the one proposition that appellant did not agree to pay off the total amount of the indebtedness until ten years had elapsed. Practically the same objection was raised in **Morrison v. Peay**, 21 Ark. 110.

See also **Kerr v. Moore**, 6 Cal. App. 305, 92 Pac. 107; **South & North Ala. R. Co. v. Highland Ave. & Belt R. Co.** 98 Ala. 405, 39 Am. St. Rep. 74, 13 So. 682.

The question in such cases always is, Was the contract, at the time it was made, a reasonable and fair one? If such was the fact, the parties are considered as having taken upon themselves the risk of subsequent fluctuations in the value of the property, and such fluctuations are not allowed to prevent its specific enforcement.

Willard v. Tayloe, 8 Wall. 557, 19 L. ed. 501.

Where there is a completed contract, 54 L. ed.

founded on an executed consideration, the doctrine of mutuality, it would seem, might well be ignored. So, also, where the consideration for the contract sought to be enforced is the contemporaneous contract or obligation of the party seeking enforcement, there can be, as a rule, no lack of mutuality of obligation.

26 Am. & Eng. Enc. Law, 2d ed. p. 31; **South & North Ala. R. Co. v. Highland Ave. & Belt R. Co.** supra.

It is discretionary with the court whether the contract shall be enforced or not; but this discretion must be exercised according to well-established rules.

Morrison v. Peay, supra; **Stevens v. Trafton**, 36 Mont. 520, 93 Pac. 811; **Willard v. Tayloe**, supra.

The appellant, having partly performed his contract, and offering or tendering performance according to its terms, and having entered into possession and made improvements in reliance upon the contract, is clearly entitled to a decree for specific performance, and should not be required to hazard his rights on the possible outcome of a suit at law.

26 Am. & Eng. Enc. Law, 2d. ed. p. 104; **Morrison v. Peay**, supra; **Brown v. Hoag**, 35 Minn. 373, 29 N. W. 135; **Riggles v. Erney**, 154 U. S. 244, 38 L. ed. 976, 14 Sup. Ct. Rep. 1083; **Townsend v. Vanderwerker**, 160 U. S. 171, 40 L. ed. 383, 16 Sup. Ct. Rep. 258; **Whitney v. Hay**, 181 U. S. 77, 45 L. ed. 758, 21 Sup. Ct. Rep. 537; **Sutherland v. Taintor**, 17 Okla. 427, 87 Pac. 900.

Mr. C. C. Flansburg submitted the cause for appellees.

Mr. Chief Justice Fuller delivered the opinion of the court:

The supreme court of Oklahoma held that there was no *error in excluding all the [450] evidence because the petition did not state a cause of action in equity; that the doctrine is well settled that specific performance is never demandable as a matter of absolute right, but as one which rests entirely in judicial discretion, to be exercised, it is true, according to the settled principles of equity, but not arbitrarily and capriciously, and always with reference to the facts of the particular case.

The principles applied were announced in **Pope Mfg. Co. v. Gormully**, 144 U. S. 224, 236, 36 L. ed. 414, 419, 12 Sup. Ct. Rep. 632. As remarked by Mr. Justice Brown in that case: "To stay the arm of a court of equity from enforcing a contract, it is by no means necessary to prove that it is invalid; from time to time immemorial it has been the recognized duty of such courts to exercise a discretion; to refuse their aid in the

enforcement of unconscionable, oppressive, or iniquitous contracts; and to turn the party claiming the benefit of such contract over to a court of law. This distinction was recognized by this court in *Cathcart v. Robinson*, 5 Pet. 264, 276, 8 L. ed. 120, 124, where in Chief Justice Marshall says: "The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. *Mortlock v. Buller*, 10 Ves. Jr. 292; *Day v. Newman*, 2 Cox, Ch. Cas. 77. It is said that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific performance, by showing that, under the circumstances, the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation, or any unfairness, are enumerated among the causes which will induce the court to refuse its aid." And see *Hennessy v. Woolworth*, 128 U. S. 438, 442, 32 L. ed. 500, 501, 9 Sup. Ct. Rep. 109; *Nickerson v. Nickerson*, 127 U. S. 668, 32 L. ed. 314, 8 Sup. Ct. Rep. 1355.

And the supreme court of Oklahoma further said (p. 443) that where it is disclosed by complainant himself that the contract upon which he bases his suit "is unreasonable in its provisions, if not unconscionable, and void under the statute of frauds, and that the acts done and relied upon to warrant a decree on the ground of part performance are not of such a nature that damages would not be an adequate relief, but, on the contrary, that he has within his immediate control money and property more than sufficient to compensate him for any loss sustained, a case for equitable intervention is not shown, and upon such state of facts, a court of equity is justified in refusing specific performance."

In short, the court held that the trial court was fully warranted in refusing to require the alleged contract to be specifically performed, as being so unreasonable in its provisions as to justify such refusal, and also for want of mutuality, and not practically enforceable as to both parties, and as to the part performance relied on to take the contract out of the statute of frauds, that the contention was without merit. The doctrine is that, in order that specific performance may be decreed on the ground of part performance, the acts done by the one seeking relief, and relied on to warrant a decree, must be of such a nature that damages would not be an adequate relief. *Williams v. Morris*, 95 U. S. 444, 24 L. ed. 360. But here, as the lower court pointed out, the

plaintiff showed on the face of his petition that he had in his possession money belonging to the defendant adequate to cover any possible damages many times over. He had paid the merely nominal sum of \$50.20 on the purchase price, entered into the possession of the property, done the repairing common to all farmers, expended \$60 in improvements, and prepared 110 acres for crop. But he had in his own control the \$920 derived from the sale of the wheat and oats, and, in addition thereto, the sum of \$458.76, the first year's returns from the farm above the cost of obtaining it. In other words, he had lived on the farm free for over a year; had almost \$1,400 of the other's money in his hands, and now complained in equity that fraud would be perpetrated upon him if the court does not enforce a contract which will allow him to remain nine years longer in possession of the land, free from any obligations with which defendant can force him to comply until the expiration of that time. Such a condition of affairs did not appeal to equitable consideration. The action of the trial court was sustained as entirely justified. We concur in that conclusion, and nothing else calls for comment.

Judgment affirmed.

INTERSTATE COMMERCE COMMISSION,
Appt.,
v.
ILLINOIS CENTRAL RAILROAD COMPANY.

(See S. C. Reporter's ed. 452-478.)

Constitutional law — usurpation of administrative function by courts.

1. The courts cannot, under the guise of exerting judicial power, usurp merely administrative functions by setting aside an order of the Interstate Commerce Commission within the scope of the power delegated to such Commission, upon the ground that such power was unwisely or inexpediently exercised.

[For other cases, see Constitutional Law, III. a, in Digest Sup. Ct. 1908.]

Commerce — scope of commerce clause — instrumentalities — railway fuel cars.

2. Commerce, in the constitutional sense, includes the instrumentalities by which commerce is carried on, and extends to the coal cars owned by a railway company engaged in interstate commerce, in which it receives from the tipple of the coal mines along its line coal purchased by it and used solely for its own fuel purposes.

[For other cases, see Commerce, I. b, in Digest Sup. Ct. 1908.]

NOTE. — On the constitutionality of statutes restricting contracts and business—see note to *State v. Loomis*, 21 L.R.A. 789.

Interstate Commerce Commission — powers — regulating distribution of railway fuel cars.

3. Authority to regulate the distribution of a railway company's fuel cars in times of car shortage to the bituminous coal mines along its line was delegated to the Interstate Commerce Commission by the act to regulate commerce of February 4, 1887 (24 Stat. at L. 380, chap. 104, U. S. Comp. Stat. 1901, p. 3155), as a means of prohibiting the unjust preferences or undue discriminations forbidden by § 3 of that act.

[Power of Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — powers — regulating distribution of railway fuel cars.

4. An order of the Interstate Commerce Commission commanding a railway company to desist from its practice not to take into account the company's fuel cars in the daily distribution of coal cars in times of car shortage to the bituminous coal mines on its line, and requiring it for a future period of two years to count such cars against the share of the mine receiving them, is within the authority delegated by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149), § 4, upon complaint duly made, to declare a rate or practice affecting rates illegal, and to determine and prescribe for a term not exceeding two years what will be a just and reasonable rate, and what regulation or practice in respect to transportation is just, fair, and reasonable thereafter to be followed.

[Power of Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Constitutional law — freedom to contract — regulating distribution of railway coal cars.

5. Requiring a railway company, in making its daily distribution of coal cars, in times of car shortage, to the bituminous coal mines on its line, to desist from its practice not to count the company's fuel cars against the share of the mine receiving them, cannot be said to destroy the freedom of contract, on the theory that any discriminations or preferences resulting from such practice arose from the fact that the railway company chose to purchase coal for its fuel supply from a particular mine or mines.

[For other cases, see Constitutional Law, 591-604, in Digest Sup. Ct. 1908.]

[No. 233.]

Argued October 15, 1909. Decided January 10, 1910.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a decree restraining the enforcement of an order of the Interstate Commerce Commission, commanding a railway company to desist from its practice

not to take into account the company fuel cars in the daily distribution of coal cars in times of car shortage to the bituminous coal mines along its line, and requiring it, for a future period of two years, to count such cars against the share of the mine receiving them. Reversed.

See same case below, 173 Fed. 930.

The facts are stated in the opinion.

Assistant to the Attorney General Ellis and Mr. Luther M. Walter argued the cause and filed a brief for appellant:

The court will refuse to interfere with an order resulting from the exercise of discretion by an administrative tribunal charged with a legislative duty, and clothed with the power of removing such discriminations practised by carriers in connection with the interstate transportation of property, as, after full investigation, pursuant to complaint filed in its office, that tribunal concludes are undue and unreasonable; and the court will so refuse, regardless of whether or not, as an original proposition, it would have formed an opinion in consonance with the decision of said tribunal.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 39 C. C. A. 413, 99 Fed. 52; Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 324, 47 L. ed. 1078, 23 Sup. Ct. Rep. 698; United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644.

The act to regulate commerce gives the Commission jurisdiction to prescribe a regulation providing for a system of car distribution in lieu of a system of car distribution already in force, found by the Commission to be unjust and unreasonable by reason of undue preference or prejudice.

Rail & River Coal Co. v. Baltimore & O. R. Co. 14 Inters. Com. Rep. 86.

Messrs. L. A. Shaver and H. B. Arnold also filed a brief for appellant:

The allotment of appellee's fuel cars to the mines receiving them in addition to the full distributive shares of such mines in the general distribution of cars by appellee, and the failure to count and charge appellee's cars against the mines receiving them, results in undue and unreasonable preference and advantage to the mines receiving such cars, and subjects the owners and operators of mines who do not receive such cars to undue and unreasonable prejudice and disadvantage.

Logan Coal Co. v. Pennsylvania R. Co. 154 Fed. 497; Baltimore & O. R. Co. v.

United States, 91 C. C. A. 147, 165 Fed. 113; Railroad Commission v. Hoeking Valley R. Co. 12 Inters. Com. Rep. 398.

All shippers should be placed upon an absolute equality.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075; United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 248; United States ex rel. Greenbrier Coal & Coke Co. v. Norfolk & W. R. Co. 74 C. C. A. 404, 143 Fed. 268.

The interstate commerce act contemplates not merely that there shall be absolute equality between shippers, but also that there shall be uniformity.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Interstate Commerce Commission v. Reihmann, 145 Fed. 235.

Messrs. Eldon J. Cassoday and Rush C. Butler (by special leave) filed a brief for the receivers of the Illinois Collieries Company:

The method of distribution of ears to be used in interstate commerce is within the provisions of the act to regulate commerce, and within the jurisdiction of the Interstate Commerce Commission.

United States ex rel. Piteairn Coal Co. v. Baltimore & O. R. Co. 154 Fed. 108, 91 C. C. A. 147, 165 Fed. 113; Logan Coal Co. v. Pennsylvania R. Co. 154 Fed. 497; United States ex rel. Greenbrier Coal & Coke Co. v. Norfolk & W. R. Co. 74 C. C. A. 404, 143 Fed. 266; United States ex rel. Kingwood Coal Co. v. West Virginia Northern R. Co. 125 Fed. 252, 67 C. C. A. 220, 134 Fed. 198; United States ex rel. Northwestern Warehouse Co. v. Oregon R. & Nav. Co. 159 Fed. 975; Majestic Coal & Coke Co. v. Illinois C. R. Co. 162 Fed. 810; Railroad Commission v. Hoeking Valley R. Co. 12 Inters. Com. Rep. 404; Traer v. Chicago & A. R. Co. 13 Inters. Com. Rep. 451; Royal Coal & Coke Co. v. Southern R. Co. 13 Inters. Com. Rep. 440; Rail & River Coal Co. v. Baltimore & O. R. Co. 14 Inters. Com. Rep. 86.

The practice of the appellees, and each of them, in failing and refusing to charge against the percentage or distributive number of ears to which certain mines would be entitled, ears sent to said mines, to be loaded with appellees' own fuel supply, is an unjust discrimination against the other coal mines on said lines of railroad, and is a violation of the provisions of the act to regulate commerce.

The railroad company and a shipper do not stand on a footing of equality.

New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627.

The right to use such ears is a matter separate and distinct from, and not in any way dependent upon, or affected by, the counting or failure to count such ears.

Traer v. Chicago & A. R. Co. 13 Inters. Com. Rep. 457.

The railroad companies cannot justify their practice of not counting such ears on the ground that, without it, they would be compelled to pay a higher price for their coal.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 399, 50 L. ed. 515, 524, 26 Sup. Ct. Rep. 272; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 596, 41 L. ed. 560, 566, 17 Sup. Ct. Rep. 198; Union P. R. Co. v. Goodridge, 149 U. S. 680, 37 L. ed. 896, 13 Sup. Ct. Rep. 970; Smyth v. Ames, 160 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The rule or practice of counting or not counting ears has been before the court and the Commission in a number of cases.

Logan Coal Co. v. Pennsylvania R. Co. supra; United States ex rel. Piteairn Coal Co. v. Baltimore & O. R. Co. 154 Fed. 108, reversed in 91 C. C. A. 147, 165 Fed. 113; Majestic Coal & Coke Co. v. Illinois C. R. Co. supra; United States ex rel. Coffman v. Norfolk & W. R. Co. 109 Fed. 831; Traer v. Chicago & A. R. Co. 13 Inters. Com. Rep. 451; Royal Coal & Coke Co. v. Southern R. Co. supra; Railroad Commission v. Hoeking Valley R. Co. 12 Inters. Com. Rep. 398; Rail & River Coal Co. v. Baltimore & O. R. Co. supra.

The contract and noncontract mines are similarly situated.

Logan Coal Co. v. Pennsylvania R. Co. and Majestic Coal & Coke Co. v. Illinois C. R. Co. supra.

Cars, even when in use by the railroad company in transporting its own fuel, are still a part of the equipment of the road, and within the terms of the interstate commerce act.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158.

Even though such ears, when transporting the railroad's fuel, may not themselves be engaged in commerce, strictly speaking, the failure to count them directly affects the distribution of the remaining ears which are engaged in interstate commerce.

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121;

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485; United States v. Wells-Fargo Exp. Co. 161 Fed. 606; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

A comparison of the practice of the railroad companies, the plan proposed by the honorable circuit court judge, and the practice provided for in the order of the Commission, shows unjust discrimination in the two former methods.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700; Traer v. Chicago & A. R. Co. 13 Inters. Com. Rep. 457.

The practice of the railroad companies has a direct and immediate effect upon the distribution of cars engaged in interstate commerce, and is an unjust discrimination, in violation of the act to regulate commerce.

Majestic Coal & Coke Co. v. Illinois C. R. Co. *supra*; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272.

Mr. W. S. Kenyon argued the cause, and, with Messrs. J. M. Dickinson, Garrard B. Winston, Robert Mather, and F. S. Winston, filed a brief for appellee:

The Commission's rule of distribution is not a regulation of interstate commerce.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Express Cases, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; East & West India Dock Co. v. Shaw, S. & A. Co. L. R. 39 Ch. Div. 524; West v. London & N. W. R. Co. L. R. 5 C. P. 622; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 54 L. ed.

ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764.

Section 15 of the interstate commerce act does not empower the Interstate Commerce Commission to make the order enjoined.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896.

The order is a taking of private property, prohibited by the 5th Amendment to the Constitution of the United States.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

Messrs. Francis I. Gowen, Wayne Maeveagh, and McKenney & Flannery (by special leave) filed a brief for the Pennsylvania Railroad Company.

Mr. Justice White delivered the opinion of the court:

Whether a duty rested upon the Illinois Central Railroad Company to obey an order made by the Interstate Commerce Commission is the question here to be decided.

On the ground that preferences were created and discriminations engendered by regulations established by the railroad company concerning the daily distribution of coal cars to mines along its line in periods when the supply of such cars was inadequate to meet the demand upon it for the movement of coal, the order in question commanded the railroad company to desist from enforcing the regulations found to be preferential, and for a future period of two years to deliver cars to mines along [460 its line in conformity with the rule announced by the Commission.

A clearer perception of the question to be considered will be afforded by giving a brief statement of the cause of car shortage referred to, accompanied with a mere outline of the steps generally taken by carriers to deal with the subject, and the particular method applied by the Illinois Central Railroad Company prior to the date when the complaint was made against it, concerning which the order previously referred to was entered.

It is conceded in argument that bituminous coal mines, which are the character of mines here involved, must dispose of their product as soon as the coal is delivered at the surface, as it is not practicable for an operator to store such coal, and the amount that a mine will produce is therefore directly dependent upon the quantity that can be taken away day by day. As a result of

this situation, it is also conceded that railroads upon whose lines coal mines are situated pursue a system by which daily deliveries of cars, based upon requisitions of the respective mines, are made to such mines to permit of the removal of their available output for that day.

Notwithstanding full performance by railway carriers of the duty to have a legally sufficient supply of coal cars, it is conceded that unforeseen periods arise when a shortage of such cars to meet the demand for the transportation of coal takes place, because, among other things, (a) of the wide fluctuation between the demands for the transportation of bituminous coal at different and uncertain periods; (b) the large number of loaded coal cars delivered by a carrier beyond its own line for transportation over other roads, consequent upon the fact that the coal produced at a particular point is normally distributed for consumption over an extensive area; and (c) because the cars thus parted with are subject to longer detentions than usually obtain in the case of shipments of other articles, owing to the fact that bituminous coal is often shipped by mining operators 461] to distant points, to be sold after *arrival, and is hence held at the terminal points awaiting sale, or because, owing to the cost of handling coal, and the difficulty of storing such coal, the car in which it is shipped is often used by the shipper or purchaser at the terminal points as a convenient means of storage or as an instrument for delivery, without the expense of breaking bulk, to other and distant points.

It is disclosed that the railroads of the United States generally, at various times, put in force regulations for the distribution of coal cars. Generally speaking, these regulations provide for fixing the capacity of coal mines in order to determine the number of cars to which each might normally be entitled to daily move its output of coal. And these regulations also provide for a method of determining the *pro rata* share of the cars daily allotted for distribution in times of car shortage. Neither the method by which capacity was to be ascertained nor the regulation for daily distribution upon the basis of such capacity in case of shortage was identical among the various railroad systems of the United States. The divergence, and even conflict, between those systems, is illustrated by the cases of *Logan Coal Co. v. Pennsylvania R. Co.* 154 Fed. 497; *United States ex rel. Piteairn Coal Co. v. Baltimore & O. R. Co.* 91 C. C. A. 147, 165 Fed. 113; cases cited at pages 503 and 504 of the report of the *Logan Coal Co. Case*, and the case of *Majestic Coal & Coke Co. v. Illinois C. R. Co.* 162 Fed. 810.

In a general sense, however, all the regulations of the various railroads, either for ascertaining the capacity of coal mines, or in order to determine the *pro rata* share for daily distribution of cars to the respective mines in case of shortage, dealt with four classes of cars: 1, system cars, that is, cars owned by the carrier and in use for the transportation of coal; 2, company fuel cars, that is, cars belonging to the company, and used by it when necessary for the movement of coal from the mines on its own line, and which coal had been bought by the carrier, and was used solely for its own fuel purposes; 3, private cars, that is, cars either owned by coal mining companies or shippers or *consumers, [462 and used for the benefit of their owners in conveying coal from the mines to designated points of delivery; 4, foreign railway fuel cars, that is, cars owned by other railroad companies, and which were by them delivered to the carriers on whose lines mines were situated, for the purpose of enabling the cars to be loaded with coal and returned to the company by whom the cars had been furnished, the coal being intended for use as fuel by such foreign railroad companies.

The various regulations, irrespective of minor differences between them, fell upon one or the other side of this broad line of division. One system took into account class 2, the fuel cars of the carrier, class 3, the private cars, and class 4, the cars of foreign railroads, and deducted from the rated capacity of the mine the sum of coal delivered by that mine in such cars, and upon the basis thus resulting apportioned ratably, in case of shortage, the system cars; that is, those embraced in class 1. On the other hand, the other class of regulation not only took no account of the cars in classes 2, 3, and 4, as a means of rating the capacity of the mine, but moreover did not charge against any mine, for the purpose of ascertaining the daily *pro rata* of the cars to which such mine was entitled, any car whatever furnished such mine on such day embraced within classes 2, 3, and 4, that is, any company fuel car, foreign railway fuel car, or private car. By this system, therefore, where a mine was entitled daily to a given *pro rata* of the cars subject to general distribution, it received its full share of such cars, and in addition on that day also received such of the company fuel cars, foreign railway fuel cars, and private cars as might have been sent to it for loading on that day. This absolute disregard in the allotment of the company fuel cars, foreign railway fuel cars, and private cars was not in all respects common to all the systems which took no account of such cars in fixing capacity, since in some of the regulations one or the other of the

classes was taken into account in fixing the *pro rata* for distribution.

Previous to 1907, the railroad commission of the state of Ohio filed with the Interstate Commerce Commission two **463**] *complaints against the Hocking Valley and another railroad company. These complaints were based upon the ground that the failure of the railroads in times of car shortage to include in the *pro rata* of cars for distribution foreign railway fuel cars and private cars, and to charge the mines which had received such cars with the same as part of their distributive share, created an undue preference, and worked unjust discrimination, in violation of the act to regulate commerce. On July 11, 1907, the report and opinion of the Commission was announced in the cases referred to. 12 Inters. Com. Rep. 398. It was declared that the complaints were well founded, and the relief prayed was awarded. Nine days afterwards, —presumptively in ignorance of the finding of the Commission, just referred to,—the Illinois Central Railroad Company promulgated rules governing the distribution of cars to coal mines. Although by these rules foreign fuel cars, private cars, and company fuel cars were not taken into account in ascertaining the capacity of a mine or mines, such cars were expressly directed not to be counted for the purpose of the daily distribution of cars among the respective mines. On August 15 following, however, presumably to cause the regulations to conform to the interpretation of the interstate commerce act adopted by the Commission in the Hocking Valley Case, a circular was issued by the Illinois Central Railroad Company, to go into effect September 1, 1907, canceling the circular of July 20, 1907, and directing that account should be taken in the distribution of cars to a particular mine or mines of both foreign railway fuel and private cars. Before the date fixed for the going into effect of this last-named circular, the Majestic Coal & Coke Company, a West Virginia corporation, filed a suit against the Illinois Central Railroad Company in the United States circuit court for the northern district of Illinois, complaining that to charge against its distributive share of coal cars, in the event of a car shortage, the fuel cars and private cars furnished it, would violate its legal rights. After hearing, a temporary injunction, preventing the **464**] *going into effect of the regulations in the particulars mentioned, was issued. The distribution of coal cars thereafter continued to be made as provided in the prior circular.

With this prelude we come more immediately to the origin of the controversy before us.

On October 31, 1907, the Illinois Collieries Company filed with the Interstate Commerce Commission a complaint against the Illinois Central Railroad Company. The regulations of the railroad company as to the distribution of coal cars were assailed as unjustly discriminatory, in violation of the act to regulate commerce, particularly as respected the practice of not taking into consideration foreign railway fuel cars and private cars in determining the distribution of coal cars among the various coal operators along the lines of the railroad on interstate shipments of coal. It appears that the complaint just referred to was heard before the Commission, with two other complaints against other railroads, involving the same general subject. In its report, which was filed in all three of the cases on April 13, 1908 (13 Inters. Com. Rep. 451), the Commission held that not to count, in times of car shortage, when the daily distributions were made against the mine receiving the same, company fuel cars, foreign railway fuel cars, and private cars, was a violation of the act to regulate commerce. In announcing this conclusion, reference was made to the previous opinion of the Commission in the Hocking Valley Case, *supra*, and it was declared that the Illinois Central Railroad Company, on the hearing before the Commission, had conceded the controlling effect of the previous ruling of the Commission. Considering the temporary injunction issued by the circuit court of the United States for the northern district of Illinois, the Commission declared that, in view of the decision of this court in the case of the Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075, it was the duty of the Commission to order the carrier to desist from the unlawful discrimination.

Although the complaint in the case of the Illinois Central Railroad Company **465**] differed from the complaints in the two other cases which were considered and passed upon by the Commission at the same time, in that it did not assail the failure to take into account the company fuel cars in making distribution in times of car shortage, nevertheless the Commission declared that the Illinois Central Railroad Company, both in its brief and argument, had conceded the importance of the subject to that company, and had invoked the action of the Commission thereon.

The order of the Commission, as heretofore stated, therefore, not only directed the desisting from the practice of failing to take into account the foreign railway fuel cars,

private cars, and the company fuel cars, but also required the carriers to establish regulations for a period of two years from July 1, 1908, providing for the counting of all such cars. The general scope of the order was, however, qualified by expressly authorizing a railroad company to deliver to a particular mine all the foreign railway fuel cars, the private cars, and the company fuel cars consigned or assigned to said mine, even although the number thereof might exceed the *pro rata* share of the cars attributable to said mine when ascertained by taking into account all the cars which the order required to be considered. Where, however, the number of such cars was less than the *pro rata* share of the mine, the order only permitted the carrier to add a sufficient number of system cars to make up the rightful *pro rata* number.

Being unwilling to comply with the order of the Commission, the Illinois Central Railroad Company commenced the suit which is now before us to enjoin in all respects the enforcement of the order of the Commission. It was averred that, although the company was adequately equipped with coal cars, and with sufficient motive power and operative forces, yet at times an inadequate supply of coal cars to meet the demand arose from the circumstances which we have previously stated. It was alleged that the regulations adopted by the company for ascertaining the [466] capacity of the mines *and for the distribution of cars were, in all respects, just and reasonable, and it was charged that the order of the Commission, directing the taking into account of private cars in the distribution of cars, was unjust, unreasonable, oppressive, and unlawful, because it deprived the owners of such cars of the right to the use of their own property. It was further alleged that, as to the foreign railway fuel cars, the order was also unjust, unreasonable, oppressive, and unlawful, because such cars constituted no part of the equipment of the road, and failing to count them could not constitute an unlawful discrimination or the giving of an unjust preference within the intendment of the act to regulate commerce. Besides charging that the order to count the company fuel cars was unjust, unreasonable, etc., it was averred that the attempt of the Commission to deal with such cars was beyond its power, and was but an effort to deprive the company of its lawful right to freely contract for the purchase of the fuel necessary for the operation of its road. In addition, the proceedings in the suit brought by the Majestic Coal Company were set out, the granting of a temporary injunction therein as to counting foreign railway fuel cars and private cars was alleged, and it was charged that, in any event, as to

those two classes of cars, the order of the Commission was not lawful, since it compelled the company to violate the injunction which was yet in force. The Commission answered by asserting the validity in all respects of the order by it made, substantially upon the grounds which had been set out in its report and opinion announced when the order was made. All the averments in the complaint as to want of power were traversed, and it was expressly charged that the subject of the distribution of coal cars, as dealt with by the order, was within the administrative power delegated to the Commission by the terms of the act to regulate commerce. The nature and character of the preferences and discriminations which had led the Commission to conclude that unlawful discrimination and unjust preference arose from the failure to count the classes of cars referred to *was alleged in sub- [467] division 14 of the answer, a portion whereof is reproduced in the margin.† A certificate as to the public importance of the cause was filed by the attorney general, in compliance with § 5 of the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149), and the cause was thereafter *submitted at the same time [468] with one brought by the Alton Railroad, involving a similar question, to a circuit court held by Judges Grosseup, Baker, and Kohlsatt. A single opinion was announced in both cases. 173 Fed. 930. While deciding that the complainants were not entitled to relief in so far as the order of the Commission concerned the counting of foreign railway fuel cars and private cars, it was yet held that the railway companies were entitled to an injunction restraining the enforcement of the orders of the Commission in so far as they directed the taking into account of the cars employed by the company in hauling its own fuel. The conclusion on this latter subject was based upon the theory that, as the railroad companies took the coal which they bought for their own use from the tipple of a coal mine, and thereafter moved it for their own account, and not for commercial purposes, that the cars used for that pur-

†14. Defendant avers that the allotment by complainant of said foreign railway fuel cars, private cars, and complainant's fuel cars to the mines receiving them, in addition to the full distributive shares of such mines in the general distribution of cars by complainant, and the failure by complainant to count and charge said foreign railway fuel cars, private cars, and company cars against the mines receiving them, in said general distribution, results in undue and unreasonable preference or advantage to the mines and operators receiving such cars, and subjects the owners and operators of mines which do not receive such cars to

pose could not be treated as being engaged in commerce as "commerce, under these circumstances, ends at the tippie." The court, however, observed:

"But this does not mean that these cars do not affect the problem of an equitable distribution of commercial equipment. The mine operators are objects of interest under the interstate commerce law, not as diggers of coal, but as shippers who tender a commercial product for transportation by interstate common carriers. The basis, therefore, on which the mines in a district should be rated is not their average output as a physical question, but the average output which they respectively tender for transportation in commerce."

And in accord with this reasoning it was 469] in conclusion remarked "that the complainants, as to the cars used for hauling their fuel, were entitled to an injunction "against their being compelled to take fuel cars into consideration except as a means in determining the true capacities of the mines to tender coal to them for transportation in commerce."

From the final decree enjoining the Commission from enforcing its order, in so far as it directed the taking into account the company fuel cars in the distribution of coal cars in times of car shortage, and in so far as it directed the future taking such cars into account, the Interstate Commerce Commission appeals.

It is stated in the brief of counsel for the railroad company that, at the hearing below, despite the scope of the prayer of the bill, no question was raised by the railroad company as to the validity of the order of the

Commission to the extent that it controlled private cars and foreign railway fuel cars. Irrespective, however, of this admission, as the Interstate Commerce Commission alone has appealed, the correctness of the conclusions of the court below on these subjects is not open to inquiry. And this also renders it unnecessary to consider in any respect the effect of the injunction to which we have previously referred as issued in the suit filed on behalf of the Majestic Coal Company, since such injunction only related to foreign railway fuel cars and private cars. Besides, it is stated in the brief of counsel that, before the decision of this case, the preliminary injunction in favor of the Majestic Coal Company was dissolved, and no appeal was taken therefrom.

In consequence of one of the comprehensive amendments to the act to regulate commerce, adopted in 1906 (§ 4, act June 29, 1906, 34 Stat. at L. 589, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1158), it is now provided that "all orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission, or be suspended *or set aside by a court of com- [470 petent jurisdiction." The statute endowing the Commission with large administrative functions, and generally giving effect to its orders concerning complaints before it without exacting that they be previously submitted to judicial authority for sanction, it

undue and unreasonable prejudice and disadvantage in the following respects, to wit:

(a) That the operator receiving the foreign railway fuel cars, private cars, or company fuel cars thereby receives a higher percentage of cars than mines of equal capacity which do not receive such cars.

(b) That the operator receiving the foreign railway fuel cars, private cars, or company fuel cars may operate his mine to a fuller capacity, and thereby reduce the cost of coal per ton, resulting in an increased profit on his commercial coal.

(c) That the operator receiving foreign railway fuel cars, private cars, or company fuel cars is enabled to increase the number of working places in the mine, is enabled to develop his mine more rapidly, is enabled to increase his capacity rating, and in future reratings of such mine by complainant, for the purposes of car distribution, the mine would receive a higher rating, and consequently a larger number of cars in complainant's general distribution of cars.

(d) That the operator receiving the foreign railway fuel cars, private cars, or com-
54 L. ed.

pany fuel cars is enabled thereby to secure and hold a larger, more efficient, and regular working force of miners and laborers.

(e) That the development of the mines which do not receive the foreign railway fuel cars, private cars, or company fuel cars is retarded in inverse ratio as the development of the mines receiving said cars is accelerated.

(f) That, by the arbitrary allotment of the foreign railway fuel cars, private cars, or company fuel cars, the complainant and the so-called foreign railways are enabled to secure low prices on railway fuel because the operator receiving such cars is enabled to produce his commercial coal at much lower prices than do the mines which do not receive such arbitrary cars.

(g) That the operator of the mine receiving the foreign railway fuel cars, private cars, or company fuel cars is thereby enabled to make contracts for the delivery of coal, distributed over a long period, to an extent that the operator of the mines which do not receive such cars cannot do.

becomes necessary to determine the extent of the powers which courts may exert on the subject.

Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, *viz.*, whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Telegraph Co. v. Adams*, 155 U. S. 688, 698, 39 L. ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.

Power to make the order, and not the mere expediency or wisdom of having made it, is the question. While, as we have seen, the court below reasoned that the transportation of coal bought from a mine by the railroad company for its own use, after delivery to it [471] in its coal cars at the tippie, was "not commerce, because "commerce, under these circumstances, ends at the tippie," it yet reasoned that such coal was within the control of the interstate commerce law to the extent that a regulation compelling its consideration, for the purpose of rating the capacity of a mine as a basis for fixing its *pro rata* share of cars in times of shortage, would be valid. Because of this reasoning, it is insisted, it appears that the court below but substituted a regulation which it deemed wise for one which it considered the Commission had inexpediently adopted, and this upon the assumption by the court that its authority was not limited to determining power. Without intimating an opinion as to the merits of the proposition, we put it aside as irrelevant, since we must decide whether the action of the court below was

correct, irrespective of the reasoning by which such action was induced. We further also dismiss from view a contention, strenuously insisted upon in argument by the government, to the effect that, in determining the issue of power, we must treat the railroad company as being at fault for the failure to daily deliver all the cars called for in times of car shortage. We put it aside because it is in direct conflict with facts expressly admitted or impliedly conceded in the answer of the Interstate Commerce Commission, and from which facts we must take it for granted that the equipment of coal cars of the railroad company was reasonably adequate to meet all normal conditions, although it became insufficient at times because of extraordinary circumstances, against which it was, in reason, impossible to provide.

We think the issues for decision will be best disposed of by at once considering the contentions advanced by the railroad company to establish that there was a want of power in the Commission to make that portion of the order which the court below enjoined. The contentions on this subject are stated in argument in many different forms, and, if not in some respects contradictory, are, at all events, confusing, since, considered logically, we think they virtually intermingle power and expediency as if they [472] were one and the same thing. We shall not therefore, in making an analysis of the contentions, follow their mere form of statement, but shall treat them all as reducible to two propositions, *viz.*: First. That the act to regulate commerce has not delegated to the Commission authority to consider, where a complaint is made on such subject, the question of the distribution of company fuel cars in times of car shortage as a means of prohibiting unjust preference or undue discrimination. Second. That, even if such power has been delegated to the Commission by the act to regulate commerce, the order whose continued enforcement was enjoined by the court below was beyond the authority conferred by the statute.

As the Interstate Commerce Commission alone has appealed, it is patent that those portions of the order of the Commission which concern foreign railway fuel cars and private cars, and which the court below refused to enjoin, are not open to inquiry. The suggestion at once presents itself whether, if these subjects are not open, they do not necessarily carry with them the question of company fuel cars, on the ground that the three classes rest upon one and the same consideration, and that to divorce them would bring about conditions of preference and discrimination which the act to regulate commerce expressly prohibits. In view,

however, of the great importance of the questions directly arising for decision, and the fact that the court below has treated the company fuel cars as distinct, we shall not be sedulous to pursue the suggestion, and come at once to the propositions of power previously stated.

First. *That the act to regulate commerce has not delegated to the Commission authority to regulate the distribution of company fuel cars in times of car shortage as a means of prohibiting unjust preferences or undue discrimination.*

When coal is received from the tippie of a coal mine into coal cars by a railway company, and the coal is intended for its own use and is transported by it, it is said there [473] is no consignor, *no consignee, and no freight to be paid, and therefore, although there may be transportation, there is no shipment, and hence no commerce. In changed form, these propositions but embody the reasoning which led the court below to its conclusion that, under the circumstances, commerce ended at the tippie of the mine. The deduction from the proposition is, as the movement of coal under the conditions stated is not commerce, it is therefore not within the authority delegated to the Commission by the act of Congress, as all such acts have relation to the regulation of commerce, and do not, therefore, embrace that which is not commerce. It is to be observed, in passing, that if the proposition be well founded, it not only challenges the authority of the Commission, but extends much further, and in effect denies the power of Congress to confer authority upon the Commission over the subject. In all its aspects the proposition calls in question the construction given to the law by the Commission in every case where the subject has been before it, and also assails the correctness of numerous decisions in the lower Federal court, to which we have previously referred, where the subject, in various forms, was considered. It goes further than this, since it, in effect, seeks to avoid the fair inferences arising from the regulations adopted by the railroad company. Those regulations, in providing for the obligation of the railroad company to supply cars, and recognizing the duty of equality of treatment, found it necessary, by express provision, to provide that private cars, foreign railway cars, and company fuel cars should not be counted against the mine on the day when furnished, thus implying that, under the general rule of equality, if not restricted, it was considered the duty would exist to consider such cars. The contention, moreover, conflicts with the rule which, as we have seen, obtains in other and great systems of railroad,

54 L. ed.

by which, for the purpose of avoiding inequality and preference, foreign railway fuel cars, private cars, and company fuel cars are made one of the factors upon which a mine is rated in order *to fix the [474] basis upon which its distributive share of cars is to be allotted in case of car shortage. And from this it must follow, if the proposition contended for be maintained, that it would not only relieve the railroad company, whose rights are here involved, from the obligation of taking into account its fuel cars in the making of the distribution, but from the duty even to consider them for the purpose of capacity rating. As a result, it would lead to the overthrow of the system of rating prevailing on other railroads, by which, as we have said, such cars are taken into account,—a consequence which is well illustrated by the case of Logan Coal Co. v. Pennsylvania R. Co. 154 Fed. 497.

Under these conditions, it is clear that doubt, if it exist, must be resolved against the soundness of the contentions relied on. But that rule of construction need not be invoked, as, we think, when the erroneous assumption upon which the proposition must rest is considered, its unsoundness is readily demonstrable. That assumption is this: that commerce, in the constitutional sense, only embraces shipment in a technical sense, and does not, therefore, extend to carriers engaged in interstate commerce, certainly in so far as so engaged, and the instrumentalities by which such commerce is carried on,—a doctrine the unsoundness of which has been apparent ever since the decision in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, and which has not since been open to question. It may not be doubted that the equipment of a railroad company engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the governmental power of regulation, which extends, in time of car shortage, to compelling a just and equal distribution, and the prevention of an unjust and discriminatory one.

The corporation, as a carrier engaged in interstate commerce, being, then, as to its interstate commerce business, subject to the control exerted by the act to regulate commerce, and the instrumentalities employed for the purpose *of such commerce be- [475] ing likewise so subject to control, we are brought to consider the remaining proposition, which is:

Second. *That, even if power has been delegated to the Commission by the act to regulate commerce, the order whose continued enforcement was enjoined by the court below was beyond the authority delegated by the statute.*

In view of the facts found by the Commission as to preferences and discriminations resulting from the failure to count the company fuel cars in the daily distribution in times of car shortage, and in further view of the far-reaching preferences and discriminations alleged in the answer of the Commission in this case, and which must be taken as true, as the cause was submitted on bill and answer, it is beyond controversy that the subject with which the order dealt was within the sweeping provisions of § 3 of the act to regulate commerce, prohibiting preferences and discriminations. [24 Stat. at L. 380, chap. 104, U. S. Comp. Stat. 1901, p. 3155.] But it is contended that although this be the case, as the order of the Commission not only forbade the preferences and discriminations complained of, but also commanded the establishment of a rule excluding such discriminations for a future definite period of not exceeding two years, the order transcended the authority conferred upon the Commission. This proceeds upon the assumption that § 4 of the act to regulate commerce, as enacted by the act of June 20, 1906, while conferring upon the Commission the authority, upon complaint duly made, to declare a rate or practice affecting rates illegal, and to establish a new and reasonable rule or practice affecting such rates for a term not exceeding two years, has no relation to complaints concerning preferences or discriminations, unless such practices, when complained of, are of a character to affect rates, which it is insisted is not here the case. The pertinent part of the section in question (4) reads as follows:

"That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section 13 of this act, 476] or upon *complaint of any common carrier, it shall be of the opinion that any of the rates or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, for the transportation of persons or property, as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist,

and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed.

"All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

The contention gives to the words found in the earlier part of the section, "any regulation or practice whatsoever of such carrier or carriers affecting such rates," a dominant and controlling power, so as to cause them to limit every other provision in the section, however general in its language. We do not stop to critically examine the provision relied upon, for the purpose of pointing out, as a matter of grammatical construction, the error of the contention, because we think, when the text of the section is taken into view and all its provisions *are given [477 their natural significance, it obviously appears that the construction relied upon is without foundation, and that to sustain it would be to frustrate the very purpose which it is clear, when the entire provision is considered, it was designed to accomplish, and thus would be destructive of the plain intent of Congress in enacting the provision. The antecedent construction which the interstate commerce act had necessitated, and the remedial character of the amendments adopted in 1906, all serve to establish the want of merit in the contention relied upon. In addition, to adopt it would require us to hold that Congress, in enlarging the power of the Commission over rates, had so drafted the amendment as to cripple and paralyze its power in correcting abuses as to preferences and discriminations which, as this court has hitherto pointed out, it was the great and fundamental purpose of Congress to further.

Conceding, for the sake of the argument, the existence of the preferences and discriminations charged, it is insisted, when the findings made by the Commission are taken into view and the pleadings as an entirety are considered, it results that the discriminations and preferences arose from the fact that the railroad company chose to purchase its coal for its fuel supply from a particular mine or mines, and that, as it had a right to do so, it is impossible, without destroying freedom of contract, to predicate illegal preferences or wrongful discriminations from the fact of purchase. But the proposition overlooks the fact that the regulation addresses itself, not to the right to

purchase, but to the duty to make equal distribution of cars. The right to buy is one thing, and the power to use the equipment of the road for the purpose of moving the articles purchased in such a way as to discriminate or give preference are wholly distinct and different things. The insistence that the necessary effect of an order compelling the counting of company fuel cars in fixing, in case of shortage, the share of cars a mine from which coal has been purchased will be entitled to, will be to bring [478] about *a discrimination against the mine from which the company buys its coal, and a preference in favor of other mines, but inveighs against the expediency of the order. And this is true also of a statement in another form of the same proposition; that is, that if, when coal is bought from a mine by a railroad, the road is compelled to count the cars in which the coal is moved in case of car shortage, a preference will result in favor of the mine selling coal and making delivery thereof at the tipple of the mine to a person who is able to consume it without the necessity of transporting it by rail. At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute, and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils. It follows from what we have said that the court below erred in enjoining the order of the Commission, in so far as it related to company fuel cars, and its decree is therefore reversed, and the case remanded for further proceedings in conformity with this opinion.

Mr. Justice Brewer dissents.

479] *INTERSTATE COMMERCE COMMISSION, Appt.,
v.
CHICAGO & ALTON RAILROAD COMPANY.

(See S. C. Reporter's ed. 479-481.)

This case is controlled by the decision in *Interstate Commerce Commission v. Illinois C. R. Co.* ante, 280.

[No. 232.]

Argued October 15, 1909. Decided January 10, 1910.

A PPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a decree restraining the enforcement of an order of the Interstate Commerce Commission, commanding a railway company to desist from its practice not to take into account the company fuel cars in the daily distribution of coal cars in times of car shortage to the bituminous coal mines along its line, and requiring it, for a future period of two years, to count such cars against the share of the mine receiving them. Reversed.

See same case below, 173 Fed. 930.

The facts are stated in the opinion.

Assistant to the Attorney General Ellis and Mr. Luther M. Walter argued the cause and filed a brief for appellant.

Messrs. L. A. Shaver and H. B. Arnold also filed a brief for appellant.

Messrs. Eldon J. Cassoday and Rush C. Butler (by special leave) filed a brief in behalf of the receivers of the Illinois Collieries Company.

Mr. Garrard B. Winston argued the cause, and, with Messrs. Robert Mather, F. S. Winston, W. S. Kenyon, and J. M. Dickinson, filed a brief for appellee.

Messrs. Francis I. Gowen, Wayne MacVeagh, and McKenney & Flannery (by special leave) filed a brief for the Pennsylvania Railroad Company.

For contentions of counsel, see their briefs as reported in *Interstate Commerce Commission v. Illinois C. R. Co.* ante, 280.

*Mr. Justice White delivered the [480] opinion of the court:

This case is controlled by the opinion just announced in the case of *Interstate Commerce Commission v. Illinois C. R. Co.* [215 U. S. 452, ante, 280, 30 Sup. Ct. Rep. 155]. The complaints made to the Commission were alike in both cases, and they were heard before that body at the same time, and one report was made in both cases. The order in both cases was the same. Like bills for injunction were filed in the court below, and there also they were heard together and were disposed of in one opinion. There is only this difference between the two cases. In this the bill for injunction contained the following averment concerning a small number out of the thousands of coal cars forming part of the equipment of the road:

"That your orator has purchased and now operates on its line 360 steel hopper-bottom coal cars; that said cars are of an extreme height, to wit, 10 feet; that, by reason of

such height, said cars can be unloaded only upon specially constructed trestles; that no consignees to whom coal is shipped from mines on your orator's line own or have the use of such trestles, and that such cars are not available for commercial shipment of coal. And your orator avers that it at all times restricts these cars to the service of hauling your orator's own fuel supply, and that, by reason of such restriction, and by reason of the fact that your orator alone has the means of unloading said hopper-bottom cars, said cars never constitute a part of your orator's equipment available for commercial shipments of coal."

The answer of the Commission denied all knowledge of the truth of the averments thus made, and called for proof on the subject. No proof was made, and the cause was submitted to the court below on bill and answer. In view of this fact, and in consideration, moreover, of the weight which the law gives to the finding of the Commission as to the existence of unlawful preference, and the operative effect of the order which the Commission made, until set aside, **481**] we think the mere *avermment of the facts referred to in no way causes this case to differ from the Illinois Central Case. Of course, under these circumstances, we intimate no opinion as to how far, had the facts alleged as to the hopper cars been established, they would, to the extent of such cars, have taken this case out of the rule announced in the Illinois Central Case. It follows that the judgment must be reversed and the case remanded for further proceedings in conformity to this opinion.

Mr. Justice Brewer dissents.

BALTIMORE & OHIO RAILROAD COMPANY et al., Plffs. in Err.,

v.

UNITED STATES OF AMERICA EX REL. PITCAIRN COAL COMPANY et al.

(See S. C. Reporter's ed. 481-500.)

Mandamus — to control distribution of coal cars — necessity of action by Interstate Commerce Commission.

The grievances produced by regulations adopted by a railway company for the distribution of coal cars in times of car shortage to the bituminous coal mines served by it, which are alleged to violate the provisions of the act to regulate commerce of February 4, 1887 (24 Stat. at L. 380, chap. 104, U. S. Comp. Stat. 1901, p. 3155), prohibiting unjust preferences or undue discriminations, cannot be redressed, in advance of the action of the Interstate Commerce Commission, by mandamus to prohibit the acts complained of and pre-

scribe a rule or regulation for the future, since the provisions of the act of March 2, 1889 (25 Stat. at L. 862, chap. 382, U. S. Comp. Stat. 1901, p. 3172), § 10, authorizing mandamus to compel the furnishing of cars and other facilities for transportation, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to the orders of the Commission, rendered within the lawful scope of its authority, until set aside by the Commission or enjoined by the courts.

[Mandamus to private corporation, see *Mandamus*, II. c, in Digest Sup. Ct. 1908.]

[No. 289.]

Argued October 18, 19, 1909. Decided January 10, 1910.

IN ERROR to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which, modifying a decree of the Circuit Court for the District of Maryland, directed mandamus to issue, to redress grievances produced by regulations adopted by a railway company for the distribution of coal cars in times of car shortage to the bituminous coal mines served by it. Reversed and remanded for the entry of judgment dismissing the petition.

See same case below, 91 C. C. A. 147, 165 Fed. 113.

The facts are stated in the opinion.

Mr. Edgar H. Gans argued the cause, and, with Mr. Charles Markell, filed a brief for plaintiffs in error.

Mr. Hugh L. Bond, Jr., also argued the cause, and, with Messrs. W. Ainsworth Parker and W. Irvine Cross, filed a brief for plaintiffs in error.

Mr. William A. Glasgow, Jr., argued the cause, and, with Mr. Frederick Dallam, filed a brief for defendants in error.

Mr. Justice White delivered the opinion of the court:

To decide the merits of this cause will require us to determine the legality of the regulations of the Baltimore & Ohio Railroad Company, by which that company distributed cars to coal mines along the line of its road in case of car shortage. As an incident to this general question, we would further be required to consider the relations, irrespective of its mere attributes and duties as a common carrier, of the Baltimore & Ohio Railroad with various coal mines along the line of its road, and the relation with or control over some, if not all, of

these coal mines by other mines or mine op-
483] erators, and, in *addition, to consider the relation of the Baltimore & Ohio Railroad with the Cumberland & Pennsylvania Railroad. This road taps the main track of the Baltimore & Ohio Railroad at Cumberland, Maryland, proceeds thence to the state line between Maryland and Pennsylvania, where it strikes the Pennsylvania Railroad, and passing thence through a country rich in bituminous coal deposits, and containing coal mines, it reaches Piedmont, West Virginia, where its tracks again connect with those of the Baltimore & Ohio Railroad. As an additional incident, we might also be required to consider the relation or control, direct or indirect, if any, which the Baltimore & Ohio Railroad exerted over some, if not all, of the coal mines along the line of the Cumberland & Pennsylvania Road. Some, therefore, of the underlying questions involved in the cause, if we may consider them, are similar to the issues which were passed upon by us in the case of the Interstate Commerce Commission v. Illinois C. R. Co., which we have just decided. [215 U. S. 452, ante, 280, 30 Sup. Ct. Rep. 155.] While referring to the general situation as depicted in that case, we think, in addition, a mere outline sketch of the conditions existing prior to the commencement of this suit, as regards the matters with which it is concerned, will serve to render clear the reasons which control us in deciding it.

The Baltimore & Ohio Railroad Company, a corporation existing under the laws of Maryland, owned and operated a railroad or railroads in the states of Maryland, West Virginia, Virginia, Pennsylvania, Ohio, and other states, and, as a common carrier, was engaged in interstate commerce between such states. The main line of said road west of Cumberland, Maryland, passes through a bituminous coal field, which is worked by many coal operators, the product of whose mines depends for its movement to market in interstate commerce on the facilities for such movement which the Baltimore & Ohio affords. For the purpose of this case, the coal mines referred to may be treated as situated in what is described as the Monongah district of the Baltimore & Ohio Rail-
484] road. *Regulations of the Baltimore & Ohio Railroad, by which mines were rated in order to fix the basis for a *pro rata* distribution of coal cars in case of car shortage, had their peculiarities differing from other roads. They were based, first, upon the capacity of the mines; second, upon the previous shipments by the mines for a period of two years, the capacity counting as one and the previous shipments as two. The capacity was ascertained by considering the number of working places, etc., modified by taking

into account the facilities for moving the coal out of the mine, such as tracks, tippie, etc. The previous shipments were taken from the records of the company during periods when there was no car shortage. Upon the basis of the capacity thus ascertained, the regulations of the company for giving each mine owner in the case of shortage its percentage of cars, stated in the most summary way, were briefly these: In the first place, there were assigned, out of the general mass of cars before the distribution was made, such cars as it was deemed the Cumberland & Pennsylvania Railroad was entitled to. This was done by no fixed rule, but, in the discretion of the traffic manager, generally upon the basis of the percentage of shipments of coal hauled in the two previous years by that road. The estimated mass remaining after the deliveries to the Cumberland & Pennsylvania Railroad was subjected to certain arbitrary assignments, and the remainder, after such assignments had been taken out, were equally distributed among the mine operators, according to their capacity rating. The arbitrary deductions which were made, as we have just stated, were these:

1. Baltimore & Ohio Railroad cars placed at mines for Baltimore & Ohio fuel coal.

2. New mines are allotted an arbitrary number of cars daily or weekly for development. In cases where the inspection shows a marked increase in the capacity of certain mines, and it is not practicable to change the percentage of the whole district, proper arbitraries are applied pending a general revision.

- *3. Cars of foreign railroads, as- [485 signed by them to their own fuel trade.

4. Cars of individual companies, placed at mines owned by such companies, and cars owned by individual consumers, placed at mines for their coal.

There are also certain exceptions of a local character, as follows:

1. Curtis Bay premium. Whenever a shipper on the Baltimore & Ohio Railroad handles cars at Curtis Bay promptly in any one month, he is allowed in the succeeding month a premium of 50 per cent of the number of cars so handled, in addition to his regular percentage. This in lieu of an assignment of cars to the Curtis Bay trade.

2. At certain points, noted on the percentage sheets, an arbitrary number of cars is assigned to mines on fire.

3. At certain mines in the immediate vicinity of industries, empty cars intended for loading at such industries are first sent into the mines for loading coal for such industries.

4. When annual contracts are placed for foreign railroad fuel coal with mines on the

Baltimore & Ohio, arrangements are made that, if the foreign railroads' cars are furnished for this fuel coal, the Baltimore & Ohio will allow the mines shipping the coal a number of Baltimore & Ohio cars equal to the foreign cars furnished.

5. When mines are connected with foreign railroads as well as with the Baltimore & Ohio, their rating is reduced 50 per cent. A similar reduction is made in cases where mines are located near rivers and are equipped for loading boats.

Where mines needed box and stock cars for the shipment of coal, as to which class of cars shortage rarely arose, there was a special rule which we need not notice.

With the system just referred to in force on the 19th of January, 1907, the Pitcairn Coal Company, a West Virginia corporation owning a coal mine on the line of the Baltimore & Ohio Railroad in West Virginia, filed its petition in mandamus in the United States circuit court for the district of 486] *Maryland. The defendants were the Baltimore & Ohio Railroad Company, the Fairmont Coal Company, the Clarksburg Fuel Company, the Pittsburg & Fairmont Fuel Company, and the Southern Coal & Transportation Company, these four coal companies operating coal mines located in West Virginia on the Monongah division of the Baltimore & Ohio Railroad. Along with these there were also made defendants two other corporations, the Consolidation Coal Company, located on the Cumberland & Pennsylvania Railroad in Maryland, and the Somerest Coal Company, located on the Baltimore & Ohio Railroad in Pennsylvania. All of these coal companies were charged to be substantially one in interest and were generally described as the Fairmont Companies. In addition, thirty-one other coal companies, alleged to be independent companies, operating coal mines on the line of the Baltimore & Ohio Railroad, were also made defendants. Rearranging somewhat the order of the averments as contained in the bill, the prayer for relief was substantially based upon the following grounds: The Pitcairn Coal Company, it was averred, was entitled to an equal distribution of the coal cars of the Baltimore & Ohio Railroad in times of shortage, in order to move its output of coal in interstate commerce; that the railroad company had refused, after demand, to give it the share of cars to which it was entitled; and that its not doing so had been seriously prejudicial to the business of the company, had curtailed its production, and interfered with the moving of the coal produced in interstate commerce, and that the conduct of the railroad in the premises had amounted to the giving of an undue preference to the Fairmont Coal Company and its affiliated

companies, to the prejudice of the Pitcairn Company and all other independent companies. The method pursued by the Baltimore & Ohio Railroad for rating mines by the consideration of both capacity and previous shipments was alleged, and it was charged that, on the basis of capacity of the mine as rated by that system, the Pitcairn Company was entitled to 7/10 per cent *of [487 the cars for distribution in the Monongah division. General averments were, however, made concerning the method of rating, which, in effect, charged that such method was discriminatory and preferential, and was put in force so as to operate in favor of the Fairmont Coal Company and the companies affiliated with it, to the prejudice of the Pitcairn Company and other independent coal operators, the Baltimore & Ohio Railroad being interested, it was charged, directly or indirectly, in the Fairmont and its affiliated companies. The method of deduction from the mass of cars for the benefit of the Cumberland & Pennsylvania Railroad was also charged to be discriminatory and preferential, and to have been devised for the purpose of favoring mines on the line of the Cumberland & Pennsylvania, which were affiliated with the Fairmont. The failure to charge against the mines which had received them, individual or private cars, foreign railroad cars, and company fuel cars, as well as the other arbitrary allotments of cars provided for in the regulations to which we have referred, including the Curtis Bay regulation, were all assailed as preferential and discriminatory, it being alleged that, in many instances, the individual cars had been virtually paid for by the Baltimore & Ohio Railroad, and that the failure to charge them was in effect a mere means resorted to in order to give a preference contrary to the act to regulate commerce. The prayer was for an alternative writ of mandamus, commanding an equal distribution in accordance with the averments of the petition in effect for the undoing of the regulations referred to, and for the establishment of regulations conformable to the rights which the petition asserted. As the scope of the prayer is important in the view we take of the case, it is excerpted in the margin.†

†First. That in the event of scarcity of cars to be furnished by defendant Baltimore & Ohio Railroad Company, to shippers of coal on the Monongah division of said road, that defendant the Baltimore & Ohio Railroad Company be required to furnish to relator one and seven tenths (1.7) per cent, until such percentage shall properly be increased, of the total number of cars in service, or supplied to all the shippers on the Monongah division of said road, without deducting from said number of cars "individ-

488] *It suffices for the present purposes to say that the answer of the Baltimore & Ohio Railroad traversed every averment as to preference and discrimination, asserted the validity of the method of rating and the rules of distribution to which we have referred. In great detail the origin and history of the operation of private or individual cars was set out, various contracts on that subject were annexed to the bill, and a decree rendered by the circuit court of the United States for the northern district of West Virginia in favor of the Fairmont Coal Company, perpetually enjoining the Baltimore & Ohio Railroad Company to deliver certain private cars to the Fairmont

489] * Company, was referred to and made part of the bill. The Cumberland & Pennsylvania Railroad Company, the Fairmont Coal Company, and the five coal companies alleged in the bill to be affiliated with the Fairmont Coal Company, applied for leave to answer, on the ground that, although the alternative rule

ual cars," or any arbitrary allotment of cars to other shippers, and without deducting from the total number of cars on all the lines of the Baltimore & Ohio Railroad the "individual cars" claimed by the Somerset Coal Company, or the cars arbitrarily assigned to the Cumberland & Pennsylvania Railroad Company, or the Consolidation Coal Company, before making the percentage distribution to the Monongah division.

Second. That writ of mandamus may be issued against the said Baltimore & Ohio Railroad Company, defendant, to command and require it to cease to make or give any undue or unreasonable preference or advantage to Fairmont Coal Company, Consolidation Coal Company, Cumberland & Pennsylvania Railroad Company, Somerset Coal Company, Southern Coal & Transportation Company, Clarksburg Fuel Company, or Pittsburgh & Fairmont Fuel Company, or either of them, in the shipping and transportation of their coal, and to cease from subjecting the relator, Pitcairn Coal Company, or any other independent shipper of coal on the Monongah division aforesaid, to any undue or unreasonable prejudice or disadvantage in the shipping and transportation of coal, or in any respect whatsoever, and to move and transport the traffic of relator, Pitcairn Coal Company, and the other independent coal companies on the Monongah division aforesaid, without discrimination or preference, and to furnish the said Pitcairn Coal Company and the other independent shippers of coal on the Monongah division, without preference or discrimination, and upon conditions as favorable to it or them as is given by the said railroad company to the said Fairmont Coal Company, Consolidation Coal Company, Somerset Coal Company, Clarksburg Fuel Company, Southern Coal & Transportation Company, and Pittsburgh & Fairmont Fuel Company, or for like traffic,

54 L. ed.

for mandamus had not been served upon them, and they had only been summoned to "do whatever they deemed proper to protect their interest in the premises," they desired to answer, because the questions involved "are extremely important and of unusual interest, not only to your petitioners and the railroad against whom the mandamus is *asked, but to the whole body of [490 transportation companies engaged in interstate commerce, and that the importance of the questions involved is so great that your petitioners feel that they are making but a reasonable request when they ask for a reasonable time to thoroughly present the facts which the court ought to be in possession of for a full and complete determination of the question." The right to answer having been given, and delay for that purpose having been accorded, these companies answered. Without at all going into detail, we think it suffices to say that the answer traversed all the averments as to preference and discrimi-

under similar conditions, to any other shipper, its fair and reasonable percentage of all cars on the line of said railroad and to shippers of like traffic along its railroad line, based upon the system of distribution of cars in effect on said railroad as aforesaid, or upon any fair, reasonable, and equitable basis, and to furnish to the said Pitcairn Coal Company, for the transportation of its coal, without discrimination, exception, or limitation, and upon conditions as favorable as those given to other shippers, the percentage of the total car supply on said railroad at this time properly distributable by said railroad company to the said Monongah division, and thereon distributed among the relator and the other shippers of coal thereon as aforesaid.

Third. That in ascertaining and fixing the number of cars to which relator, Pitcairn Coal Company, and the other coal companies on the Monongah division aforesaid, are entitled, the said Baltimore & Ohio Railroad Company shall take into consideration and include in the estimate or calculation of the number of cars to be divided in the proportion to which the percentages of each mine entitles the owner thereof to cars, all cars, whether owned by individual operators, shippers, other railroad companies, or by the Baltimore & Ohio Railroad Company, and which may be upon the road of said Baltimore & Ohio Railroad Company, and shall also take into consideration, and include in the estimate or calculation of the number of cars to be divided upon the percentages aforesaid, all cars, whether furnished or used for fuel or supply coal for the Baltimore & Ohio Railroad Company, or for any other railroad company, and shall not deduct, before dividing the cars upon the percentages aforesaid, any cars for premiums at Curtis Bay, or other arbitrary allotments.

nation alleged in the bill. It specially asserted the legality of the operation on the Baltimore & Ohio Railroad of private or individual cars; made copious reference to the acts or contracts from which the right to operate said cars had arisen; charged that to take said cars from the service of the persons who owned them would be confiscatory, and in substance asserted the validity of the system of rating and of distribution enforced by the regulations of the company which we have previously referred to. Fourteen out of the thirty-one corporations referred to in the petition as independent companies briefly answered, adopting the averments of the petition, and praying for the awarding of the relief therein asked. Sixteen did not answer, and one of said companies substantially joined in the defenses of the railroad company, except as to the individual cars, concerning which it averred that it was the duty of the railroad to purchase said cars from the persons owning them, and to operate them as part of the railroad equipment. By stipulation the cause was heard by the court without a jury.

There was voluminous testimony and a protracted trial, each side requesting findings and instructions embodying their respective contentions, and excepting in so far as they were overruled. The court considered all the contentions raised by the pleadings except several which were not pressed at bar. It held that, in view of the relations which the Cumberland & Pennsylvania Railroad had to the [491] Baltimore & Ohio, and *the origin of those relations, the method by which coal cars were turned over to the Cumberland road was not preferential or discriminatory. It decided that however amenable, abstractly considered, to criticism, if at all, might be the system of rating, and especially the inclusion therein of the amount of coal shipments, and the large influence attributed to that fact, yet, when the particular facts concerning the Monongah district and the relations of the Baltimore & Ohio to that district were given their proper weight, the system was a just one and ought not to be interfered with. The complaint as to the Curtis Bay premium was also decided to be without merit; and so also was the complaint as to consumer's cars, as to foreign railway fuel cars and company fuel cars. Considering the private cars belonging to mine operators, and, without at all going into the relation of the Baltimore & Ohio Railroad with the owners of such cars, it was decided that while there was a right on the part of the railroad to move the cars, and it would be confiscation to deprive the owners of the right to use them, yet the duty

was on the railroad to take account of the cars in fixing the percentage in case of shortage. The court declined to consider the decree which had been rendered in favor of the Fairmont Company against the Baltimore & Ohio in the previous case, which was pleaded, as well as that in another cause, which was relied upon in argument to the same effect as controlling. The mandamus prayed, therefore, was refused as to every item embraced in the petition but that particular item, and, as to it, the writ was awarded. 154 Fed. 108.

The Baltimore & Ohio Railroad Company, the Fairmont Companies, and the Pitcairn Coal Company prosecuted error. The circuit court of appeals held as follows: (a) that the system of ratings, so far as taking into view the shipments and percentages based thereon was considered, was discriminatory and preferential; (b) that while the right to allot cars to the Cumberland & Pennsylvania Railroad under the facts found below was lawful, the methods by which the allotment *was made was also discrim- [492] inatory and preferential; (c) that the practice as to the Curtis Bay regulation was also amenable to the same criticism; (d) that the duty existed to take into account the individual cars, the foreign railway fuel cars, and the company fuel cars in making a *pro rata* division in case of car shortage, and that not to do so would give rise to undue preferences and unlawful discriminations forbidden by the act to regulate commerce. Concluding that the various subjects embraced in the complaint with which it thus dealt were all controlled by the act to regulate commerce, it was expressly decided that the right to rectify the wrongs by the issue of the writ of mandamus as prayed for was sanctioned by the twenty-third section of the act to regulate commerce, and the case was remanded to the court below, with directions to allow the writ of peremptory mandamus, in accordance with the opinion. 91 C. C. A. 147, 165 Fed. 113. The case is here upon error prosecuted by the Baltimore & Ohio Railroad and the Fairmont Coal Companies.

One of the assignments of error assails the correctness of the conclusion of the court below to the effect that, compatibly with the act to regulate commerce, there was power, under the circumstances disclosed by the record, to consider the subject-matters which were complained of, and to award the relief concerning them which was prayed. Indeed, the nature of the controversy and the relief which it requires is such that, even without the assigned error, to which we have referred, the question at the very threshold necessarily arises and commands our attention as to whether there was power in the

courts, under the circumstances disclosed by the record, to grant the relief prayed consistently with the provisions of the act to regulate commerce, and to that subject we therefore at once come.

To a consideration of this question it is essential to at once summarily and accurately fix the subject-matter of the alleged grievances and the precise character of the relief required in order to remedy the evils complained of upon the assumption *of their existence. As to the first, it is patent that the grievances involve acts of the Baltimore & Ohio Railroad, regulations adopted by that company, and alleged dealings by the other corporations, all of which, it is asserted, concern interstate commerce, and all of which, it is alleged, are in direct violation of the duty imposed upon the railroad company by the provisions of the act to regulate commerce. As to the second, in view of the nature and character of the acts assailed, of the prayer for relief which we have previously excerpted, and of the relief which the court below directed to be awarded, it is equally clear that a prohibition, by way of mandamus, against the act, is sought, and an order, by way of mandamus, was invoked and was allowed, which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of interstate commerce in the future. When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced; at least, until that body, clothed by the statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions.

The controversy is controlled by the considerations which governed the ruling made in *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075. In that case suit was brought in a court of the state of Texas to recover, because of an exaction by a carrier, on an interstate shipment, of an alleged unreasonable rate, although the rate charged was that stated in the schedules duly filed and published in accordance with the act to regulate commerce. After great consideration, it was held that the relief prayed was inconsistent with the act to regulate commerce, since by that act the rates, as filed, were controlling until they had been declared to be unreasonable by the Interstate Commerce Commission on a complaint made to that body. It was pointed out that any [494] other view would give *rise to inextric-

able confusion, would create unjust preferences and undue discriminations, would frustrate the purposes of the act, and, in effect, cause the act to destroy itself. The ruling there made dealt with the provisions of the act as they existed prior to the amendments adopted in 1906, and when those amendments are considered they render, if possible, more imperative the construction given to the act by that ruling, since, by § 4, as enacted by the amendment of June 29, 1906 [34 Stat. at L. 589, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1158], the Commission is empowered, indeed it is made its duty, in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to an unjust preference or undue discrimination, and to forbid the same, but, moreover, to direct the practice to be followed as to such subject for a future period, not exceeding two years, with power in the Commission, if it finds reason to do so, to suspend, modify, or set aside the same, the order, however, to become operative without judicial action. In considering § 4 in the case of *Illinois C. R. Co. v. Interstate Commerce Commission*, just decided, it was pointed out that the effect of the section was to cause it to come to pass that courts, in determining whether an order of the Commission should be suspended or enjoined, were without power to invade the administrative functions vested in the Commission, and therefore could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency. Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the *Abilene Case*, that the primary interference of the courts with the administrative functions of the Commission was wholly incompatible with the act to regulate commerce. This result is easily illustrated. A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found, the complaint is declared to be well founded. The administrative powers of the Commission are invoked concerning a regulation of like character upon a similar complaint. *The Commission finds, from the evi- [495] dence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the Commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the Commission were to prevail,

then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body. That these illustrations are not imaginary is established not only by this record, but by the record in the case of the Illinois C. R. Co. v. Interstate Commerce Commission.

We say this record, because, as has been pointed out, one of the questions which we would be called upon to decide if the merits were open is whether the court below was right in holding that if anything but the physical capacity of a mine was taken into consideration by a railroad company in rating the mine for car distribution in time of car shortage, the act to regulate commerce would be violated, and therefore the system adopted by the Baltimore & Ohio Railroad Company was repugnant to the act, because it made not alone the physical capacity, but past shipments, factors to be considered. But the reports of the Interstate Commerce Commission show that, on a complaint made to that body on the subject of the system of mine rating of the Baltimore & Ohio Railroad Company, the Commission, before the decision of the circuit court of appeals in this case was announced, had expressly refused to hold that the system was either preferential or prejudicial within the act to regulate commerce. In that report, speaking of the Baltimore & Ohio system of mine rating, it was said (14 Inters. Com. Rep. p. 94):

496] **"This method of rating mines was adopted by the defendant in 1902, after a careful examination of the various systems in force on other lines. It was intended as a compromise between ratings based on physical capacity only and ratings based on commercial capacity only."*

And after elaborately weighing the matter, it was said (p. 95):

"In combining the two systems, the defendant has adopted a middle ground, apparently upon the thought that neither the physical nor the commercial capacity is always a fair test. We are not prepared, on this record, to say that there is no force in that view, and that a system of mine rating based upon a combination of the physical and commercial capacities of the several mines does not more closely approximate the actual car requirements of the mines than a system based upon physical capacity only."

We say also the Illinois Central Case, since it is shown in that case that when the railroad company changed its regulations, presumably to have them conform to the administrative ruling made by the Commission in the Hocking Valley Case [12 Inters. Com. Rep. 398], such change was prevented

from going into effect by an injunction issued by the circuit court of the United States for the northern district of Illinois in the Majestic Coal Co. Case [162 Fed. 810]. And when the Commission came to discharge its duty upon the complaint made to it in the Illinois Central Case, it was put to the alternative of either abdicating its administrative duties or making an order in violation of the injunction.

And the destructive effect upon the system of regulation devised by the act to regulate commerce, which these illustrations show must be the result of construing that act as giving authority to the courts, without the preliminary action of the Commission, to consider and pass upon the administrative questions which the statute has primarily confided to that body, may be greatly multiplied. This is shown by the opinion of the Commission in the Baltimore & Ohio Case, to which we have already referred, where the decisions of *other lower courts are referred to in conflict with the opinion of the court below in this case as to mine rating, and not in harmony with the views expressed by the Commission in the Baltimore & Ohio Case.

The court below deemed that it was its duty to award to the coal company the relief by mandamus which was prayed, upon the theory that § 10 of the act to regulate commerce [March 2, 1889, 25 Stat. at L. 862, chap. 382, U. S. Comp. Stat. 1901, p. 3172] rendered it imperative to do so, this conclusion being specially based upon the provision of that section authorizing the remedy of mandamus to compel carriers "to furnish cars or other facilities for transportation for the party applying for the writ."

The section in question is as follows:

"Sec. 10. That the circuit and district courts of the United States shall have jurisdiction, upon the relation of any person or persons, firm or corporation, alleging such violation by a common carrier of any of the provisions of the act of which this is a supplement, and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given, by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory

mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: Provided, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held 498] *to exclude or interfere with other remedies provided by this act or the act to which it is a supplement."

That it is not necessary to point out that there is ample scope for giving effect to and applying the remedy embraced in § 10, if that section be construed in harmony with the act, is, we think, obvious. It is to be destructive of one of the main purposes of the act is, we think, obvious. It is to be observed that the section, besides empowering the use of the writ of mandamus to compel the furnishing of cars and other facilities for transportation, also authorizes the use of that writ for the purpose of compelling the movement of traffic "at the same rates as are charged, or upon terms or conditions as favorable as those given, by said common carrier for like traffic under similar conditions to any other shipper." As it was settled in the Abilene Case that the right to question in the courts the rates established in accordance with the act to regulate commerce without previous resort, by complaint, to the Commission, in order to determine their unreasonableness, would be destructive of the act, and therefore was not permissible, that ruling is equally applicable to the provision as to furnishing cars, contained in § 10, which is here relied upon. But as we are required, for the determination of the case now before us, to consider the scope of the act to regulate commerce as now existing, as a result of the amendments of 1906, we shall not rest our conclusion alone upon the persuasive force of the reasoning which constrained to the conclusion announced in the Abilene Case. Speaking generally, it is true to say that, prior to 1889, although the prohibitions of the act to regulate commerce as to preferences and discriminations were far-reaching, the mechanism provided by the statute for the enforcement of orders of the Commission on the subject, as well as those concerning a finding as to unreasonable rates, were deemed to be in many respects ineffective, or at least tardy in operation or unsatisfactory in prompt remedial results, and this because immediate effect was not given to the orders of the Commission, but the aid 499] *of judicial authority was required as a prerequisite for such result. Section 10, here relied upon, was not part of the original act, but, as we have said, was added thereto on March 2, 1889, for the obvious purpose of

making the remedial processes of the act more speedy and efficacious. Now, it cannot in reason be questioned that among the purposes contemplated by the amendments adopted in 1906 was the curing of the presumed remedial inefficiency of the act by supplying efficient means for giving effect to the orders of the Commission, made in the exertion of the authority conferred upon that body. To that end, one of the amendments, § 4, gives operative effect to the orders of the Commission without the sanction of previous judicial authority, and endows that body with the power, not only as to unreasonable rates, but as to practices found upon complaint to be unduly prejudicial and unjustly discriminatory, to correct the same by its order, which order should have effect within the period fixed in the statute, and, to enforce these provisions, penalties and forfeitures are provided. Sec. 5. It being demonstrable, as we have seen, that to give to § 10 the broad meaning which the court below fixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted, since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889. This conclusion being in reason impossible, it must follow that, construing the provisions of § 10 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory *force which the statute attaches to orders of the Commission, rendered within the lawful scope of its authority, until such orders are set aside by the Commission or enjoined by the courts.

Nor is there anything in the contention that the decision in *Southern R. Co. v. Tift*, 206 U. S. 428, 51 L. ed. 1124, 27 Sup. Ct. Rep. 709, 11 A. & E. Ann. Cas. 846, qualifies the ruling in the Abilene Case, and is an authority supporting the right to resort to the courts in advance of action by the Commission for relief against unreasonable rates or unjust discriminatory practices which, from their nature, primarily require action by the Commission. While it is true that the original bill in the Tift Case sought relief from alleged unreasonable rates be-

fore action by the Commission, yet, as said by this court (p. 437):

"The circuit court granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon sufficient pleadings, identical with those before the court, and upon testimony adduced upon the issues made, the decision was adverse to the appellants. This action of the Commission, with its findings and conclusions, was presented to the circuit court, and it was upon these, in effect, the decree of the court was rendered. There was no demurrer to that petition, and the testimony taken before the Commission was stipulated into the case, and the opinion of the court recites that, 'with equal meritorious purpose, counsel for the respective parties agreed that this would stand for and be the hearing for final decree in equity.'"

The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the Circuit Court with directions to set aside its judgment, and enter judgment dismissing the petition.

Reversed.

Mr. Justice Harlan and Mr. Justice Brewer dissent.

501] *MACON GROCERY COMPANY et al., Appts.,
v.

ATLANTIC COAST LINE RAILROAD COMPANY et al.

(See S. C. Reporter's ed. 501-514.)

Federal courts — proper district for suit — jurisdiction not invoked solely upon citizenship.

A suit by resident shippers to restrain foreign interstate carriers from putting into effect a proposed advance in freight rates which is averred to be an "arbitrary and unlawful exaction," and to be the outcome of a conspiracy and combination in restraint of interstate trade, unlawful both at common law and under the Federal statutes, is one in which the jurisdiction of the Federal court is not invoked solely upon the ground of diversity of citizenship, and can therefore not be brought in a Federal district in which none of the defendants reside, in view of the provision of the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), that no civil suit shall be brought in any other district than that whereof the defendant is an inhabitant, but, where the jurisdiction is founded only on the fact that the action is

between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

[For other cases, see Courts, 928-955, in Digest Sup. Ct. 1908.]

[No. 351.]

Argued October 20, 21, 1909. Decided January 17, 1910.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which reversed a decree of the Circuit Court for the Southern District of Georgia, enjoining an advance in freight rates by foreign interstate carriers, and remanded the case to the latter court with instructions to dismiss the bill without prejudice. Affirmed.

See same case below, 92 C. C. A. 114, 166 Fed. 206.

The facts are stated in the opinion.

Mr. William A. Wimbish argued the cause and filed a brief for appellants:

If the jurisdiction of the court is founded upon a right arising out of the act to regulate commerce, it is exclusive.

Van Patten v. Chicago, M. & St. P. R. Co. 74 Fed. 981; Re Hohorst, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; United States v. Mooney, 116 U. S. 106, 29 L. ed. 551, 6 Sup. Ct. Rep. 304; Atkins v. Fibre Disintegrating Co. 18 Wall. 272, 21 L. ed. 841; Re Louisville Underwriters, 134 U. S. 488, 493, 33 L. ed. 991, 994, 10 Sup. Ct. Rep. 587; United States v. Standard Oil Co. 152 Fed. 290; Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Asso. 91 C. C. A. 39, 165 Fed. 1.

Unless the cause of action is one over which state courts have concurrent jurisdiction, the judiciary act of 1887 and 1888 does not apply, and the defendants may be sued wherever found.

Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; The Federalist, No. 82; Van Patten v. Chicago, M. & St. P. R. Co. and Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Asso. supra.

The cases of Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; Re Keasbey & M. Co. 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. Rep. 273; Shaw v. Quincy Min. Co. 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44, are none of them in point. In each of these cases the cause of action was one over which the state courts had concurrent jurisdiction, and they are all directed to the point that a corporation is, within the meaning of the

NOTE.—As to what Federal district is the proper one for suit—see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

judiciary act, an inhabitant only of the district and state of its incorporation.

Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Asso. *supra*.

Messrs. Henry L. Stone and Claudian B. Northrop argued the cause, and, with Messrs. Ed. Baxter, W. E. Kay, Robert C. Alston, Claude Waller, John L. Tye, Alex. P. Humphrey, Sanders McDaniel, and Edward Colston, filed a brief for appellees:

The bill involves Federal questions.

Tift v. Southern R. Co. 123 Fed. 789; Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Asso. 91 C. C. A. 39, 165 Fed. 1; Memphis Cotton Oil Co. v. Illinois C. R. Co. 164 Fed. 290; Imperial Colliery Co. v. Chesapeake & O. R. Co. 171 Fed. 589; Atlantic Coast Line R. Co. v. Macon Grocery Co. 92 C. C. A. 114, 166 Fed. 218; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135, 26 L. ed. 96; Illinois ex rel. McCartney v. Illinois C. R. Co. 16 Fed. 887; Leonard v. Shreveport, 28 Fed. 257; Cohen v. Virginia, 6 Wheat. 264, 379, 5 L. ed. 257, 285; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204.

Federal questions being involved, suit can be brought only in the district of inhabitancy of the appellees.

Shaw v. Quincy Min. Co. 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; Re Keasbey & M. Co. 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. Rep. 273; Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; Re Moore, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706; Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co. 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 710; Wolff v. Choctaw, O. & G. R. Co. 133 Fed. 601; Sunderland Bros. v. Chicago, R. I. & P. R. Co. 158 Fed. 877; Memphis Cotton Oil Co. v. Illinois C. R. Co. *supra*; Powhatan Coal & Coke Co. v. Norfolk & W. R. Co. 171 Fed. 589.

Suit must be brought in the district of inhabitancy, even though the jurisdiction of the Federal court is exclusive.

Sunderland Bros. v. Chicago, R. I. & P. R. Co. *supra*; Gorham Mfg. Co. v. Watson, 74 Fed. 418; Donnelly v. United States Cordage Co. 66 Fed. 613; Re Keasbey & M. Co. 160 U. S. 221, 228, 40 L. ed. 402, 404, 16 Sup. Ct. Rep. 273; United States use of Brady v. O'Brien, 120 Fed. 446; Bates, Fed. Eq. Proc. §§ 84, 86, 89; United States v. Northern P. R. Co. 67 C. C. A. 269, 134 54 L. ed.

Fed. 715; Memphis Cotton Oil Co. v. Illinois C. R. Co. 164 Fed. 291; Imperial Colliery Co. v. Chesapeake & O. R. Co. 171 Fed. 590.

*Mr. Justice White delivered the [502 opinion of the court:

This litigation was commenced on the equity side of the circuit court of the United States for the southern district of Georgia, by the filing on July 25, 1908, of a bill on behalf of the present appellants, all citizens of the state of Georgia, who are wholesale dealers in groceries and food products and like commodities. The defendants named in the bill are the appellees in this court, railroad corporations of states other than Georgia, *viz.*, the Atlantic Coast Line Railroad Company, the Louisville & Nashville Railroad Company, the Nashville, Chattanooga, & St. Louis Railway Company, the Southern Railway Company, and the Cincinnati, New Orleans, & Texas Pacific Railway Company.

Briefly stated, the object of the bill was to restrain the putting into effect, by the interstate carriers just named, of proposed advances in rates on fresh meats, grain products, hay, and packing-house products within the territory of what is known as the Southeastern Freight Association. That territory, roughly described, embraces the states of South Carolina, Florida, Georgia, points in Tennessee, and that portion of Alabama east of a line drawn from Chattanooga through Birmingham, Selma, and Montgomery to Pensacola. It was averred that freight tariffs embodying the proposed advances in rates had been filed with the Interstate Commerce Commission, that notice had been given that such tariffs would become effective on August 1, 1908, and that practically every interested line of railroad within the territory in question had joined in such tariffs as participating carriers. The advance in rates was averred to be an "arbitrary and unlawful exaction," and to be the direct outcome of understandings and agreements in suppression of competition and in unlawful combination in restraint of interstate trade, arrived at and made effective through the agency of the Southeastern Freight Association and other affiliated associations, and that the acts of such combinations in making *the advance [503 of rates complained of was the result of a conspiracy unlawful as well at common law as under the statutes of the United States. Averring that to permit the going into effect of the proposed unjust and unreasonable rates would entail irreparable loss and injury to complainants and others similarly situated, would operate to the

prejudice of the public interest, and would bring about a multiplicity of suits for reparation, the bill prayed the allowance of an injunction *pendente lite*, restraining the putting into effect of the proposed advances, and that, upon a final hearing, a decree might be awarded perpetually enjoining such advances.

Specially appearing for the purpose, the various defendants respectively filed a plea to the jurisdiction, each defendant asserting in substance an exemption from being sued in a district of which it was not an inhabitant. Demurrers to the pleas to the jurisdiction were sustained. Thereupon, without waiving the benefit of the pleas, defendants jointly demurred to the bill upon numerous grounds. Without specifically passing on the demurrer, the court heard the application for an injunction upon affidavits and documents submitted on behalf of the complainants, and on August 1, 1908, announced its opinion sustaining the contention of the complainants, and directing the injunction prayed to issue upon the condition that complainants should, within ten days, present their complaint to the Interstate Commerce Commission for investigation and determination of the reasonableness of the rates involved. 163 Fed. 738. Two days afterwards an order was entered, in which, among other statements, it was recited—

“that the complainants, together with other persons in the cities of Atlanta, Columbus, Rome, and Athens, Georgia, have this day filed with the Interstate Commerce Commission their complaint, praying the Commission to investigate and determine the reasonableness of the rates involved, also to declare what are just and reasonable maximum rates.”

504] *The order decreed that the defendants to the action and each of them—“be and they are hereby jointly and severally enjoined from enforcing collection of the advance in rates made effective August 1st, 1908, from Ohio and Mississippi river crossings, Nashville, Tennessee, and points with relation thereto, to all points within the state of Georgia, on classes B, C, D, and F, fresh meats, C, L, grain products, hay, and packing-house products; this injunction to continue and remain in force pending an investigation and determination of the reasonableness of the rates involved, by the Interstate Commerce Commission, or until further order of the court.”

Thereupon an appeal was taken to the circuit court of appeals for the fifth circuit. It was there held that the case presented “for necessary consideration the proper construction of the act to regulate

commerce,” and that the jurisdiction of the court did not rest solely upon diversity of citizenship of the parties. The court, being of opinion “that the sound construction of the different provisions of the act to regulate commerce, as amended and now in force, necessarily forbids the exercise of the jurisdiction attempted to be invoked by the bill” [166 Fed. 218, 219, 92 C. C. A. 114, 127], reversed the decree of the circuit court, and remanded the case to that court with instructions to dismiss the bill without prejudice.

Assignments of error, eighteen in number, have been filed, wherein, in various forms of statements, appellants assail the action of the circuit court of appeals in adjudging that the circuit court was without jurisdiction over the subject-matter of the bill. The appellees also, in the argument at bar, press upon our notice, as they did below, the claims made in the special pleas to the jurisdiction filed in the circuit court. It is, of course, the duty of this court to see to it that the jurisdiction of the circuit court was not exceeded (*Louisville & N. R. Co. v. Mottley*, 211 U. S. 149, 152, 53 L. ed. 126, 127, 29 Sup. Ct. Rep. 42, and cases cited), and we shall dispose of the case before us by considering and deciding the last-mentioned contention. The basis of the claim that the circuit court had not *acquired jurisdiction [505 over the person of the defendants was that none of the defendants was an inhabitant of the district in which the suit was brought, and that the suit being one “wherein the jurisdiction is not founded only on the fact that the action is between citizens of different states, but is based also upon acts of Congress of the United States relating to interstate commerce, and alleged causes of action arising thereunder,” the defendant could not be sued outside of the district of which it was an inhabitant. As cause of demurrer to the pleas, the complainants stated “that the controversy presented by the bill is wholly between citizens of different states, and is solely founded upon diversity of citizenship.” While sustaining the demurrer, the circuit court yet declared:

“It is true that, in this case, the illegality of the alleged increase in rates must necessarily, in large measure, be determined by the Federal law. The legality or illegality of the alleged combination in restraint of trade must be determined by the same law, and it seems to be conceded that, generally speaking, this court would not have jurisdiction of these questions finally except under conditions which do not exist here. That is to say, the court can only, for final determination, entertain

the Federal question in the district of which the defendants are inhabitants." [163 Fed. 736.]

Despite these views, however, as the court considered, if the averments of the bill were taken as true, there was "a threatened and immediate violation of the Federal law of the gravest character to a large number of people," irreparable injury would be occasioned if the increase in rates were allowed to go into effect, and as there was not time for those affected to have protection or seek recourse elsewhere, jurisdiction was entertained for the purpose of giving temporary relief.

The pertinent section of the statute regulating the original jurisdiction of circuit courts of the United States is the first section of the act of March 3, 1875, chap. 137, 506] 18 Stat. at L. 470, as amended by the act of March 3, 1887, chap. 373, 24 Stat. at L. 552, as corrected by the act of August 13, 1888, chap. 866, 25 Stat. at L. 433, U. S. Comp. Stat. 1901, p. 508, reading as follows:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States . . . or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid. . . . But . . . no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

In *Patton v. Brady*, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493, discussing the question as to when a case may be said to arise under the Constitution of the United States, the court observed:

"It is said by Chief Justice Marshall that 'a case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either' (*Cohen v. Virginia*, 6 Wheat. 264, 379, 5 L. ed. 257, 285); and again, when 'the title or right set up by the party may be defeated by one con-

struction of the Constitution or law of the United States, and sustained by the opposite construction.' *Osborn v. Bank of United States*, 9 Wheat. 738, 822, 6 L. ed. 204, 224. See also *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 201, 24 L. ed. 656, 658; *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648; *White v. Greenhow*, 114 U. S. 307, 29 L. ed. 199, 5 Sup. Ct. Rep. 923, 962; *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135, 139, 26 L. ed. 96, 97."

*In *Tennessee v. Davis*, supra, the [507 court said:

"What constitutes a case thus arising [under the laws of the United States] was early defined in the case cited from 6 Wheat. [*Cohen v. Virginia*]. It is not merely where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege or claim or protection or defense of the party, in whole or in part, by whom they are asserted. *Story*, Const. § 1647; *Cohen v. Virginia*, 6 Wheat. 379, 5 L. ed. 285. It was said in *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204, 'when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.' And a case arises under the laws of the United States when it arises out of the implication of the law."

In cases of the character of the one at bar, the rulings of the lower Federal courts have uniformly been to the effect that they arose under the Constitution and laws of the United States. *Tift v. Southern R. Co.* 123 Fed. 789, 793; *Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Asso.* 91 C. C. A. 39, 165 Fed. 1, 9; *Memphis Cotton Oil Co. v. Illinois C. R. Co.* 164 Fed. 290, 292; *Imperial Colliery Co. v. Chesapeake & O. R. Co.* 171 Fed. 589. And see *Sunderland Bros. v. Chicago, R. I. & P. R. Co.* 158 Fed. 877; *Jewett Bros. & Jewett v. Chicago, M. & St. P. R. Co.* 156 Fed. 160. We are of opinion that the case before us may properly be said to be one arising under a law or laws of the United States. As said by Taft, Circuit Judge, in *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19

L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730:

"It is immaterial what rights the complainant would have *had before the passage of the interstate commerce law. It is sufficient that Congress, in the constitutional exercise of power, has given the positive sanction of Federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States."

The object of the bill was to enjoin alleged unreasonable rates, threatened to be exacted by carriers subject to the act to regulate commerce. The right to be exempt from such unlawful exactions is one protected by the act in question, and the purpose to avail of the benefit of that act, as well as of the anti-trust act, is plainly indicated by the averments of the bill. Of necessity, in determining the right to the relief prayed for, a construction of the act to regulate commerce was essentially involved.

The jurisdiction of the circuit court not being invoked solely upon the ground of diversity of citizenship, it inevitably follows that, as there was no waiver of the exemption from being sued in the court below, that court was without jurisdiction of the persons of the defendants. *Re Keasbey & M. Co.* 160 U. S. 222, 40 L. ed. 402, 16 Sup. Ct. Rep. 273; *Re Moore*, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706; *Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co.* 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720. In the first case, the question involved was as to the jurisdiction of the United States circuit court for the southern district of New York over an action brought in that court by a corporation of Pennsylvania against a corporation of Massachusetts, having its principal place of business in New York city, for infringement of a trademark. In the course of the opinion it was said (pp. 228, 229, 230):

"But when this suit was brought, the first section of the judiciary act of 1875 had been amended by the act of March 3, 1887, chap. 373, as corrected by the act of August 13, 1888, chap. 866, in the parts above quoted, by substituting for the jurisdictional amount of \$500, exclusive of costs, the amount of \$2,000, exclusive of interest and costs; and by striking out, after the clause, 'and no civil suit shall be brought before *either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant,' the alternative, 'or in which he shall be found at the time of serving such process or commencing

such proceeding,' and by adding, 'but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' 24 Stat. at L. 552; 25 Stat. at L. 433.

"The last clause is added by way of proviso to the next preceding clause, which, in its present form, forbids any suit to be brought in any other district than that of which the defendant is an inhabitant; and the effect is that, in every suit between citizens of the United States, when the jurisdiction is founded upon any of the grounds mentioned in this section, other than the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but when the jurisdiction is founded only on the fact that the parties are citizens of different states, the suit shall be brought in the district of which either party is an inhabitant. And it is established by the decisions of this court that, within the meaning of this act, a corporation cannot be considered a citizen, an inhabitant, or a resident of a state in which it has not been incorporated; and, consequently, that a corporation incorporated in a state of the Union cannot be compelled to answer to a civil suit, at law, or in equity, in a circuit court of the United States, held in another state, even if the corporation has a usual place of business in that state. *McCormick Harvesting Mach. Co. v. Walthers*, 134 U. S. 41, 43, 33 L. ed. 833, 834, 10 Sup. Ct. Rep. 485; *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44. Those cases, it is true, were of the class in which the jurisdiction is founded only upon the fact that the parties are citizens or corporations of different states. But the reasoning on which they proceeded is equally applicable to the other class, mentioned in the same section, of suits arising under the Constitution, laws, or treaties of the United States; and the only difference is [510] that, by the very terms of the statute, a suit of this class is to be brought in the district of which the defendant is an inhabitant, and cannot, without the consent of the defendant, be brought in any other district, even in one of which the plaintiff is an inhabitant.

"This suit, then, assuming it to be maintainable under the act of 1881 [21 Stat. at L. 502, chap. 138, U. S. Comp. Stat. 1901, p. 3401], is one of which the courts of the United States have jurisdiction concurrently with the courts of the

several states. The only existing act of Congress which enables it to be brought in the circuit court of the United States is the act of 1888. The suit comes within the terms of that act, both as arising under a law of the United States and as being between citizens of different states. In either aspect, by the provisions of the same act, the defendant cannot be compelled to answer in a district of which neither the defendant nor the plaintiff is an inhabitant. The objection, having been seasonably taken by the defendant corporation, appearing specially for the purpose, was rightly sustained by the circuit court."

We are of opinion that the jurisdictional statute of 1888 is applicable, even upon the assumption that the cause of action was alone cognizable in a court of the United States, as the particular venue of the action was not provided for elsewhere than in that statute.

The pleas to the jurisdiction of the circuit court, having been seasonably made, should have been sustained and the bill dismissed without prejudice, for want of jurisdiction over the persons of the defendants. As, however, practically the same result will be reached by the decree entered in the circuit court of appeals, which ordered the reversal of the decree of the circuit court, and remanded the cause, with instructions to dismiss the bill without prejudice, we affirm that decree without expressing an opinion as to the merits of the reasoning upon which it was based.

Affirmed.

511] *Mr. Justice Harlan, dissenting:

I cannot agree to the opinion in this case, and will briefly state the reasons for my dissenting.

The plaintiffs in error, citizens of Georgia, brought this suit in equity in the circuit court of the United States for the southern district of Georgia, against the defendants in error, corporations of several different states other than Georgia. The relief sought was a decree enjoining those corporations from putting in force and maintaining in Georgia certain rates established by agreement among themselves. It seems to me that this case could have been disposed of upon the authority of *Baltimore & O. R. Co. v. United States*, recently decided [215 U. S. 481, ante, 292, 30 Sup. Ct. Rep. 164], in which the court held, in substance, that shippers who complain of rates adopted by interstate carriers cannot obtain relief by an original suit brought in any court, Federal or state, but must make application, at the outset, to the Interstate Commerce Commission. This, I think, is all that need have been said; for, whatever

interpretation was given to the judiciary act of 1888 [25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508], the circuit court would have been required, under the case just cited, to decline jurisdiction. But the court, in its wisdom, does not refer to this view of the case, and deems it necessary to determine whether the plaintiffs, citizens of Georgia, may, under the judiciary act of 1888, considered alone, invoke the jurisdiction of the circuit court, held in that state, against the defendant corporations of other states.

If I correctly interpret the opinion of the court, it proceeds on the theory that if the action had been founded alone on diversity of citizenship, the suit—although the defendants were corporations of other states—could have been maintained in the United States circuit court sitting in Georgia, that being the state of the residence of the plaintiffs. But as the plaintiffs were so unfortunate as to possess, and, in their pleadings, to assert, in addition to diversity of citizenship, a Federal right, and to seek to have that right protected by the *Federal court against the illegal acts [512 of the defendant corporations, they must now either go into a state court of Georgia, in order to obtain the desired relief, or go to the respective states, however distant, which incorporated the defendants, and sue there. Certain cases are referred to as requiring this construction of the act of 1888, —*McCormick Harvesting Mach. Co. v. Walthers*, 134 U. S. 41, 33 L. ed. 833, 10 Sup. Ct. Rep. 485; *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; and *Re Keasbey & M. Co.* 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. Rep. 273. But I cannot perceive that there was in either of those cases such a question as the one just stated. Neither of them actually involved or decided any such question. The *McCormick Case* was a suit in the circuit court of Nebraska, by a citizen of that state, against an Illinois corporation, having an agent in Nebraska. The defendant pleaded that, as it was not an inhabitant of Nebraska, it could not, under the act of 1888, be sued in that state. But this plea was overruled by the court below, and this court held that the *McCormick Company*, although not an inhabitant of Nebraska, was liable to be sued in the Federal court held in the state of the plaintiff's residence. Nothing more was involved or decided in that case. The *Shaw Case* was a civil suit brought in the Federal court sitting in New York, by a citizen of Massachusetts against a citizen of Michigan. But although the parties were citizens of different states, neither the plaintiff nor the defendant resided in or was a citizen of the

state in which the suit was brought. What was really involved in that case, and what was decided, appears from the last paragraph of the opinion of this court, as follows: "All that is now decided is that, under the existing act of Congress, a corporation incorporated in one state only cannot be compelled to answer in a circuit court of the United States held in another state, in which it has a usual place of business, to a civil suit, at law or in equity, *brought by a citizen of a different state.*" In the *Keasbey-Mattison* Case it appears that the suit was brought in the Federal court of New York by a Pennsylvania corporation against a Massachusetts corporation. What 513] *the court said leaves no doubt as to what was intended to be decided. It said: "This suit, then, assuming it to be maintainable under the act of 1881 [21 Stat. at L. 502, chap. 138, U. S. Comp. Stat. 1901, p. 3401], is one of which the courts of the United States have jurisdiction concurrently with the courts of the several states. The only existing act of Congress, which enables it to be brought in the circuit court of the United States, is the act of 1888. This suit comes within the terms of that act, both as arising under a law of the United States and as being between citizens of different states. In either aspect, by the provisions of the same act, the defendant cannot be compelled to answer in a district of which *neither the defendant nor the plaintiff is an inhabitant.*" Whatever general expressions are to be found in the opinions in the cases cited, neither of those cases is an authority for the broad, unqualified statement that the United States circuit court held in a state of which the plaintiff is a citizen may not take cognizance of a suit brought by him in a Federal court against a corporation of another state, where such suit presents a controversy between citizens of different states and, *in addition*, discloses the fact that the plaintiff claims a Federal right which needs to be protected against the wrongful or illegal acts of the defendant corporation. This proposition is, of course, subject to the condition that the foreign corporation, by having an agency in Georgia or otherwise, can be reached by some process and brought into the Federal court sitting in Georgia. It is inconceivable, I think, that Congress intended to deprive the Federal court sitting in the state of the plaintiff's residence of jurisdiction to protect his Federal right, simply because it appears from the record that the defendant and the alleged wrongdoer are citizens of different states. It necessarily follows from the opinion of the

court in this case that where a citizen of another state is sued in a state court, and the suit involves a Federal right claimed by the plaintiff, the defendant cannot remove the case to the Federal court, but *must* remain in the state court of original jurisdiction, and there defend his asserted Federal right. The state court might well say, under *the opinion just delivered, [514 that although the controversy between the parties involves Federal rights, and presents a controversy between citizens of different states, as well as one arising under the Constitution and laws of the United States, it is a suit of which the Federal court could not take cognizance by removal. We so say because such a case could not, under the court's present view of the act of 1888, have been originally brought in that court, and because, according to the settled doctrines of this court, no case can be removed from a state court to a Federal court which could not have been originally brought in the latter court. *Tennessee v. Union & P. Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; *Joy v. St. Louis*, 201 U. S. 340, 341, 50 L. ed. 780, 781, 26 Sup. Ct. Rep. 478.

I recognize the fact that the act of 1888 was not drawn with precision. But I am of opinion that, as the act gives the circuit court original jurisdiction, concurrent with the courts of the several states, "of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000 . . . in which there shall be a controversy between citizens of different states," the intention of Congress would be best effectuated by holding that the jurisdiction of the circuit court is not excluded, in a controversy between citizens of different states, simply because the plaintiff, who sued in the Federal court held in the state of his residence, asserts a Federal right and seeks to have it protected against the illegal acts of the defendant, a citizen of another state; provided, always, that the defendant, if a corporation of another state, may, through agents conducting its business in the state where the suit is brought, be reached by the process of the court, and subjected to its authority. The presence in the case of a Federal right asserted by the plaintiff ought not to prejudice him, and does not, I think, alter the fact that the controversy is one of which a circuit court may take cognizance, because it is a controversy between citizens of different states.

515] *STATE OF NORTH DAKOTA EX REL. R. E. FLAHERTY, Plff. in Err.,
v.

O. G. HANSON, Sheriff of the County of Grand Forks, State of North Dakota.

(See S. C. Reporter's ed. 515-527.)

States — burdening Federal taxation — publishing and registering internal revenue receipt — police power.

The requirement that receipts for the payment of the Federal internal revenue tax upon the business of selling intoxicating liquors be registered and published at the holder's expense, which is made by N. D. act of March 13, 1907, is not a valid exercise of the police power, but is invalid, as placing a direct burden upon the taxing power of the Federal government.

[For other cases, see States, 95-116, in Digest Sup. Ct. 1908.]

[No. 47.]

Submitted November 29, 1909. Decided January 17, 1910.

IN ERROR to the Supreme Court of the State of North Dakota to review a judgment denying relief by habeas corpus to a person in custody on the charge of violating a statute of that state requiring the holder of a Federal internal revenue tax receipt to register and publish the same. Reversed.

See same case below, 16 N. D. 347, 113 N. W. 371.

The facts are stated in the opinion.

Mr. Edward Engerud submitted the cause for plaintiff in error. Messrs. Daniel B. Holt, John S. Frame, and George A. Bangs were on the brief:

Because the language is not apt for that purpose, the act does not purport to regulate the business of dealing in malt and other liquors.

Ruggles v. Illinois, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832; United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304; United States v. Wiltberger, 5 Wheat. 95, 5 L. ed. 42; United States v. Hartwell, 6 Wall. 395, 18 L. ed. 832.

The act is an unlawful interference with Federal regulation.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 475, 31 L. ed. 703, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579;

NOTE.—For a discussion of police power generally—see notes to State v. Marshall, 1 L.R.A. 51; State v. Schlemmer, 10 L.R.A. 135; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

54 L. ed.

Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19; Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. Rep. 288; Ohio v. Thomas, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453; Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Com. v. Petty, 96 Ky. 452, 29 L.R.A. 786, 29 S. W. 291; Cranson v. Smith, 37 Mich. 309, 26 Am. Rep. 514; Hollida v. Hunt, 70 Ill. 109, 22 Am. Rep. 63; Com. v. Felton, 101 Mass. 204; Crittenden v. White, 23 Minn. 24, 23 Am. Rep. 676; People v. Kelly, 38 Cal. 147, 99 Am. Dec. 360; State v. Pike, 15 N. H. 83.

No appearance for defendant in error.

Mr. Justice White delivered the opinion of the court:

By § 18 of the act of February 8, 1875, chap. 36, 18 Stat. at L. 307, as amended by § 4 of the act of March 1, 1879, chap. 125, 20 Stat. at L. 333, U. S. Comp. Stat. 1901, p. 2100, a special tax of \$25 is imposed on retail dealers in liquors, as therein defined, and a tax of \$20 on a retail dealer in malt liquors. By Rev. Stat. §§ 3232 and 3233 (U. S. Comp. Stat. 1901, p. 2091), a person is forbidden to engage in or carry on any trade or business made subject to a special tax until the tax has been paid; and it is made the duty of one engaging in a trade or business on which a special tax is imposed by law to register with the [518 collector of the district "his name or style, place of residence, trade or business, and the place where such trade or business is to be carried on." In addition, Rev. Stat. § 3239, as amended by the act of February 27, 1877, chap. 69, 19 Stat. at L. 248, U. S. Comp. Stat. 1901, p. 2093, requires every person engaging in any business made liable to a special tax, except tobacco peddlers, to place and keep conspicuously in his establishment or place of business all stamps denoting the payment of said special tax, and penalties are affixed for noncompliance. So also anyone carrying on a business made liable to a special tax without payment of the tax is subject to fine and imprisonment under § 16 of the act of 1875.

By other sections of the Revised Statutes it is provided as follows.

"Sec. 3240. Each collector of internal revenue shall, under regulations of the Commissioner of Internal Revenue, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state

thereon the time, place, and business for which such special taxes have been paid.

"Sec. 3243. The payment of any tax imposed by the internal-revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any state for carrying on the same within such state, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such state, or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any state from placing a duty or tax on the same trade or business, for state or other purposes."

The state of North Dakota, on March 13, 1907, enacted a law requiring a registration and publication of any receipt, stamp, or license, showing the payment of the special tax levied under the laws of the United States upon the business of selling distilled, malted, and fermented liquor. Briefly, the law provides as follows: A notice of the particulars contained in the receipt or license, and other details respecting the place where the tax receipt or license is posted, etc., is required to be made for three weeks in official newspapers, and the fees for publication are declared to be the same "as allowed by law for the publication of other legal notices." The holder of the receipt or license is also required to place and keep posted, at all times, with the government tax receipts or license, an affidavit of the fact of publication and the obtaining of such license, etc., together with a copy of the notices or advertisements. A duly authenticated copy of the tax receipt or license is required to be filed with a named official, to whom a ten-dollar filing fee is to be paid, and such official is required to publish, in certain official newspapers, the first week in each month, a list of all such tax receipts or licenses filed during the previous month, such notice to be published one week in each newspaper.

Upon complaint made before a committing magistrate for the county of Grand Forks, state of North Dakota, R. E. Flaherty, by the name of R. C. Flarty, was held to answer upon a charge of neglecting to register and publish a government receipt for the payment of an internal revenue tax on the business of a retail dealer in malt liquors. Having been committed to the custody of the sheriff, Flaherty unsuccessfully made application for a writ of habeas corpus to a judge of the state district court. Afterwards a similar application was made to the supreme court of the state, and the writ was granted by that court, but, upon

hearing, the writ was quashed. 16 N. D. 347, 113 N. W. 371. This writ of error was thereupon prosecuted.

The detention complained of was asserted to be illegal upon the ground that the law upon which the prosecution was based was repugnant to the state and Federal Constitutions. We, of course, have to deal solely with the claim of alleged repugnancy to the Constitution of the United States.

*The law of North Dakota, which we [520 have already summarized, is in the margin.†

The state court was of opinion that the law made the person *who had paid [521 the special United States tax and taken a receipt therefor subject to the burdens which the law imposed, wholly without reference to whether such person so paying the tax *and taking the receipt had posted [522 ed the same, as required by the laws of the United States, or done any act within the state. The court said:

"The argument of petitioner's counsel, to the effect that the act applies only to those persons who have complied with the Federal

†An Act Providing for the Publication and Registration of Special Tax Receipts or Licenses from the Government of the United States to Sell Distilled, Malt, and Fermented Liquors, Issued to Persons in North Dakota, the Payment and Collection of Registration Fees and Publication Fees, Regulating the Posting and Exhibiting of Such Tax Receipts or Licenses, Prescribing the Duties of Officials and Owners and Lessors of Property in Relation Thereto, Prescribing Penalties for Failure to Perform the Duties Prescribed, and Other Regulations Pertaining to the Sale of Intoxicating Liquors.

Be it enacted by the Legislative Assembly of the State of North Dakota:

Sec. 1. Liquor License. Tax Receipt Must Be Registered.—Every receipt, stamp, or license showing payment of the special tax levied under the laws of the United States upon the business of selling distilled, malt, or fermented liquor, issued to or held by any person, firm, or corporation in this state, shall be registered and published as in this act required.

Sec. 2. Notice to Be Published. Contains What.—Immediately upon posting or displaying the special tax receipt or license mentioned in said § 1 of this act, as required under government regulations, it shall be the duty of the person in whose name such tax receipt or license is issued to cause to be published for three successive weeks in the official newspaper of the county, and for the same period in the official newspaper of the city, within an incorporated city, a notice which shall contain the following information: Name of person to whom the government tax receipt or license is issued; date of special tax receipt or license; description of property where said tax receipt or license is posted.

statute with reference to posting the receipts for the payment of such tax is, we think, unsound. While § 2 of the act, when given a literal construction, and without considering the other portions of the act, would appear to sustain petitioner's contention in this respect, we think it apparent that when the whole act is construed together, the legislative intent that the same shall apply to all who have paid the Federal tax is apparent, and such intent must be given effect."

Considering the contention that the sole purpose was to burden the person who

made a payment of a tax to the United States, and thus in effect hinder the making of such payments, the court said:

"Such is not the scope nor intent of the act, as we construe it, but, on the contrary, the obvious purpose sought to be accomplished by its enactment was to furnish knowledge to the public and all concerned of the fact that the persons who have paid such tax to the government are or may become engaged in the business of selling intoxicating liquors contrary to the laws of this state. Its purpose, in other words, was solely to furnish knowledge to aid in the

ed, and, if within an incorporated city, the number of the lot and block and street number, and setting forth specifically the room, building, or place where said tax receipt or license is posted; the name of the owner and the name of the lessor of the property in which said tax receipt or license is posted. Upon discontinuance of business or removal of the special tax receipt or license mentioned in § 1 of this act to another building or place, a similar notice containing the information prescribed in this section shall be published in the same manner prescribed herein, and setting forth further the fact of removal, giving date and description of place to which such removal is made as fully as in the original notice.

Sec. 3. Copy of Receipt Filed with Auditor.—It shall be the further duty of any person to whom a tax receipt or license from the government of the United States is issued, as mentioned in § 1 of this act, to file a duly authenticated copy of the same before or immediately upon posting, if in an incorporated city with the city auditor, otherwise with the county auditor of the county, and pay a fee for the filing thereof of \$10, which fee shall be turned into the general fund of the city or county, as the case may be.

Sec. 4. Auditor Publishes List of Licenses.—The city auditor, if in an incorporated city, or county auditor, if not within an incorporated city, shall be required to publish in the official newspaper of the city and each of the official newspapers of the county, the first week in each month, a list of all such tax receipts or licenses filed during the previous month, such notice to be published one week in each newspaper.

Sec. 5. Fees for Publication. Copy Posted.—The fee for publication of notices required under this act shall be the same as allowed by law for publication of other legal notices, and the publisher may require the fee for such publication to be paid in advance. Upon the expiration of the publication required by this act, the publisher or manager of the newspaper in which said notice is published shall make an affidavit of publication, with a copy of the advertisement attached thereto, together with the copy of notice or advertisement referred to herein, shall be posted and remain posted at all times with the tax receipt or license referred to in § 1 of this act.

54 L. ed.

Sec. 6. Owner of Premises Must Publish, When Penalty for Failure.—In case the person to whom the tax receipt or license referred to in § 1 of this act shall be issued shall fail to cause to be published the notice required by this act, it shall be the duty of the owner or lessor of the premises whereon or wherein the tax receipt or license from the government of the United States referred to in § 1 of this act shall be posted, to cause such advertisement to be published as in this act required, and if such owner or lessor shall knowingly fail to do so, he shall be guilty of a misdemeanor.

Sec. 7. Duty of Officers.—It shall be the duty of every sheriff, deputy sheriff, constable, mayor, marshal, police judge, and police officer of any city or town having knowledge of any violation of the provisions of this act to notify the state's attorney of the fact of such violation, and to furnish him the names of any witnesses within his knowledge by whom such violation can be proven. If any such officer shall fail to comply with the provisions of this section, he shall be guilty of a misdemeanor, and upon conviction, in addition to the punishment therefor prescribed by law, shall forfeit his office. For failure or neglect of official duty in the enforcement of this act any of the city or county officers herein referred to may be removed by civil action.

Sec. 8. Duty of County Auditor.—It shall be the duty of the county auditor of each county to apply to the internal revenue department of the government of the United States the first week in each month for a list of all special tax receipts or licenses mentioned in § 1 of this act, issued to persons within his county, naming the persons, date, and places, and the same shall be immediately published one week in each of the official newspapers of the county and city. The cost of procuring such information, upon filing of a duly verified voucher, shall be paid by the county as other county expenses are paid.

Sec. 9. Penalty.—Failure on the part of any person to comply with the provisions of this act shall constitute a misdemeanor.

Sec. 10. Emergency.—Whereas, it is desirable that the publicity required by this act shall begin as soon as possible, an emergency exists, and this act shall be in force from and after its passage and approval.

Approved March 13, 1907.

enforcement of our statute against the unlawful traffic in intoxicating liquors.

"The legislature, in enacting this law, merely did what it had the unquestioned right to do under the police power of the state. Such power is very broad, and is limited only by the Constitution and laws of the United States and the Constitution of this state. That the legislature has the right, within the police power of the state, to provide that the possession of an internal revenue tax receipt for the payment of the government tax upon the occupation of retail dealer in fermented and distilled liquors shall constitute prima facie evidence that the possessor is violating or has violated the prohibition law of this state is too well settled to admit of serious doubt. 23 Cyc. Law & Proc. p. 255 and cases cited. Yet such a law is no less free from the objection urged by petitioner's counsel than is the act in question. If such a law is constitutional, then why cannot the legislature also enact a law making it a public offense for any citizen of the state to procure such a receipt, and neglect or refuse to furnish a public record thereof, and to give the most complete publicity to the fact of its issuance? Such a law would certainly have a tendency to aid in the better enforcement of the law against such illegal traffic, and we are aware of no provision, either in the Federal Constitution or statutes, or in the Constitution of the state, which directly or impliedly prohibits such legislation."

As thus interpreted, the law was held [524] not to be repugnant to *the Constitution of the United States, and to be but a lawful exercise of the police power of the state to regulate the traffic in liquor within the state.

The errors assigned insist that the statute, as thus construed, is repugnant to the Constitution of the United States: First, because, under the guise of the exertion of the police power of the state, the law really imposes a burden directly upon the exertion by the government of the United States of its lawful power of taxation, and because, even if this be not the case, the conditions and requirements of the statute are so in conflict with the act of Congress concerning the payment of the tax and the issuance of the receipt as to amount to a direct burden upon the constitutional power of Congress to tax.

The propositions, which are in substance one and the same, we think are well founded. Under the construction placed upon the statute by the court below we see no escape from the conclusion that it immediately and directly places a burden upon

the lawful taxing power of the United States, or, what is equivalent thereto, places the burden upon the person who pays the United States tax, solely because of the payment of such tax, and wholly without reference to the doing by the person of any act within the state which is subject to the regulating authority of the state. That the attempted exertion of such a power is repugnant to the Constitution of the United States is so elementary as to require nothing but statement. We place in the margin,[†] however, a few of the numerous cases in which the principle has been announced or recognized.

*But if the mere form in which the [525] burdens imposed by the statute be disregarded and their essence be considered, nevertheless we are of the opinion that the statute must be held to be repugnant to the Constitution of the United States. This follows, because it is clear that, in principle, a state may not so exert its police power as to directly hamper or destroy a lawful authority of the government of the United States. Here, again, the doctrine is elementary, and finds clear and consistent expression in the cases previously cited. Its potentiality, however, as applied to the case in hand, is so pointedly illustrated by the case of *United States v. Snyder*, 149 U. S. 210, 37 L. ed. 705, 13 Sup. Ct. Rep. 846, that we briefly refer to that decision. In that case a circuit court of the United States had refused to enforce, in favor of the United States, a lien upon real estate for taxes under the internal revenue laws, on the ground that the lien, or assessment for the tax, had not been recorded in the mortgage records for the parish of Orleans, where the real estate in question was situated, as required by the laws of Louisiana,

[†]*M'Culloch v. Maryland*, 4 Wheat. 405, 406, 436, 4 L. ed. 601, 608; *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Brown v. Maryland*, 12 Wheat. 448, 449, 6 L. ed. 688, 689; *Willson v. Black Bird Creek Marsh Co.* 2 Pet. 251, 7 L. ed. 414; *License Cases*, 5 How. 523, 524, 529, 12 L. ed. 264, 265, 267; *Sinnot v. Davenport*. 22 How. 227, 16 L. ed. 243; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 584, 39 L. ed. 759, 820, 15 Sup. Ct. Rep. 673; *Davis v. Elmira Sav. Bank*, 161 U. S. 283, 40 L. ed. 701, 16 Sup. Ct. Rep. 502; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 625, 626, 42 L. ed. 878, 882, 883, 18 Sup. Ct. Rep. 488; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 667, 43 L. ed. 852, 19 Sup. Ct. Rep. 557; *Knowlton v. Moore*, 178 U. S. 59, 44 L. ed. 977, 20 Sup. Ct. Rep. 747; *Plummer v. Coler*, 178 U. S. 117, 44 L. ed. 999, 20 Sup. Ct. Rep. 829; *Reid v. Colorado*, 187 U. S. 151, 47 L. ed. 115, 23 Sup. Ct. Rep. 92.

and that the proceeding to enforce the lien had not been brought within the period fixed by the state law. The circuit court, therefore, in effect, had held that it was in the power of the state to burden, control, or regulate the right of the United States to assess and collect taxes under its constitutional power of taxation. In deciding that this view was unsound, it was said:

"The power of taxation has always been regarded as a necessary and indispensable incident of sovereignty. A government that cannot, by self-administered methods, collect from its subjects the means necessary to support and maintain itself in the execution of its functions, is a government merely in name. If the United States, proceeding in one of their own courts, in the collection of a tax admitted to be legitimate, can be thwarted by the plea of a state statute prescribing that such a tax must be assessed and recorded under state regulation, and limiting the time within which such tax shall be a lien, it would follow that the potential existence of the govern- 526] ment *of the United States is at the mercy of state legislation.

"Moreover, it scarcely seems necessary to look beyond the Constitution itself for a decisive reply to the question we are now considering. The eighth section of the first article declares that 'the Congress shall have power to lay and collect taxes, duties, imposts, and excises . . . but all duties, imposts, and excises shall be uniform throughout the United States.' The power to impose and collect the public burthens is here given in terms as absolute as the language affords. The provision exacting uniformity throughout the United States itself imports a system of assessment and collection under the exclusive control of the general government. And both the grant of the power and its limitation are wholly inconsistent with the proposition that the states can by legislation interfere with the assessment of Federal taxes, or set up a limitation of time within which they must be collected."

Undoubtedly, as suggested by the court below, there are decisions of state courts holding that, in a proceeding to enforce a penalty or to punish for a violation of a state law as to the sale of liquor, the payment of the special United States tax and taking of a receipt therefor by the defendant may be offered in evidence, and creates a prima facie presumption that the person paying the tax and holding the receipt was engaged in the business of selling liquor. Without in anywise intimating an opinion as to the soundness of the decisions thus referred to, and assuming only for the purpose of the argument their correctness, we 54 L. ed.

yet fail to see how in any respect they can be considered persuasive as to the compatibility of the statute here under consideration with the Constitution of the United States.

Nor is there merit in the contention that the cases of *Allen v. Riley*, 203 U. S. 347, 51 L. ed. 216, 27 Sup. Ct. Rep. 95, 8 A. & E. Ann. Cas. 137, *Woods v. Carl*, 203 U. S. 358, 51 L. ed. 219, 27 Sup. Ct. Rep. 99, and *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89, tend to support the proposition that the statute in question was a valid exercise of the police power of the state, and not a *direct burden upon the tax- [527 ing power of the government of the United States. In the cases relied upon it was but held that certain state statutes regulating the sale within a state of patent rights or patented articles were valid because but a reasonable exertion of the police powers of the state over acts done in the state, and were hence not inconsistent with the legislation of Congress over the subject. But that, as we have stated, is not the character of the legislation here involved. Indeed, testing the provision of the law under consideration by the criterion of reasonableness which was applied in the cases relied upon, it becomes manifest that the act here in question is directly antagonistic to the legislation of Congress concerning the subject with which the state statute deals, since that statute adds onerous burdens and conditions in addition to those for which the act of Congress provides, and which burdens are, therefore, inconsistent with the paramount right of Congress to exert, within the limits of the Constitution, an untrammelled power of taxation.

Reversed and remanded.

The CHIEF JUSTICE, Mr. Justice McKenna, and Mr. Justice Holmes dissent.

JOHN A. BRILL and the J. G. Brill Company, Appts.,
v.

WASHINGTON RAILWAY & ELECTRIC COMPANY.

(See S. C. Reporter's ed. 527-533.)

Patents — invention — car truck — infringement.

The Brill patents, Nos. 627,898 and 627,900, for improvements in car trucks, in which the only element of novelty, if any, is

NOTE.—As to what constitutes infringement of patent—see notes to *Royer v. Coupe*, 36 L. ed. U. S. 1073, and *Dashiell v. Grosvenor*, 40 L. ed. U. S. 1025.

the suspension of the semielliptic springs supporting the ear body by spring or elastic links connected with the side frame of the truck by a pin having a universal ball-and-socket joint at the point of connection, are not infringed by a device which does not use a ball and socket, but instead a rigid link, supported by a relatively unyielding spiral spring in the frame of the truck.

[For other cases, see Patents, 289-304, 982-1001, in Digest Sup. Ct. 1908.]

[No. 66.]

Argued December 10, 13, 1909. Decided January 17, 1910.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, dismissing the bill in a suit to restrain the infringement of a patent. Affirmed.

See same case below, 30 App. D. C. 255. The facts are stated in the opinion.

Messrs. **Francis Rawle and Frederick P. Fish** argued the cause, and, with Mr. Melville Church, filed a brief for appellants:

The question of invention must be determined not by the alleged obviousness of an invention, after the event, but by examining the history of the invention and the antecedent attempts of preceding inventors.

Keystone Mfg. Co. v. Adams, 151 U. S. 139, 38 L. ed. 103, 14 Sup. Ct. Rep. 295; C. & A. Potts & Co. v. Creager, 155 U. S. 597, 608, 39 L. ed. 275, 279, 15 Sup. Ct. Rep. 194; Topliff v. Topliff, 145 U. S. 156, 163, 36 L. ed. 658, 661, 12 Sup. Ct. Rep. 825; Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co. 113 U. S. 157, 28 L. ed. 939, 5 Sup. Ct. Rep. 513; Brill v. Third Ave. R. Co. 103 Fed. 289; Gindorff v. Deering, 81 Fed. 953; George Frost Co. v. Cohn, 112 Fed. 1009; Wooster v. Blake, 8 Fed. 429.

The importance of the success of the Brill truck, shown by its extensive sales both by the Brill Company and the Peekham Company, far in excess of other types of trucks, should not be overlooked.

Smith v. Goodyear Dental Vulcanite Co. 93 U. S. 495, 23 L. ed. 954; Washburn & M. Mfg. Co. v. Grinnell Wire Co. 24 Fed. 23; Keystone Mfg. Co. v. Adams, supra; Topliff v. Topliff, 145 U. S. 156, 36 L. ed. 658, 12 Sup. Ct. Rep. 825; Barbed Wire Patent (Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co.) 143 U. S. 275, 36 L. ed. 154, 12 Sup. Ct. Rep. 443, 450.

Mr. **Holland S. Duell** argued the cause, and, with Messrs. Charles H. Duell and F. P. Warfield, filed a brief for appellee:

When a combination of elements found in a car truck designed for use on a steam

railroad is taken from such a truck and incorporated into a truck designed to be propelled by electricity, there is no patentable invention disclosed, and the former is a pertinent reference for the latter.

Johnson Co. v. Toledo Traction Co. 56 C. C. A. 415, 119 Fed. 885.

Giving Brill all the credit that is due him, it must be said that when he grouped together the elements combined in the claims in suit, he had only to make selections from devices of the prior art. So far as such selections are set forth in claims of a specific character, he may ask for the consideration of the court; but when he seeks by generic claims to shut others out from an equal right to use the devices of the prior art, he is not entitled to any consideration whatsoever.

E. M. Miller Co. v. Meriden Bronze Co. 80 Fed. 525; Canda Bros. v. Michigan Malleable Iron Co. 123 Fed. 101; North British Rubber Co. v. Jandorf, 85 Fed. 455.

A combination of old elements, producing only old results, and involving no new function, is not patentable, though the product may be more convenient and salable than anything which preceded it.

Stimpson v. Woodman, 10 Wall. 117, 19 L. ed. 866; Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co. 174 U. S. 492, 43 L. ed. 1058, 19 Sup. Ct. Rep. 641; Covert v. Covert, 53 C. C. A. 225, 115 Fed. 493; Carnegie Steel Co. v. Brislin, 59 C. C. A. 651, 124 Fed. 213; Singer Mfg. Co. v. Cramer, 192 U. S. 265, 48 L. ed. 437, 24 Sup. Ct. Rep. 291.

The burden of proof is on the complainant to show that a combination of old and well-known elements produces a new and better result than that produced by prior combinations.

Fairbanks, M. & Co. v. C. A. Stiekney & Co. 115 Fed. 720; Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co. 53 C. C. A. 583, 116 Fed. 363; Overweight Counterbalance Elevator Co. v. Henry Vogt Maeh. Co. 43 C. C. A. 80, 102 Fed. 961.

Irrespective of the question of patentability, in view of the state of the prior art, it is not possible for this court to find infringement.

Carnegie Steel Co. v. Brislin, 59 C. C. A. 651, 124 Fed. 220; Singer Mfg. Co. v. Cramer, supra; Sander v. Rose, 58 C. C. A. 171, 121 Fed. 840.

The operativeness or nonoperativeness of either the Thyng truck or the Beach truck as an entirety has nothing whatever to do with the use of the Thyng spring system, or of the substitution therein of the Beach hanger, both of which are clearly operative.

E. M. Miller Co. v. Meriden Bronze Co. 215 U. S.

supra; *Aron v. Manhattan R. Co.* 132 U. S. 84, 33 L. ed. 272, 10 Sup. Ct. Rep. 24.

Though the invention has not been actually anticipated, its novelty may be destroyed, owing to the general state of knowledge at the time when the application was made for the patent. It may be impossible to point to any specific thing or to any particular publication which disclosed the subject-matter of the patent, and yet the information at the disposal of the world at large may be such that obviously the patentee has produced nothing new.

Edmunds, Patents, 2d ed. 1897, p. 650.

Even if the complainant had shown that these trucks had had a reasonable amount of commercial success, that is not sufficient to render valid the claims of these patents.

Klein v. Seattle, 23 C. C. A. 114, 44 U. S. App. 741, 77 Fed. 200.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity to restrain the infringement of a patent. The suit is brought against a party that is alleged to have used the patented device, but it is defended by the Peckham Manufacturing Company, the vendor, which is a successor by purchase to the Peckham Motor Truck & Wheel Company. The principal claim now relied upon was declared void in *North Jersey Street R. Co. v. Brill*, 67 C. C. A. 380, 134 Fed. 580, reversing the decision of the circuit court, 124 Fed. 778, 125 Fed. 526, a suit brought by the same plaintiff, and said to have been defended by the Peckham Motor & Truck Company. (On the authority of that case a preliminary injunction against the present defendant was refused in 68 C. C. A. 486, 135 Fed. 784.) If the first Peckham Company was privy to the decree declaring the patent void, there would be great force in the argument that that decree established, as against the plaintiff, the right of the Peckham Manufacturing Company to make and sell the patented article, and that the right ought to be recognized in a suit against its customer, defended by it. *Kessler v. Eldred*, 206 U. S. 285, 288, 289, 51 L. ed. 1065, 1067, 1068, 27 Sup. 529] Ct. Rep. 611. *It is unnecessary to decide that question, because the formal proofs are wanting; but, on the obvious facts, we should be unwilling to come to a different conclusion from that reached in the earlier litigation and again in the present suit, unless it was impossible to avoid the result. With these preliminaries we proceed to the merits of the case.

The present form of car used on the electric street railways is a long car, resting by pivots upon two four-wheeled trucks. The plaintiff makes a truck of this sort and has

a parent and a divisional patent for "Improvements in Car Trucks for Motor Propulsion and the Like," dated June 27, 1899, and numbered respectively 627,898 and 627,900. The arrangement in actual use may be described as follows, nearly in the plaintiff's words: The side frames are connected near the middle by two parallel metal cross-pieces or transoms, having space enough between them to allow another parallel piece, called the bolster, to move vertically, occupying the space between with but slight play. The car body rests on a pivot in the middle of the bolster. The ends of the bolster rest on the top of semielliptic springs parallel to and below the sides of the truck. The ends of the springs in their turn rest on two spring links hanging from the sides of the truck, near the axles. More specifically, they are supported on the bottom of metal bands or stirrups which surround and hang by their tops on spiral springs each of which is attached underneath to a metal bolt running up through its middle and connected at the top with the frame of the truck by a ball-and-socket joint. That is to say, the pin passes up through the frame, in which is a conoidal aperture to give it play in all directions, and the head of the pin is hemispherical, seated in a like recess in the frame.

The claims relied upon are the following: In number 627,898, the parent patent,

"13. The combination in a car truck of the side frames, the semielliptic springs movably and resiliently suspended from the side frames, and a bolster secured to said springs, substantially as described."

"*81. The combination in a car truck [530 of the side frames, the semielliptic springs, a cross bolster resting on the semielliptic springs, links, and springs combined with said links, said links deriving their support from the side frames, and connecting the ends of the semielliptic springs with the side frames, substantially as described."

In 627,900, the divisional patent,

"13. In a car truck, the combination with the side frames of the links comprising bolts pivoted between their ends, said links being pivotally suspended from the side frames, longitudinally-disposed semielliptic springs secured to the lower end of said bolts, a cross bolster resting on said springs, and further springs included in the link suspension of said semielliptic springs, substantially as described."

"14. In a car truck, the combination with the side frames of the cross bolster suspended below the side frames by semielliptic springs and pivotal links, said links comprising a plurality of sections pivotally secured together, and further springs combined with said links to elastically suspend

said semielliptic springs from the side frames, substantially as described.

"15. In a car truck, the combination with the side frames of the cross bolster suspended below the side frames by semielliptic springs and articulated and pivotal links, said links comprising a plurality of sections pivotally secured together, and spiral springs about and combined with said links to elastically suspend said semielliptic springs from the side frames, substantially as described."

"17. The combination in a car truck having an upper chord, of the longitudinally-disposed semielliptic springs, a transverse bolster supported upon said springs, links depending from and flexibly supported on said upper chord and passing through enlarged apertures therein, said links being articulated between their ends, the ends of the semielliptic springs being supported upon the lower articulation of said links, substantially as described."

531] *The parent patent contains the following disclaimer:

"The location of the semielliptic springs outside of the wheel gage on each side of the truck, together with the location of the links for supporting the semielliptics closely adjacent to the axle boxes, and the swinging of said springs from the truck frame from such points, gives a better support for the ear body than does the usual link-hung bolster supported from the truck transoms within the wheel gage. These general features of construction, however, are embraced in an application filed by Samuel M. Curwen and myself on the 3d of November, 1896, Serial No. 610,902, and therefore I do not claim the same herein."

The answer denies the validity of the patents, setting up a large number of earlier ones, and also denies infringement. There was a trial in the supreme court of the District, upon which a decree was rendered dismissing the bill. The decree was affirmed by the court of appeals, 30 App. D. C. 255, and an appeal was taken to this court.

It is difficult to put one's finger with certainty upon what the plaintiff claims. It certainly is not the total combination of a successful truck. Mr. Brill, the inventor and the plaintiff's assignor, is pictured as playing a large part in the development of street railway trucks, but whether that be true or not, his share in the invention of the truck that we have described, so far as the present patent, at least, is concerned, must be at best but very small. It is insisted to be sure, that the case is not affected by inventions for use with steam railroad cars, because of the different requirements upon street roads. Cars for the latter use must

be low hung to make getting in and out easy, must accommodate the motors hung upon the axles, must be adapted to short curves, and so forth. But these differences are not of universal effect; indeed, this patent is not confined to street cars. The suspension of the car body upon a semielliptic spring hung from the side frame of the truck by a jointed hanger, with most of the characteristics of the present patent, as disclosed in a patent to Thyng in 1845, was obviously *as available for street as [532 for steam railways, and the use of these features by Brill was not a patentable invention. The use, on the modern long car, of two four-wheeled pivotal trucks with a short wheel base and wheels of equal diameter, which support the car body by a pivot on a bolster between the axles, resting on semielliptic springs, was not peculiar to Brill. It was described in a patent to Taylor, October 31, 1895, No. 507,855. Brill's specification disclaims at the outset the general features of the truck it describes. Indeed, it hardly is denied that every element in the combination was well known in the construction of railway cars.

We are not dealing with a new type of trucks, but with certain features only. At the argument it was admitted that the plaintiff's case must stand or fall on claim 13 of No. 627,898. In that claim the only possible element of novelty is the mode in which the semielliptic springs are suspended from the side frames. In practice the links are elastic and the pins on which the whole combination hangs have a universal ball-and-socket movement, although the claim only says "movably and resiliently suspended . . . substantially as described." Neither "movably" nor "resiliently" indicates the ball-and-socket arrangement, but it is described in the specification, and we give the plaintiff the benefit of the doubt. We agree, however, with the circuit court of appeals, that the substitution of a ball-and-socket movement for the movement in one direction of the Thyng link, coupled, as it was, with a slight longitudinal play, required a minimum of invention. A link having universal movement was patented by Beach in 1876. The plaintiff's witness, Akerman, says that there always has been provision made for lateral and longitudinal motion in every well-constructed truck. Spring links to support semielliptic springs were old; it is unnecessary to recite the patents in which they appear. The mention of "the usual link-hung bolster" in the disclaimer indicates the indisputable fact. We also agree with the other court that the disclaimer in favor of Brill and Curwen is a solemn admission of the priority of the *de- [533

vices claimed by them. It certainly covers the collocation of the spring links and semielliptic springs. One of the claims of Brill and Curwen is: "12. The combination in a car truck of the side frames, the equalizing-bars movably and resiliently suspended from the side frames, and a bolster supported on said equalizing-bars, substantially as described." It is said that the Brill patent did not follow the Thyng invention for more than fifty years. The answer is that for most of that time it was not wanted. Very soon after the change in street railway travel required it, it came.

If the plaintiff's claim could be sustained, which we cannot admit, it would be confined to the specific form of link described. There would be little room for the doctrine of equivalents. The defendant's device does not use a ball and socket, but uses a rigid link supported by a relatively unyielding spiral spring in the frame of the truck, and does not infringe the very narrow claim which is the most that, in any view, could be allowed.

Decree affirmed.

Mr. Justice McKenna dissents.

EDWIN T. MANKIN and Henry M. Magie.
Copartners, Doing Business under the
Firm Name of Mankin Construction Com-
pany, et al., Plffs. in Err.,
v.

UNITED STATES FOR THE USE AND
BENEFIT OF LUDOWICI-CELADON
COMPANY, J. L. Mott Iron Works, and
the N. O. Nelson Manufacturing Company.

(See S. C. Reporter's ed. 533-540.)

Bonds. — extent of obligation — labor and materials used in public work.

1. The additional phrase, "the person or persons supplying the contractor with labor and materials," used in the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1909, p. 948), amending the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), in describing the persons entitled to a copy of the contract and bond for the purpose of suit, does not change the rule that labor and materials used in the prosecution of a public work, though furnished to a subcontractor, are within the obligation of a bond conditioned, conformably to those statutes, for the prompt payment by the contractor to all persons supplying him with labor or materials in the prosecution of the work.

[For other cases, see Bonds, I., in Digest Sup. Ct. 1908.]

Damages — liability on bond of public contractor — notice of claim against subcontractor.

2. The recovery on the bond of a contract-
54 L. ed.

or for a public work for labor and materials furnished a subcontractor is not limited to the amounts remaining unpaid to the subcontractor when notice was given of outstanding claims, where the bond is conditioned, conformably to the acts of August 13, 1894, and February 24, 1905, for the prompt payment by the contractor to all persons supplying him with labor or materials in the prosecution of the work.

[For other cases, see Damages, 113 120, in Digest Sup. Ct. 1908.]

[No. 167.]

Submitted January 7, 1910. Decided January 17, 1910.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of Mississippi in favor of the claimants in an action upon the bond given by a contractor for a public work. Affirmed.

See same case below, 86 C. C. A. 672, 158 Fed. 1021.

The facts are stated in the opinion.

Messrs. C. V. Meredith, T. C. Catchings, and O. W. Catchings submitted the cause for plaintiffs in error. Mr. J. Jordan Leake was on the brief:

No one is embraced within the terms of mechanics' lien statutes unless clearly so embraced.

1 Phillips, *Mechanics' Liens*, 2d ed. §§ 36, 47-50; Wood v. Donaldson, 17 Wend. 550; 22 Wend. 395; Boisot, *Mechanics' Liens*, §§ 246-253; McGugin v. Ohio River R. Co. 33 W. Va. 63, 10 S. E. 36.

If the defendants in error can enforce any claim against the said bond, their recovery must be limited to the amount of balance unpaid to the subcontractor at the time the plaintiffs in error received notice of the claims of the defendants in error.

West Coast Lumber Co. v. Knapp, 122 Cal. 81, 54 Pac. 533; Hampton v. Christensen, 148 Cal. 729, 84 Pac. 201; Alderman v. Hartford & N. Y. Transp. Co. 66 Conn. 47, 33 Atl. 589; Nixon v. Cydon Lodge No. 5, K. P. 56 Kan. 298, 43 Pac. 236; Dunn v. Rankin, 27 Ohio St. 132; Morrison v. Whaley, 16 R. I. 715, 19 Atl. 330; Garrison v. Borio, 61 N. J. Eq. 236, 47 Atl. 1060; Phillips, *Mechanics' Liens*, 2d ed. §§ 36, 39, 61, 62, pp. 56, 99, 101, 103, 104; Renton v. Conley, 49 Cal. 188; McKnight v. Washington, 8 W. Va. 666; Stout v. Golden, 9 W. Va. 231; McIntire v. Barnes, 4 Colo. 288; Stewart v. Wright, 52 Iowa, 335, 3 N. W. 144; Craig v. Smith, 37 N. J. L. 549; Reeve v. Elmendorf, 38 N. J. L. 125; Boisot, *Mechanics' Liens*, § 255; Re Hobbs, 145 Fed. 218; McMurray v. Brown, 91 U. S.

257-266, 23 L. ed. 321-324; *Wolf Co. v. Pennsylvania R. Co.* 29 Pa. Super. Ct. 439; *Knelly v. Horwath*, 208 Pa. 487, 57 Atl. 957; *Mullikin v. Harrison*, 53 Fla. 255, 44 So. 426; *Gridley v. Sumner*, 43 Conn. 14; *Alabama Lumber Co. v. Smith*, 139 Ala. 179, 35 So. 693; *Merritt v. Crane Co.* 126 Ill. App. 343; *American Surety Co. v. United States*, 127 Ala. 349, 28 So. 664; *General Supply Co. v. Hunn*, 126 Ga. 615, 55 S. E. 957; *Vandenberg v. Walton Lumber Co.* 19 Okla. 169, 92 Pac. 149; *Brainard v. Kings County*, 155 N. Y. 538, 50 N. E. 263; *Hunter v. Truckee Lodge No. 14*, 1. O. O. F. 14 Nev. 41; *Fullerton Lumber Co. v. Osborn*, 72 Iowa, 472, 34 N. W. 215.

Mr. C. H. Alexander submitted the cause for defendants in error. Messrs. W. C. Bowman, Richard F. Reed, and Gerard Brandon were on the brief:

The principles of law involved in this case have been fully and clearly decided by this court.

United States use of *Hill v. American Surety Co.* 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168.

Mr. Justice Day delivered the opinion of the court:

This is a writ of error to the circuit court of appeals for the fifth circuit, wherein a judgment of the circuit court of the United States for the southern district of Mississippi in favor of the defendants in error was affirmed. The facts are: The Mankin Construction Company on February 27, 1905, entered into a contract with the Secretary of the Treasury for the construction 536] *of a certain postoffice building in the city of Natchez, Mississippi, and gave bond under the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1909, p. 948), amending the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523). This bond was conditioned that the Mankin Construction Company should "promptly make payment to all persons supplying them labor or materials in the prosecution of the work contemplated by said contract." Upon this bond the Title, Guaranty, & Trust Company of Scranton, Pennsylvania, was surety.

The Mankin Construction Company, on April 29, 1905, entered into a written contract with one W. E. Smythe, as subcontractor, by the terms of which Smythe agreed to furnish certain plumbing, gasfitting, sheetmetal, tile roofing, etc., to be used in the construction and erection of the postoffice building. The building was completed about July 12, 1906, was accepted by the government, and payment therefor was made

to the Mankin Construction Company, in accordance with the terms of the contract.

The defendants in error, the Ludowici-Celadon Company, the Nelson Manufacturing Company, and the J. L. Mott Iron Works, respectively, sold and delivered to Smythe, the subcontractor, certain materials which he used in the construction of the postoffice building, as required by the original contract. Smythe failed to make full payment on account of such purchases, and no suit having been brought by the United States under the act of Congress (33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1909, p. 948) within six months, affidavit was made by the Ludowici-Celadon Company that it had supplied labor and material for the prosecution of the work of constructing the postoffice building; and it was furnished with a copy of the contract and bond, as required by the act, and thereupon instituted suit in the name of the United States in the United States circuit court for the southern district of Mississippi against the Mankin Construction Company and its surety.

The Nelson Manufacturing Company and the J. L. Mott Iron Works intervened in the action, and claimed the right *also [537 to recover on account of the materials furnished by them respectively. There was a judgment upon the bond in favor of the claimants. It also appears that the Mankin Construction Company had paid Smythe, the subcontractor, the amount due him under the contract, less \$644.57, before receiving any notice from either of the claimants of their respective claims against Smythe. The judgment upon the bond was in favor of the United States for the use of the Ludowici-Celadon Company in the sum of \$1,217.78, for the use of the Mott Iron Works in the sum of \$709.97, for the use of the Nelson Manufacturing Company in the sum of \$2,129.47. The amount due upon the accounts not being disputed, the court instructed the jury to find for the claimants.

Upon writ of error to the circuit court of appeals for the fifth circuit, that court affirmed the judgment of the circuit court upon the authority of *United States ex rel. Hill v. American Surety Co.* 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168. In the *Hill* Case, this court held that one who furnished labor or materials in the carrying out of a contract for public works, although such materials were furnished to a subcontractor, to whom a part of the work had been let, could recover upon a bond given under the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523). In the *Hill* Case it was held that, construing the bond in the light of the statute, and the purpose of Congress to provide

security for payment for labor and material going into the construction of a public building, it was intended thereby to provide indemnity for a person or persons who furnished labor or materials to the subcontractor, thereby enabling the contractor to meet his engagement to supply the material and labor necessary to the construction of a public building.

The present action accrued after the passage of the statute of February 24, 1905, amending the act of August 13, 1894, in which original act a right of action was given in the name of the United States for the use and benefit of the persons supplying the labor or materials in the prosecution of the work provided for in the contract, and **re-538**] quiring a bond for the benefit *of such persons. In that act there was no limitation upon the number of actions which might be brought, nor was there any preference given to the United States in a recovery upon the bond. In the amended act a single action was provided for, and priority was given to the claim and judgment of the United States. In such suit any person or company who had furnished labor or material used in the construction or repair of any public building was allowed to intervene in the suit by the United States on the bond, and to have their rights and claims adjudicated; and it was further provided that, if no suit should be brought by the United States within six months of the completion and final settlement of the contract, then the person or persons supplying the labor or materials should, upon filing an affidavit in the department under the direction of which the work had been done, or the materials furnished, be furnished with a certified copy of the contract and bond, and might thereupon bring an action in the name of the United States in the circuit court of the United States in the district where the contract was performed and executed. There are other provisions looking to the distribution of the recovery upon the bond, and providing for bringing all creditors into the single suit which is authorized to be instituted.

In respect to the condition of the bond required to be given, the language of the amended act is precisely the same as that contained in the act of August 13, 1894, and the condition is that "such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract."

It is the contention of the plaintiffs in error that the act of February 24, 1905, differs from the act of August 13, 1894, in that a copy of the contract and bond is to be furnished for the purpose of suit to the

"person or persons supplying the contractor with labor and materials," and upon furnishing an affidavit to the Department under whose direction the work had been prosecuted, that the labor and materials for the *prosecution of said work have been [539 supplied, but payment for which has not been made; whereas, in the act of August 13, 1894, it is provided that any person or persons making an application therefor, and furnishing an affidavit to the Department that the labor and materials for the prosecution of such work had been supplied by him or them, payment for which had not been made, shall have a certified copy of the contract and bond for the purpose of bringing suit thereon.

In both statutes a copy of the contract and bond is to be furnished upon an affidavit that labor and materials for the prosecution of the work have been supplied by the persons applying for such copy. In the amended statute it is provided that, if the action is not instituted by the United States within six months, then the person or persons supplying the contractor with labor and materials, and furnishing the affidavit that the same were supplied for the prosecution of such work, shall have a certified copy of the contract and bond for the purposes of the suit. The additional phrase used in this connection, "the person or persons supplying the contractor with labor and materials," it is contended, shows that only those who furnish labor and materials directly to the contractor come within the benefit of the act. We cannot agree with this contention. The phrase, "person or persons supplying the contractor with labor and materials," are the words embodied in both statutes alike in the requirement of a bond for their benefit. In the Hill Case it was distinctly held that "persons supplying the contractor with labor and materials" included not only the subcontractor, but anyone who furnished labor and materials to the subcontractor for carrying out the work contracted for. There is nothing in the provision as to who shall have a copy of the bond for the purpose of suit which changes or limits the obligation of the bond under identical requirements in both statutes, alike embracing, as construed in the Hill Case, persons furnishing labor and materials to a subcontractor.

As to the other point, that the Mankin Construction Company *had paid to [540 Smythe, the subcontractor, the amount due him, except the sum of \$644.57, before receiving notice of the claims of the outstanding debts recovered in this case, there is no provision in the statute that notice shall be given to the con-

tractor of claims against the subcontractor, and limiting the recovery to the amount unpaid at the time of such notice. Such provision is found in some of the state statutes, and is made a condition of recovery in some of the mechanics' lien acts; but this case is controlled by the Federal act under consideration and the obligation of the bond, which requires payment to all persons supplying labor and material in the prosecution of the work contemplated by the contract.

As was said in the Hill Case, the contractor can protect himself by requiring a bond securing him against liability on account of engagements of the subcontractor with persons who furnish labor and material upon his order. Indeed, the present contract contained, as the record shows, a provision that the general contractor reserved the right to require a full release from all claims for which he had become liable for materials furnished to, or work done for, the subcontractor, on account of materials and work required by the contract, with the right to withhold any amount due to the subcontractor until such release should be furnished.

We agree with the Circuit Court of Appeals that this case is ruled by the decision made in *United States ex rel. Hill v. American Surety Co.* supra. The judgment of the Circuit Court of Appeals, affirming the judgment of the Circuit Court, is therefore affirmed.

541] *OLD NICK WILLIAMS COMPANY,
Petitioner,
v.
UNITED STATES.

(See S. C. Reporter's ed. 541-545.)

Appeal — when proceedings are begun.

1. A writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. [For other cases, see *Appeal and Error*, 2591-2600, in *Digest Sup. Ct.* 1908.]

Appeal — time for taking — extension.

2. A writ of error for the review in a circuit court of appeals of a judgment of a Federal district court cannot be allowed by the court after the expiration of the six months given by the act of Congress of March 3, 1891 (26 Stat. at L. 829, chap. 517, U. S. Comp. Stat. 1901, p. 552), § 11, for suing out such writs.

[For other cases, see *Appeal and Error*, IV. d, 4, in *Digest Sup. Ct.* 1908.]

Appeal — time for taking — delay in settling bill of exceptions.

3. Delay in settling the bill of exceptions, due to judicial engagements of the trial judge, is no excuse for the failure to sue out a writ of error from a circuit court of ap-

318

peals to a Federal district court within the six months allowed by the act of March 3, 1891, § 11, although an assignment of errors should accompany the petition for the writ of error, since such assignment may be formulated without the previous settlement of the bill of exceptions, and, besides, is not a jurisdictional requirement.

[For other cases, see *Appeal and Error*, IV. d, in *Digest Sup. Ct.* 1908.]

[No. 26.]

Argued November 9, 10, 1909. Decided January 24, 1910.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit dismissing, because not sued out in time, a writ of error to the District Court for the Western District of North Carolina, to review a conviction for carrying on the business of a rectifier of spirits with intent to defraud the United States of the tax. Affirmed.

See same case below, 82 C. C. A. 73, 152 Fed. 925.

Statement by Mr. Chief Justice Fuller:

This was an indictment in the district court of the United States for the western district of North Carolina against the Old Nick Williams Company, a corporation which was authorized to carry on the business of a rectifier, and which was convicted of violating the second paragraph of § 3317 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2164) by the verdict of a jury finding it guilty of carrying on the business of a rectifier with intent to defraud the United States of the tax on the spirits rectified by it. The verdict was rendered November 28,

NOTE.—On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to *Wedding v. Meyler*, 66 L.R.A. 833.

When proceedings to transfer cause to Federal Supreme Court on writ of error or appeal are deemed begun.

The writ of error is not brought within the time limited, unless it is filed within that time in the court which rendered the judgment. *Brooks v. Norris*, 11 How. 204, 13 L. ed. 665; *Scarborough v. Pargoud*, 108 U. S. 567, 27 L. ed. 824, 2 Sup. Ct. Rep. 877; *Polleys v. Black River Improv. Co.* 113 U. S. 81, 28 L. ed. 938, 5 Sup. Ct. Rep. 369; *Cincinnati Safe & Lock Co. v. Grand Rapids Safety Deposit Co.* 146 U. S. 54, 36 L. ed. 885, 13 Sup. Ct. Rep. 13.

The day on which the writ may have been issued by the clerk, and the day on which it was tested, are not material in deciding this question. *Brooks v. Norris*, supra.

This rule is applicable to appeals, which

215 U. S.

1905, and motions to set aside the verdict and for new trial and in arrest of judgment were severally made and overruled, and thereupon judgment was entered on that day, sentencing defendant to pay a fine of \$5,000 and be taxed with the costs. On the same day it was ordered that the defendant have ninety days to prepare its bill of exceptions, and that the attorney for the 542] United States have *thirty days, after being served with the defendant's bill of exceptions, to make objections thereto, and that the court would settle the bill of exceptions upon ten days' notice to the attorneys of the parties, and that, when filed, the bill of exceptions should be deemed as made in ample time.

January 17, 1906, by consent of the parties, the court, by its order, further extended the time for preparing and filing defendant's bill of exceptions to March 15, 1906, and afterwards extended the time to April 1. On July 27, 1906, the court, over the objection of the attorney for the United States, made an order which recited that defendant had filed with the clerk its bill of exceptions, to which the United States at-

torney had filed certain objections and proposed amendments, so that the bill of exceptions had not been settled and signed by the court within six months from the date of the entry of the judgment, and the court, being of opinion that defendant was entitled, under the circumstances, to have the bill of exceptions settled and a writ of error and citation issued and served *nunc pro tunc* as within the time required by law, directed that the attorneys should appear before him August 7, 1906, and have the bill of exceptions settled and signed by the court, and further ordered that when the bill of exceptions was settled and signed, and after a petition for a writ of error and assignments of error had been filed by defendant, the writ of error and citation in due form should be issued and served, all to bear date as of the 15th of April, 1906, that being the date on which the defendant filed its proposed bill of exceptions with the clerk, and which was within six months from the entry of the judgment. Thereafter, on September 12, 1906, defendant, having presented its petition for the allowance of a writ of error and its assignment

cannot be said to be taken until in some way presented to the court which made the decree appealed from. *Credit Co. v. Arkansas C. R. Co.* 128 U. S. 258, 32 L. ed. 448, 9 Sup. Ct. Rep. 107.

And where an appeal was allowed by a justice of the Federal Supreme Court on the last day on which an appeal could be taken, but was not presented to the court below or filed with the clerk until five days after such term had expired, the appeal was not taken in time. *Ibid.*

So, in *Fowler v. Hamill*, 139 U. S. 549, 35 L. ed. 266, 11 Sup. Ct. Rep. 663, an appeal was dismissed because the appeal papers were not filed in the lower court within two years after final decree.

A cross appeal, like other appeals, is not taken within the two years' limitation, unless it is presented within that time to the court which made the decree, by filing the papers. *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771.

The actual time of presenting and filing an appeal in the court below cannot be anticipated by entering an order *nunc pro tunc*. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of the court. *Credit Co. v. Arkansas C. R. Co.* supra.

To the same effect is *Conboy v. First Nat. Bank*, 203 U. S. 141, 51 L. ed. 128, 27 Sup. Ct. Rep. 50, where it was held that the allowance of an appeal from a circuit court of appeals in a bankruptcy case, on certificate of a justice of the Supreme Court, cannot operate as an adjudication, contrary to the fact, that such appeal is taken within the thirty days allowed by general order in bankruptcy, No 33.

An exception seems to be recognized when 54 L. ed.

the delay was the act of the court, and the order will not operate to do injustice.

Thus, in *Sage v. Central R. Co.* 93 U. S. 412, 23 L. ed. 933, the court, after holding that an order that the appeal shall relate back to a time within the sixty days is not effectual for the purpose of a *superse-deas*, and stating that an appeal taken after expiration of the two years cannot be made effective by an order dating it back to a time within the limitation, added: "To make a *nunc pro tunc* order effectual for such purposes, it must appear that the delay was the act of the court, and not of the parties, and that injustice will not be done."

So, where an appeal was prayed for in due time under a special statute which secured the right of appeal to either party if asked for within one year, but the clerk neglected to make the necessary entry, the lower court properly directed that an entry of an appeal be made *nunc pro tunc*. *United States v. Vigil*, 10 Wall. 423, 19 L. ed. 954.

An appeal from the court of claims under the act of March 3, 1863, § 5, is taken in time when the application is made for its allowance under the rules prescribed by the Federal Supreme Court within the ninety days allowed by that section. *United States v. Adams*, 6 Wall. 101, 18 L. ed. 792; *Latham's Appeal*, 9 Wall. 145, 19 L. ed. 771; *Latham v. United States*, 131 U. S. xvii. Appx. and 19 L. ed. 452.

An appeal is in time when prayed for and allowed within the prescribed time, although the security was not accepted until after that time. *The Dos Hermanos*, 10 Wheat. 306, 6 L. ed. 328; *Evans v. State Nat. Bank*, 134 U. S. 330, 33 L. ed. 917, 10 Sup. Ct. Rep. 493.

of errors, the court signed an order allowing the writ of error, and directing that the writ of error and citation, when issued, bear date April 15, 1906. Thereupon the writ of error was issued on September 12, 1906, as of April 15. The attorney for the United States moved to dismiss the writ of error because not sued out within six 543] months after the entry of *the judgment. The statute restricting the time for writs of error in such cases is § 11 of the act of Congress of March 3, 1891, and reads:

"Sec. 11. That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit court of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed." [26 Stat. at L. 829, chap. 517, U. S. Comp. Stat. 1901, p. 552.]

The writ was dismissed for the reasons given in the opinion by Morris, J., reported in 82 C. C. A. 73, 152 Fed. 925.

Mr. Charles A. Moore argued the cause, and, with Messrs. William P. Bynum, Jr., Burwell & Cansler, and Moore & Rollins, filed a brief for petitioner.

Assistant Attorney General **Fowler** argued the cause and filed a brief for respondent:

The petition for a writ of error was filed too late.

Brooks v. Norris, 11 How. 204, 13 L. ed. 665; *Polleys v. Black River Improv. Co.* 113 U. S. 81, 28 L. ed. 938, 5 Sup. Ct. Rep. 369; *Scarborough v. Pargoud*, 108 U. S. 567, 27 L. ed. 824, 2 Sup. Ct. Rep. 877; *Credit Co. v. Arkansas C. R. Co.* 128 U. S. 258, 261, 32 L. ed. 448, 449, 9 Sup. Ct. Rep. 107; *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771; *Fowler v. Hamill*, 139 U. S. 549, 35 L. ed. 266, 11 Sup. Ct. Rep. 663; *Cincinnati Safe & Lock Co. v. Grand Rapids Safety Deposit Co.* 146 U. S. 54, 36 L. ed. 885, 13 Sup. Ct. Rep. 13.

Mr. Chief Justice Fuller delivered the opinion of the court:

The rule has long been settled that a "writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly." Taney, Ch. J., in *Brooks v. Norris*, 11 How. 204, 13 L. ed. 665; *Polleys v. Black River Improv. Co.* 113 U. S. 81, 28 L. ed. 938, 5 Sup. Ct. Rep. 369; *Credit Co. v. Arkansas C. R. Co.* 128 U. S. 258, 32 L. ed. 448, 9 Sup. Ct. Rep. 107; *Farrar v.* 320

Churchill, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771; *Conboy v. First Nat. Bank*, 203 U. S. 141, 51 L. ed. 128, 27 Sup. Ct. Rep. 50.

The same rule is applicable to appeals as to writs of error. Rev. Stat. § 1012, U. S. Comp. Stat. 1901, p. 716. As Mr. Justice Bradley said in *Credit Co. v. Arkansas C. R. Co.* 128 U. S. 261, 32 L. ed. 449, 9 Sup. Ct. Rep. 107:

"An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought' until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court."

*There the appeal was allowed by [544] Mr. Justice Miller on the last day on which an appeal could be taken (Rev. Stat. § 1008), but was not presented to the court below nor filed with the clerk until five days after the prescribed time had expired. It was held that the appeal must be dismissed, and Mr. Justice Bradley added:

"The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."

In *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771, it was held that a cross appeal in equity, like other appeals, must be entered within the time limited, calculating from the date of the decree, and because in that case petition, order, and bond were not filed in the circuit court until after the lapse of two years from the entry of the decree, the cross appeal was dismissed. It was ruled also that the failure to file an assignment of errors, although required by the act of Congress and the rule of court, was not jurisdictional, and could be waived. Rev. Stat. § 997, U. S. Comp. Stat. 1901, p. 712; Rule 11; *Independent School Dist. v. Hall*, 106 U. S. 428, 27 L. ed. 237, 1 Sup. Ct. Rep. 417.

In *Conboy v. First National Bank*, 203 U. S. 141, 51 L. ed. 128, 27 Sup. Ct. Rep. 50, it was held that the time within which an appeal may be taken under § 25b of the bankruptcy act and general order in bankruptcy 36 runs from the entry of the original judgment or decree, and when it has expired is not revived by a petition for a rehearing, and that where the right of appeal has been lost, appellant cannot reinvest himself with that right by filing such petition; and *Credit Co. v. Arkansas C. R. Co.*

tween the Herberts and Wagg is as follows: On October 26, 1898, they borrowed from him \$1,000, and gave their promissory note, payable in one year, with interest after maturity at 10 per cent per annum, and as security therefor a mortgage on 80 acres belonging to her, and adjoining the town of Cleveland, in the county of Pawnee. 547] *Wagg retained \$100 as interest for the first year, and sent the mortgagors \$900. At the same time, as required by him, the plaintiffs executed to him a warranty deed for the same real estate, which was left in the bank of Cleveland in escrow as security for the note and mortgage. In closing this transaction he wrote to one of the plaintiffs a letter, in which he said: "This pays first year's interest, second year's interest is not due until the end of the second year, and six months' grace on end of this makes a full two and a half years before you allow, or I can ask for, the deed in case of default of contract."

On December 26, 1899, he withdrew the deed in escrow from the bank, and caused it be filed and recorded in the office of the register of deeds of Pawnee county. His excuse for this was that not merely was \$100 due as interest, but also that there was a default in the payment of taxes for the year 1898, and that, to protect the property, he had been obliged to pay them, amounting to \$24.94, with accrued penalty and costs. Notwithstanding he had taken and recorded this deed, which apparently transferred to him the legal title, he advised Mrs. Herbert that she might still redeem the land according to the terms of the original loan. In May, 1901, the parties, who had been talking of a settlement for some time, executed two deeds, one for Mrs. Herbert, her husband having left for parts unknown, to the defendant, of the entire 80 acres, and one from him to her of 25 acres. Thereafter this defendant platted the 55 acres as an addition to the town of Cleveland, and sold and conveyed lots to the other parties named as defendants.

In the second amended petition, the one upon which the case was tried, plaintiffs alleged that the defendant Wagg was guilty of fraud and oppression, and, taking advantage of his position and the relationship of the parties, obtained for a grossly inadequate consideration the title to the 55 acres; that, after platting, he conveyed some lots "to innocent purchasers, the exact lots and amounts received for which are 548] *not known to the plaintiff, but which amount to a large sum of money;" that he had not accounted for the moneys so wrongfully received, and that an accounting was necessary.

The case was tried by the judge without

a jury. Several hundred pages of testimony were taken, and on May 19, 1905, a decree was entered finding generally the issues in favor of the plaintiff, Mrs. Herbert, the death of whose husband had been suggested pending the suit, adjudging that the deed of May, 1901, from her to the defendant, was a mortgage, that an accounting be had, and that she be allowed to redeem. The case was reserved for further consideration and determination of the claims of, and an accounting with, the other defendants. This decree was, on October 12, 1907, affirmed by the supreme court of the territory (19 Okla. 525, 92 Pac. 250), all the defendants joining in the appeal to that court. Thereafter the case was brought here on appeal by the defendant Wagg, the other defendants not joining in the appeal, but named as parties appellees.

Mr. Arthur J. Biddison argued the cause and filed a brief for appellant:

The court could not rightfully decree plaintiff to be the owner of the property without first determining whether or not there would be anything due the defendant upon an accounting, and requiring the payment of that sum, if any was found due, before the cancellation of the settlement deed. To render the decree actually entered in this case, it was necessary for the court to assume, what nowhere appears in the evidence, that, upon an accounting between the parties, the balance would be coming to the plaintiff, and not to the defendant.

1 Pom. Eq. Jur. §§ 386, 392; *Bremer v. Calumet & C. Canal & Dock Co.* 127 Ill. 464, 18 N. E. 321; *Reed v. Lansdale*, Hardin (Ky.) 6; *Pitman v. Thornton*, 66 Me. 469; *Beach v. Cooke*, 28 N. Y. 508, 86 Am. Dec. 260; *Miller v. Gunderson*, 48 Neb. 715, 67 N. W. 769; *Cline v. Robbins*, 112 Cal. 581, 44 Pac. 1023.

Appellant became possessed of the legal title.

Bradbury v. Davenport, 120 Cal. 152, 52 Pac. 301; *Vance v. Anderson*, 113 Cal. 532, 45 Pac. 816; *Seawell v. Hendricks*, 4 Okla. 435, 46 Pac. 557; *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499.

An erroneous claim is not fraudulent.

Neel v. Carson, 47 Ark. 421, 2 S. W. 107; *Schramm v. Haupt*, 38 Minn. 379, 37 N. W. 798; *Perkins v. Trinka*, 30 Minn. 241, 15 N. W. 115; *Thompson v. Phoenix Ins. Co.* 75 Me. 55, 46 Am. Rep. 357; *Georgia Home Ins. Co. v. Warten*, 113 Ala. 479, 59 Am. St. Rep. 129, 22 So. 288; *Fish v. Cleland*, 33 Ill. 238; 14 Am. & Eng. Enc. Law, 2d ed. pp. 54, 56; *Severance v. Ash*, 81 Me. 278, 17 Atl. 69; *Morton v. Morris*, 18 C. C. A. 611, 36 U. S. App. 550, 72 Fed. 392.

It is not fraud or oppression for a creditor to threaten his debtor with a civil suit.

Stewart v. Miller (Tex.) 7. S. W. 603; *Walker v. Farmers' Bank*, 8 Houst. (Del.) 258, 10 Atl. 94, 14 Atl. 823; *Dispeau v. First Nat. Bank*, 24 R. I. 508, 53 Atl. 868; *Hilborn v. Bucknam*, 78 Me. 482, 57 Am. Rep. 816, 7 Atl. 272; 10 Am. & Eng. Enc. Law, 2d ed. p. 344.

In order to constitute undue influence the grantor must be deprived of free agency.

Conley v. Nailor, 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001; *Jackson v. Rowell*, 87 Ala. 685, 4 L.R.A. 637, 6 So. 95.

Misunderstandings or misstatements as to the party's rights will not vitiate a contract.

Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; *Allen v. Galloway*, 30 Fed. 467; *Abbott v. Treat*, 78 Me. 121, 3 Atl. 47; *Kingsbury v. Sargent*, 83 Me. 230, 22 Atl. 105; *Jones v. Foster*, 175 Ill. 459, 51 N. E. 862.

Assuming that Mrs. Herbert was ignorant of her rights, and had pleaded that fact, and had some evidence to prove such a contention, her position would not be bettered.

Foster v. Mansfield, C. & L. M. R. Co. 146 U. S. 88, 36 L. ed. 899, 13 Sup. Ct. Rep. 28; *Georgia Home Ins. Co. v. Warten*, supra; *Wetzel v. Minnesota R. Transfer Co.* 12 C. C. A. 490, 27 U. S. App. 594, 65 Fed. 23, 169 U. S. 237, 42 L. ed. 730, 18 Sup. Ct. Rep. 307.

In this territory a mortgage is a mere lien.

Yingling v. Redwine, 12 Okla. 64, 69 Pac. 810.

Where a mortgage is a mere lien, a mortgagee not in possession may purchase the mortgaged property, and such purchase is not subject to be set aside in the absence of actual fraud, duress, or undue influence.

Russell v. Southard, 12 How. 139, 13 L. ed. 927; *King v. State Mut. F. Ins. Co.* 7 Cush. 1, 54 Am. Dec. 683; 3 Pom. Eq. Jur. § 1188; *Chick v. Willetts*, 2 Kan. 390; *Trimm v. Marsh*, 54 N. Y. 599, 43 Am. Rep. 623; *Cornell v. Woodruff*, 77 N. Y. 203; *McLaughlin v. Acom*, 58 Kan. 514, 50 Pac. 441; *King v. Cushman*, 41 Ill. 31, 89 Am. Dec. 372; *Sugden, Vend. & P.* 10th ed. 338; *Adler v. Van Kirk Land & Constr. Co.* 114 Ala. 551, 62 Am. St. Rep. 133, 21 So. 490; *Walker v. Farmers' Bank*, supra; *Stoutz v. Rouse*, 84 Ala. 309, 4 So. 170; *Peagler v. Stabler*, 91 Ala. 308, 9 So. 157; *McMillan v. Jewett*, 85 Ala. 476, 5 So. 145; *Waterson v. Devoe*, 18 Kan. 223; *Watson v. Edwards*, 105 Cal. 70, 38 Pac. 527; *Green v. Butler*, 26 Cal. 595; *Amos v. Livingston*, 26 Kan. 106; *West v. Reed*, 55 Ill. 242; *Scanlan v. Scanlan*, 134 Ill. 630, 25 N. E. 652; *Goree v. Clements*, 94 Ala. 337, 10 So. 906; *Ten Eyck v. Craig*, 62 N. Y. 406; *De Mar-* 54 L. ed.

tin v. Phelan, 47 Fed. 761, 2 C. C. A. 523, 7 U. S. App. 233, 51 Fed. 865; *Martin v. New Rochelle Water Co.* 11 App. Div. 177, 42 N. Y. Supp. 893; *De Martin v. Phelan*, 115 Cal. 538, 56 Am. St. Rep. 115, 47 Pac. 356, 85 Cal. 365, 24 Pac. 725.

Duress and undue influence constitute fraud, and the same limitation applies to each.

Moore v. Moore, 56 Cal. 89; *McMillan v. Chceney*, 30 Minn. 519, 16 N. W. 404.

Knowledge of facts sufficient to induce inquiry is all that is required to set the statute in motion.

Garfield County v. Renshaw (Okla.) 22 L.R.A.(N.S.) 207, 99 Pac. 638; *Black v. Black*, 64 Kan. 689, 68 Pac. 662; *Piekenbrock v. Knoer*, 136 Iowa, 534, 114 N. W. 200; *Donaldson v. Jacobitz*, 67 Kan. 244, 72 Pac. 846.

In the case at bar, the plaintiff knew every fact constituting the alleged duress and undue influence at the time, but even if she was in ignorance of the facts, it is upon her to plead and prove the facts necessary to toll the statute.

Redd v. Brun, 84 C. C. A. 638, 157 Fed. 190.

The plaintiff was guilty of such laches and acquiescence in the final settlement as barred this action.

Alson v. Riker, 155 U. S. 448, 39 L. ed. 218, 15 Sup. Ct. Rep. 162; *Leavenworth v. Douglass*, 59 Kan. 416, 53 Pac. 123; *Thornton v. Natchez*, 63 C. C. A. 526, 129 Fed. 84; *Johnson v. Atlantic, G. & W. I. Transit Co.* 156 U. S. 618, 39 L. ed. 556, 15 Sup. Ct. Rep. 520; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 699, 42 L. ed. 631, 18 Sup. Ct. Rep. 223; *State ex rel. Schintgen v. LaCrosse*, 101 Wis. 208, 77 N. W. 167; *Graff v. Portland Town & Mineral Co.* 12 Colo. App. 106, 54 Pac. 854; *Rogers v. Van Nortwick*, 87 Wis. 414, 58 N. W. 757; *Schlawig v. Purslow*, 8 C. C. A. 315, 19 U. S. App. 501, 59 Fed. 848; *Wheeler v. McNeil*, 41 C. C. A. 604, 101 Fed. 685; *Scheffel v. Hays*, 7 C. C. A. 308, 19 U. S. App. 220, 58 Fed. 457; *Kinne v. Webb*, 4 C. C. A. 170, 12 U. S. App. 137, 54 Fed. 34; *Parsons v. McKinley*, 56 Minn. 464, 57 N. W. 1134; *Paine v. Harrison*, 38 Minn. 346, 37 N. W. 588; *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *Shelby v. Creighton*, 65 Neb. 485, 101 Am. St. Rep. 630, 91 N. W. 369; *Hoyt v. Latham*, 143 U. S. 553, 36 L. ed. 259, 12 Sup. Ct. Rep. 568; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328; 28 Am. & Eng. Enc. Law, 2d ed. p. 1027; *Litchfield v. Browne*, 17 C. C. A. 28, 36 U. S. App. 130, 70 Fed. 141; *Blackman v. Wright*, 96 Iowa, 541, 65 N. W. 843; 6 Cyc. Law & Proc. pp. 300-302; *Streight v. Junk*, 8 C. C. A. 137, 16 U. S. App. 608, 59 Fed. 321.

Sagadahoc Land Co. v. Ewing, 13 C. C. A. 83, 31 U. S. App. 102, 65 Fed. 702; *Curtis v. Lakin*, 36 C. C. A. 222, 94 Fed. 251; *Day v. Ft. Scott Invest. & Improv. Co.* 153 Ill. 293, 38 N. E. 567; *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636; *Sheffield Land, Iron, & Coal Co. v. Neill*, 87 Ala. 158, 6 So. 1; *Hatch v. Ferguson*, 57 Fed. 959, 14 C. C. A. 41, 29 U. S. App. 540, 66 Fed. 668; *Connely v. Rue*, 148 Ill. 207, 35 N. E. 824; *Arnold v. Hagerman*, 45 N. J. Eq. 186, 14 Am. St. Rep. 712, 17 Atl. 93; *Mulvey v. Gibbons*, 87 Ill. 367; *Fraker v. Houck*, 36 Fed. 403; *Goodell v. Dewey*, 100 Ill. 308; *Bedford v. Moore*, 54 Mo. 448; *Learned v. Foster*, 117 Mass. 365; *Schradski v. Albright*, 93 Mo. 42, 5 S. W. 807; *Kline v. Vogel*, 90 Mo. 239, 1 S. W. 733, 2 S. W. 408; *Schlawig v. Fleckenstein*, 80 Iowa, 668, 45 N. W. 770; *Hamilton v. Lubukee*, 51 Ill. 415, 99 Am. Dec. 562; *Parkhurst v. Van Cortland*, 14 Johns. 15, 7 Am. Dec. 427; 2 Pom. Eq. Jur. § 965; *Ward v. Sherman*, 192 U. S. 168, 48 L. ed. 391, 24 Sup. Ct. Rep. 227; *Ellis v. Ellis*, 5 Tex. Civ. App. 46, 23 S. W. 996.

The plaintiff was and is estopped to set aside the transaction, by having taken conscious advantage thereof.

Bell v. Keepers, 39 Kan. 105, 17 Pac. 785; *Shubert v. Stanley*, 52 Ind. 46; *Hardy v. Keene*, 67 N. H. 166, 32 Atl. 759; *Bedier v. Reaume*, 95 Mich. 518, 55 N. W. 366; *Knaggs v. Mastin*, 9 Kan. 532; *Sliney v. Davis*, 11 Colo. App. 480, 53 Pac. 686; 6 Cyc. Law & Proc. p. 611; *Engle v. Burns*, 5 Call (Va.) 463, 2 Am. Dec. 593; *Davis v. Simpson*, 5 Harr. & J. 147, 9 Am. Dec. 500.

Mr. **Watson E. Coleman** submitted the cause for appellees. Mr. **E. M. Clark** was on the brief:

Russell v. Southard, 12 How. 139, 13 L. ed. 927, is the controlling case on all points involved in this cause, and is directly in point.

Mr. Justice **Brewer** delivered the opinion of the court:

The petition charged that the defendant **Wagg** was guilty of fraudulent, wrongful, oppressive, and unjust conduct, and that through such conduct he obtained the deed of May 28, 1901. The trial court, as stated, found generally in plaintiff's favor. The supreme court, in an elaborate opinion, in 551] which it *narrated fully the details of the transactions between these parties and the testimony given on the hearing, closed its recital in these words:

"It must therefore follow as an irresistible conclusion that the allegations in the

petition of fraud, oppression, undue influence, and inadequate consideration were fully sustained by the evidence, and we are unable to perceive how the trial court could have reached any other fair, just, and rational conclusion upon the entire evidence as disclosed by this record."

The testimony as to the value of the property at the time of the settlement in May, 1901, was conflicting, some placing it at \$100 per acre. In reference to this conflict the court said:

"It is a settled rule of this court, and one which we have reiterated and reiterated time and again, that where the evidence reasonably sustains the finding and judgment of the court, or where the evidence is conflicting, it will not be disturbed by this court."

Evidently the supreme court believed that the defendant has acquired in settlement of a debt a tract of land of far greater value than the amount of the debt, and that this was accomplished by fraud, oppression, and undue influence. Upon these facts a decree setting aside the conveyance was undoubtedly right.

Counsel for defendant, on his appeal to this court, has filed a brief of over 150 pages, in which he narrates the facts as they appear to him, and cites many authorities as to the circumstances which will uphold a conveyance upon such or similar facts. Of course, upon the face of the papers, the deed of May, 1901, vested in the defendant the title to the 55 acres, but it is well established that, in a suit in equity between parties, in which fraud, oppression, and undue influence are charged, the court is not concluded by that which appears on the face of the papers, but may institute an inquiry into the real facts of the transactions. So thoroughly is this doctrine established that any discussion of the cases in this and other courts affirming it would be useless. They rest upon elementary *principles of equity. It is sufficient [552 to refer to *Russell v. Southard*, 12 How. 139, 13 L. ed. 927, and the many authorities cited in the opinion.

Counsel further contends that the decree is erroneous, in that it adjudges that the deed of May, 1901, to defendant was a mortgage, and as such only a lien upon the property; that there is no evidence that this deed was not intended as a conveyance, or that it was intended as a mortgage; and that courts do not make contracts for parties. But this contention presents a mere technical matter. The petition alleges, in addition to the averment that the deed was

obtained wrongfully and fraudulently, "that the only consideration received by said plaintiff for the said purported deed, marked 'Exhibit E' (the deed to defendant of May, 1901, of the entire tract), was a relinquishment of the said mortgage herein referred to as 'Exhibit B' (the original mortgage given by Mr. and Mrs. Herbert to defendant)." In other words, whatever technical criticism may be made upon the form of the decree, it was in substance a finding and decree that the deed of May, 1901, was void, as having been obtained by the fraudulent conduct of the defendant, and that, being set aside, left the property subject to the lien of the original mortgage given October 24, 1898. Of course, the act of Wagg in taking from the bank the deed placed in escrow, and having it recorded, may, in view of his assurances to Mrs. Herbert, be regarded as immaterial. Equitably, the relation of mortgagor and mortgagee was not disturbed. The court did not make a new contract for the parties, but, leaving the mortgage valid and binding, decreed the invalidity of a subsequent conveyance, and also ordered an accounting by the defendant as a mortgagee in possession.

There is in this case no lapse of time, no matter of estoppel, which, so far as the defendant Wagg is concerned, forbids a court of equity from investigating and determining the real facts. Mrs. Herbert's deed to defendant was executed May 28, 1901, and this suit was commenced June 13, 1903, less than two years and a month from the 553] date of the wrong complained of. While laches is often spoken of as the equitable equivalent of the legal statute of limitations, yet there is no fixed time which makes it an absolute bar. In *Russell v. Southard*, supra, there was between the fraudulent transaction and the commencement of the suit a lapse of nineteen years and eight months, and it was held that that was not sufficient, the court saying (p. 155):

"The absence of all valuable consideration for the surrender of the equity, and the circumstances of distress under which it was made, and which, so far as it appears, continued to exist down to the filing of the bill, coupled with the conviction, which we think Russell mistakenly entertained, that his rights were probably destroyed, must prevent us from allowing the lapse of time to be a positive bar."

The rights of purchasers from Wagg subsequent to May 28, 1901, are protected by the accounting ordered, and as they did not appeal from the decree, it must be assumed that they were satisfied with it.

The decree of the Supreme Court of the Territory of Oklahoma is affirmed.

54 L. ed.

*FREDERICK J. LOWREY, George [554 P. Castle, and William O. Smith, Trustees, Appts.,

v.

TERRITORY OF HAWAII.

(See S. C. Reporter's ed. 554-580.)

Real property — condition subsequent — religious instruction.

1. Religious teaching and training in the doctrines represented by the mission are required to satisfy the condition on which such mission was transferred by the American Board of Commissioners for Foreign Missions to the Hawaiian government, viz., that the government should continue the same as an institution for the cultivation of sound literature and solid science, and should teach no religious tenet or doctrine contrary to those theretofore inculcated by the mission, as set forth in a confession of faith, where the government knew, when accepting the transfer of the mission to its "fostering care and patronage," that the mission was founded to convert the Hawaiians to Christianity, and to educate young men to be Christian ministers, and for nearly thirty years recognized its obligation under the agreement to afford religious instruction in those doctrines.

[For other cases, see Real Property, 13-25, in Digest Sup. Ct. 1908.]

Limitation of actions — trust — breach of condition subsequent.

2. A mere change in the course of studies, contrary to the condition on which a Protestant mission was transferred by the American Board of Commissioners for Foreign Missions to the Hawaiian government, viz., that the government should continue the same as an institution for the cultivation of sound literature and solid science, and should teach no religious tenet or doctrine contrary to those theretofore inculcated by the mission, as set forth in a confession of faith, the institution, in case of breach of such condition, to revert to the mission, with an alternative, at the election of the government, to pay a stipulated sum, does not instantly operate to make the grantor of the property a claimant for money, against whom the statute of limitations immediately begins to run.

[For other cases, see Limitation of Actions, 11. d, in Digest Sup. Ct. 1908.]

NOTE. — On conditions precedent and subsequent—see note to *Taylor v. Mason*, 6 L. ed. U. S. 101.

On condition in deed that land is to be used for a specified charitable, public, or quasi public purpose—see note to *Greene v. O'Connor*, 19 L.R.A. 263.

On statutes of limitation, and lapse of time as bar to enforcing trust—see notes to *Prevost v. Gratz*, 5 L. ed. U. S. 311; *Thomas v. Brookenbrough*, 6 L. ed. U. S. 287; *Philippi v. Philippi*, 29 L. ed. U. S. 336; *Ducie v. Ford*, 34 L. ed. U. S. 1091; and *Gisborn v. Charter Oak L. Ins. Co.* 35 L. ed. U. S. 1029.

Trusts — interest of trustee — right to enforce condition subsequent.

3. The right to receive a reconveyance of the school, or of the stipulated sum in lieu of such reconveyance, in case of the breach of the condition on which a Protestant mission was transferred by the American Board of Commissioners for Foreign Missions to the Hawaiian government, *viz.*, that the government should continue the same as an institution for the cultivation of sound literature and solid science, and should teach no religious tenet or doctrine contrary to those theretofore inculcated by the mission, as set forth in a confession of faith, passed under a deed from such board to certain named trustees, which purports to convey, for the purposes of the trust, every interest in the property which the grantor had, reserving to the grantor the right to direct any change or alteration in the disposition of the income and proceeds of the trust estate, or to remove any trustee, or fill any vacancy.

[For other cases, see Trusts, II. b, in Digest Sup. Ct. 1908.]

[No. 469.]

Argued December 6, 7, 1909. Decided January 24, 1910.

APPEAL from the Supreme Court of the Territory of Hawaii to review a judgment denying the right to recover from the Territory a sum of money as the alternative of the reconveyance of certain property conveyed to the Hawaiian government, for the nonfulfilment of the conditions upon which the property was conveyed. Reversed and remanded with directions to enter judgment for appellants.

See same case below, on first appeal, 17 Haw. 285; on second appeal, 19 Haw. 123.

The facts are stated in the opinion.

Mr. David L. Withington argued the cause and filed a brief for appellants:

A trust of this kind for religion is valid, and so long as there is anyone in interest demanding its fulfilment, it must be carried out.

Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Vidal v. Philadelphia, 2 How. 127, 11 L. ed. 205; General Assembly v. Overtoun [1904] A. C. 515; Schnorr's Appeal, 67 Pa. 138, 5 Am. Rep. 415; St. Mary's Church Case, 7 Serg. & R. 517; Den ex dem. Day v. Bolton, 12 N. J. L. 266; Craigdallie v. Aikman, 1 Dow, P. C. 1; Foley v. Wontner, 2 Jac. & W. 245; Leslie v. Birnie, 2 Russ. Ch. 114; Davis v. Jenkins, 3 Ves. & B. 156; Milligan v. Mitchell, 3 Myl. & C. 72, 1 Myl. & K. 446; Rosh's Appeal, 69 Pa. 462, 8 Am. Rep. 275; Rottman v. Bartling, 22 Neb. 375, 35 N. W. 126; Atty. Gen.

v. Hutton, 7 Ir. Eq. Rep. 612; Miller v. Gable, 2 Denio, 548; 2 Story, Eq. § 1191a; Atty. Gen. v. Pearson, 3 Meriv. 353, 7 Sim. 290, 5 Eng. Rul. Cas. 689; Shore v. Atty. Gen. 9 Clark & F. 355; Atty. Gen. v. Shore, 11 Sim. 592; Atty. Gen. v. Wilson, 16 Sim. 210; Atty. Gen. v. Drummond, 1 Connor & L. 210, 1 Drury & War. 353; Christian Church v. Carpenter, 108 Iowa, 650, 79 N. W. 375; Cape v. Plymouth Cong. Church, 117 Wis. 155, 93 N. W. 449; Rodgers v. Burnett, 108 Tenn. 183, 65 S. W. 408; Lamb v. Cain, 129 Ind. 486, 14 L.R.A. 518, 29 N. E. 13; Smith v. Pedigo, 145 Ind. 385, 19 L.R.A. 439, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; Princeton v. Adams, 10 Cush. 132; Bear v. Heasley, 98 Mich. 279, 24 L.R.A. 615, 57 N. W. 270; Baker v. Dueker, 79 Cal. 365, 21 Pac. 764; Peace v. First Christian Church, 20 Tex. Civ. App. 85, 48 S. W. 534; Greek Catholic Church v. Orthodox Greek Church, 195 Pa. 425, 46 Atl. 72; Doehkus v. Lithuanian Ben. Soc. 206 Pa. 25, 55 Atl. 779; Clark v. Brown (Tex. Civ. App.) 108 S. W. 421; Mack v. Kime, 129 Ga. 1, 24 L.R.A. (N.S.) 675, 58 S. E. 184; Marien v. Evangelical Creed Congregation, 132 Wis. 650, 113 N. W. 66.

This property, whether in the hands of the mission or government or the trustees, was impressed with a trust for a religious use, and the failure to enforce a trust is not barred by mere lapse of time.

Oliver v. Piatt, 3 How. 333, 411, 11 L. ed. 622, 657; New York Indians v. United States, 170 U. S. 1, 35, 42 L. ed. 927, 939, 18 Sup. Ct. Rep. 531.

Mere silence or delay will not defeat the action where the obligation is continuous.

Tynan v. Warren, 53 N. J. Eq. 313, 31 Atl. 596; Union College v. New York, 173 N. Y. 38, 93 Am. St. Rep. 569, 65 N. E. 853; Ryder v. Loomis, 161 Mass. 161, 36 N. E. 836; Stockbridge Iron Co. v. Hudson Iron Co. 107 Mass. 290; Royal v. Aultman & T. Co. 116 Ind. 424, 2 L.R.A. 526, 19 N. E. 202; Angell, Limitations of Actions, 5th ed. § 72; Ganley v. Troy City Nat. Bank, 98 N. Y. 487; Hubbard v. Hubbard, 97 Mass. 188, 93 Am. Dec. 75; Payson v. Burnham, 141 Mass. 547, 6 N. E. 708; Linzee v. Mixer, 101 Mass. 512; Bacon v. Sandberg, 179 Mass. 396, 60 N. E. 936; Coleman v. Whitney, 62 Vt. 123, 9 L.R.A. 517, 20 Atl. 322; Gray v. Blanchard, 8 Pick. 284; Maginnis v. Knickerbocker Ice Co. 112 Wis. 385, 69 L.R.A. 833, 88 N. W. 300; Jackson ex dem. Brouek v. Crysler, 1 Johns. Cas. 125; Plumb v. Tubbs, 41 N. Y. 442; Congregational Church Bldg. Soc. v. Osborn, 153 Cal. 197, 94 Pac. 881; Howe v. Lowell, 171 Mass. 575, 51 N. E. 536; Gall v. Gall, 126 Wis. 390, 5 L.R.A. (N.S.) 603, 105 N. W. 953; Blecker v. Smith, 13 Wend. 530; Doe ex

dem. *Ambler v. Woodbridge*, 9 Barn. & C. 376; *Dakin v. Williams*, 17 Wend. 447; *Doe ex dem. Baker v. Jones*, 5 Exch. 498; *Farwell v. Easton*, 63 Mo. 446; *Alexander v. Hodges*, 41 Mich. 691, 3 N. W. 187; *Adams v. Ore Knob Copper Co.* 4 Hughes, 589, 7 Fed. 634.

Demand or an equivalent act is necessary to set the statute in motion.

Preston v. Bosworth, 153 Ind. 458, 74 Am. St. Rep. 313, 55 N. E. 224; *Little Falls Water Power Co. v. Mahan*, 69 Minn. 253, 72 N. W. 69; *Lewis v. Lewis*, 74 Conn. 630, 92 Am. St. Rep. 240, 51 Atl. 854; *Hadley v. Hadley Mfg. Co.* 4 Gray, 140; *Crane v. Hyde Park*, 135 Mass. 147; *Merrifield v. Cobleigh*, 4 Cush. 178; *Ward's Appeal*, 35 Conn. 161; *Yeary v. Cummins*, 28 Tex. 91; *Link v. Jarvis (Cal.)* 33 Pac. 206; *Norris v. Harris*, 15 Cal. 226; *Eames v. Savage*, 14 Mass. 425; *United States v. Louisiana*, 123 U. S. 32, 31 L. ed. 69, 8 Sup. Ct. Rep. 17; *Bonniwell v. Madison*, 107 Iowa, 85, 77 N. W. 530; *French v. Merrill*, 132 Mass. 525; *Cromwell v. Norton*, 193 Mass. 291, 118 Am. St. Rep. 499, 79 N. E. 433; *Stretch v. Sehenck*, 23 Ind. 77; *Parks v. Satterthwaite*, 132 Ind. 411, 32 N. E. 82; *Horner v. Clark*, 27 Ind. App. 6, 60 N. E. 732; *Lydig v. Braman*, 177 Mass. 212, 58 N. E. 696; *Babcock v. Wyman*, 19 How. 289, 15 L. ed. 644; *Stringer v. Stringer*, 93 Ga. 320, 20 S. E. 242; *Parker v. Gaines (Ark.)* 11 S. W. 693; *Goodwin v. Ray*, 108 Tenn. 614, 91 Am. St. Rep. 761, 69 S. W. 730; *Bolles v. Stearns*, 11 Cush. 320; *Owen v. Higgins*, 113 Iowa, 735, 84 N. W. 713; *St. Louis, I. M. & S. R. Co. v. McGee*, 115 U. S. 469, 29 L. ed. 446, 6 Sup. Ct. Rep. 123; *Bybee v. Oregon & C. R. Co.* 139 U. S. 663, 35 L. ed. 305, 11 Sup. Ct. Rep. 641; *Topham v. Braddick*, 1 Taunt. 572; *Wright v. Hamilton*, 2 Bail. L. 51, 21 Am. Dec. 513; *Col-lard v. Tuttle*, 4 Vt. 491, 24 Am. Dec. 627.

The agreement being in the alternative, until a refusal to convey, the right to the money demand would not arise.

Mayer v. Dwinell, 29 Vt. 298; *Foster v. Goldschmidt*, 22 Blatchf. 287, 21 Fed. 70; *Dessert v. Scott*, 58 Wis. 390, 17 N. W. 14; *Smith v. Sanborn*, 11 Johns. 59; *Patelin v. Swift*, 21 Vt. 292; *Ross v. Sutton*, 1 Bail. L. 126, 19 Am. Dec. 660; *Barker v. Jones*, 8 N. H. 413; *White v. Toneray*, 5 Gratt. 179; *Ramsey v. Waltham*, 1 Mo. 395; *Phillips v. Cornelius (Miss.)* 28 So. 371; *McMillan v. Philadelphia Co.* 159 Pa. 142, 28 Atl. 220; *Center v. Center*, 38 N. H. 318; *Litchfield v. Irvin*, 51 N. Y. 51; *Hartman v. United States*, 35 Ct. Cl. 106.

The plaintiffs are entitled to maintain this action.

McCandless v. Castle, 19 Haw. 518; *Oahu R. & Land Co. v. Armstrong*, 18 Haw. 261. 54 L. ed.

Mr. C. R. Hemenway argued the cause and filed a brief for appellee:

If any breach of the condition respecting religious instruction has occurred, it occurred as early as 1877, and any action therefor is barred by the statute of limitations.

Hartman v. United States, 35 Ct. Cl. 106; *Butler v. United States*, 23 Ct. Cl. 335; *Carlisle v. United States*, 29 Ct. Cl. 414; *Aachen & M. F. Ins. Co. v. Morton*, 15 L.R.A.(N.S.) 156, 84 C. C. A. 366, 156 Fed. 654, 13 A. & E. Ann. Cas. 692; *Brown v. Houdlette*, 10 Me. 399; *Davis v. Brown*, 98 Ky. 475, 32 S. W. 614, 36 S. W. 534; *Wileox v. Plummer*, 4 Pet. 172, 7 L. ed. 821; *Finn v. United States*, 123 U. S. 227, 31 L. ed. 128, 8 Sup. Ct. Rep. 82; *United States v. Connor*, 138 U. S. 61, 66, 34 L. ed. 860, 862, 11 Sup. Ct. Rep. 229; *United States v. Greathouse*, 166 U. S. 602, 41 L. ed. 1130, 17 L. ed. 701; *United States v. Wardwell*, 172 U. S. 48, 43 L. ed. 360, 19 Sup. Ct. Rep. 86; *Kendall v. United States*, 107 U. S. 123, 27 L. ed. 437, 2 Sup. Ct. Rep. 277; *DeArn-aud v. United States*, 151 U. S. 483, 494, 38 L. ed. 244, 248, 14 Sup. Ct. Rep. 374.

Contracts under which a person receives property and assumes mere personal liability, the property itself not being impressed with the character of a trust fund, are enforceable as contracts, but do not create a trust.

Riddle v. Beattie, 77 Iowa, 168, 41 N. W. 606.

Even if it could be considered that the agreement before the court constitutes in some aspects a trust, then it is submitted that it is not such a trust as would be exempt from the operation of the statute. Not all trusts are so exempt.

Kane v. Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417.

Whenever there is an adequate remedy at law, the statute will be held to apply, even though relief may be sought in equity; and the statute will run from the time the first cause of action accrues.

Jewell v. Jewell, 139 Mich. 578, 102 N. W. 1659; *Hayward v. Gunn*, 82 Ill. 385; *Agens v. Agens*, 50 N. J. Eq. 566, 25 Atl. 707; *Roberts v. Ely*, 113 N. Y. 128, 20 N. E. 606; *Egerton v. Logan*, 81 N. C. 172; *Townsend v. Eichelberger*, 51 Ohio St. 213, 38 N. E. 207; *Hostetter v. Hollinger*, 117 Pa. 606, 12 Atl. 741; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; *Merton v. O'Brien*, 117 Wis. 437, 94 N. W. 340; *Cone v. Dunham*, 59 Conn. 145, 8 L.R.A. 647, 20 Atl. 311; *Farnam v. Brooks*, 9 Pick. 242; *Merrill v. Monticello*, 66 Fed. 165, 18 C. C. A. 636, 34 U. S. App. 615, 72 Fed. 462.

The findings of fact from which the conclusion reached by the supreme court of Hawaii necessarily follows are binding and conclusive upon this court.

Halsell v. Renfrow, 202 U. S. 287, 50 L. ed. 1032, 26 Sup. Ct. Rep. 610, 6 A. & E. Ann. Cas. 189; *San Pedro & C. del A. Co. v. United States*, 146 U. S. 120, 36 L. ed. 911, 13 Sup. Ct. Rep. 94; *Zeckendorf v. Johnson*, 123 U. S. 617, 31 L. ed. 277, 8 Sup. Ct. Rep. 261; *Eilers v. Boatman*, 111 U. S. 356, 28 L. ed. 454, 4 Sup. Ct. Rep. 432; *Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350; *Simms v. Simms*, 175 U. S. 162, 44 L. ed. 115, 20 Sup. Ct. Rep. 58; *Holloway v. Dunham*, 170 U. S. 615, 42 L. ed. 1165, 18 Sup. Ct. Rep. 784; *Idaho & O. Land Improv. Co. v. Bradbury*, 132 U. S. 509, 33 L. ed. 433, 10 Sup. Ct. Rep. 177; *Grayson v. Lynch*, 163 U. S. 468, 41 L. ed. 230, 16 Sup. Ct. Rep. 1064.

Plaintiffs are not entitled to maintain this or any cause of action for a breach of this agreement.

Peacock v. Hawaii, 11 Haw. 404; *Kendall v. United States*, 107 U. S. 123, 27 L. ed. 437, 2 Sup. Ct. Rep. 277; *Carlisle v. United States*, 29 Ct. Cl. 414; *Christie-Street Commission Co. v. United States*, 129 Fed. 506; *De Arnaud v. United States*, *supra*; *United States v. Utz*, 26 C. C. A. 184, 39 U. S. App. 630, 80 Fed. 851; *Finn v. United States*, 123 U. S. 227, 31 L. ed. 128, 8 Sup. Ct. Rep. 82.

Mr. Justice McKenna delivered the opinion of the court:

This is the second appeal in this case. The first appeal was from a judgment in favor of the territory, entered upon demurrer to the complaint, which judgment was reversed. 206 U. S. 206, 51 L. ed. 1026, 27 Sup. Ct. Rep. 622.

560] *The action is for the sum of \$15,000, which the Hawaiian government reserved the right to pay, instead of deeding back certain lands conveyed to her by the American Board of Commissioners for Foreign Missions in 1849. The facts as alleged in the complaint are set out with considerable fullness in the report of the case on the first appeal and need not be repeated. Upon the return of the case to the supreme court of the territory, an answer was filed, denying "all and singular the matters, allegations, and things set forth," and giving notice that the territory would "rely in making its defense *inter alia* on the statute of frauds." Subsequently the plaintiffs made a motion upon the record and "upon the judgment in the Supreme Court of the United States" for judgment. The territory made a motion to amend its answer to set up the statute of limitations. The plaintiffs' motion was

denied, that of the territory was granted, to which rulings plaintiffs excepted. Testimony was taken, which was directed principally to the question of the breach of the condition upon which the conveyance to the government was made. The court, in its opinion, says that, in addition to the "large amount of documentary and other evidence," it has "also referred to proceedings of a public nature, of which it could ordinarily take judicial notice, and to documents from the public archives, when specially referred to in the exhibits on file." Concluding from this and the other evidence that the plaintiffs were not entitled to recover, it rendered judgment for the territory.

The decision on the first appeal is an important factor in the determination of this, for upon that, as a guide, the supreme court of the territory accepted evidence and determined the meaning of the agreement by which the lands were conveyed.

The American Board of Foreign Missions for many years prior to 1850 conducted a Protestant mission in the Hawaiian Islands, and, as an essential part of its work, carried on many schools. Its most notable work was centered in a school, established in 1831, at Lahainaluna, on the island of Maui, where *it possessed a large [561 tract of land. The purpose for which the conveyance of this school to the Hawaiian government was made, and the course of instruction in it, before and after the conveyance, as explaining that purpose, make the controversy in this case. It is contended by appellants that the course of instruction in the institution comprised not only the usual topics belonging to secular learning, but included also direct religious teaching and training in the doctrine represented by the mission; that is, the doctrines of the Congregational and Presbyterian churches of the United States, and was expressed in a "confession of faith," which was attached to the agreement that transferred the property to the Hawaiian government. "The central purpose of the agreement was," counsel for appellants contended on the other appeal, "to 'continue' an established institution, the keystone of a system with defined and well-known aims, the chief being the promotion of religion by instruction in definite religious truth." The opposing contention was that the doctrine to be taught was not specialized, that there were no restrictions upon the course of instruction, except that it should not be, using the words of the agreement, "contrary to those theretofore inculcated by the mission;" and, insisting that those words constituted the complete measure of the obligation of the government, resisted the attempt of the appellants to go outside of them to ascertain the purpose of the parties. These conten-

tions were considered and the grounds of them accurately distinguished. The contention of the appellants was accepted. It is not necessary to repeat our reasoning at length. Our conclusion was that the Hawaiian government engaged to teach not only secular science, but the definite religious doctrine expressed in the confession of faith attached to the agreement. The latter, we said, was "not in a formally executed paper," but was found in a correspondence. "And taking the whole of it," it was said, "there is very little aid from extrinsic evidence needed to demonstrate its meaning and purpose." And after considering some parts of the correspondence, we concluded 562] *as follows: "The correspondence concerned the transfer of a school established in 1835, the design of which was to perpetuate the Christian religion, and with an object described to be 'still more definite and of equal or greater importance,'—that is, 'to educate young men to be Christian ministers.' A religious instruction was prescribed. Of this the government was informed when the proposition was made to transfer the school to 'its fostering care and patronage.' And the government accepted the grant, accepted as it was tendered, and necessarily for the purpose it was tendered."

The right to resort to extrinsic evidence, against the contention of the territory, was decided, but the amount of aid that the correspondence needed or received from such evidence we explicitly pointed out. We said that the "justness" of the conclusion expressed in the paragraph quoted above was, without extrinsic evidence, "almost indisputable," and that it became "indisputable if extrinsic evidence be considered." In other words, it was decided that the probative force of the correspondence was sufficient, without other evidence, to establish the agreement in accordance with the contention of appellants. The supreme court of the territory underestimated this ruling, and entered into an extensive inquiry of circumstances, from which it decided the agreement to be what this court had decided it not to be.

It may be that we could rest the case on the prior decision without considering the new evidence which was received, or, rather, the new facts which are expressed in the findings of the supreme court. But as that learned court based its decision upon them, and the territory earnestly urges them as taking this appeal out of the ruling on the former appeal, we have given consideration to them. We cannot, however, without extending this opinion to a great length, quote them in full, and will, therefore, only state their character and what they establish or tend to establish.

54 L. ed.

The findings set forth the circumstances which preceded *the transfer to the [563 government, as exhibited in the observations of Commodore Wilkes in 1841, and the report of the principal of the school in 1848. Commodore Wilkes observed a defective and inefficient administration of the affairs of the school and its funds, which might have been "avoided" by a full examination of the subject by "practical men," and a decadence in consequence from its "meridian." The principal report personified the school and made it conscious of the loss of admiration, but he said "she stands at her post, and is contented to do good in a more humble way than when the friends and lovers of her youth stood by and praised her." He said that during 1849 studies at the institution were practically broken up by reason of various sicknesses which attacked the principal's family, and that, in consequence, "school operations were suspended in February, and no new class entered pending the action of the general meeting of the mission," and he "thought it best" to await that meeting, for, as he said, "the late unparalleled diminution of the population may also have some effect in modifying the views of the mission in regard to this school, and render it expedient in their minds to alter its operations or the number of its scholars." If a new class was to be called, he said, he had "a few considerations to present to the brethren to guide them in their selections." And again: "Many thousands of dollars have been wasted or unprofitably laid out upon young men sent there of only middling ability and low morals. It has been with regret that the teachers have had to select, with a few good ones, many young men of doubtful talents and worth to make up a class, when they felt there were enough in the nation that would do honor to their training at the seminary."

"Besides these conditions," the findings of the court recite, "and the emigration to the gold fields of California, the general meeting had to face an embarrassing condition of the funds of the home board and the consequent curtailment of the allowance to the mission. (From the report of the committee, *April 25, 1849.) It was under these [564 circumstances that the offer of transfer to the Hawaiian government was made."

It may be well to comment on the facts as we go along, and we may say we see nothing in these declarations and reports that militates with the views of the agreement expressed in our former opinion. We see no intention in them or reason for abandoning the purpose for which the school was founded. Indeed, intention and reason for its better fulfilment by a transfer to the government. The school would receive more

constant support under the government. The young men of "doubtful ability and low morals" might not seek its instruction, could be more easily rejected if they did so, and those "in the nation that would do honor to their training at the seminary" might be attracted by the sanction which would be given to their ability and morals. That this was the hope which induced the transfer is almost expressed in the correspondence which forms the agreement.

This was in effect declared in the opinion on the first appeal, and the quotation from that becomes apposite. Stating a part of the correspondence which contained the offer to the government, we said:

"The mission reminds the minister of public instruction that the seminary was established in 1831, 'to promote the diffusion of enlightened literature and Christianity throughout the islands,' and that it had been unceasingly watched over, cherished, and cared for by the mission, and that \$77,000 had been expended for its benefit. It was stated that, in consequence of the debts incurred 'in the prosecution of its labors of benevolence and mercy,' the American Board of Commissioners of Foreign Missions was compelled to diminish its grants to each of the missions under its care, including the Hawaiian mission, and that the latter, for that reason, would be 'unable to carry forward its operations with the vigor to be desired in all of its departments of labor.' In view of these facts, it was stated and believed that, under the circumstances, the transfer of the institution 'to the fostering care and patronage of the *government' would 'promote the highest interest of the Hawaiian people.' An offer was then made to transfer the seminary, with the conditions which we have referred to. A confession of faith was inclosed. The government modified the proposal by reserving the right to pay \$15,000, as an alternative to the reversion of the property to the mission if the government should not fulfil the conditions of the grant. The modification was accepted, and in a subsequent communication a new confession of faith was substituted for that originally proposed."

And from this, it followed, we further said, as we have seen, that the school was established "'to perpetuate the Christian religion,'" and had purpose, still more definite and of equal or greater importance; that is, "'to educate young men to be Christian ministers.'" And this "the government was informed of when the proposition was made to transfer the school to its 'fostering care and patronage.'"

There are, however, other findings of fact. It is found that there was substituted for the first confession of faith, which was

printed, a second confession of faith, which was written. In a letter which accompanied the latter, it stated that the first was "not so distinctive as to present a barrier to the introduction there (in the school) of other and deleterious doctrines not specified in the said confession." It is said by the supreme court of the territory that it was "worthy of note" that it did not appear that the "prudential committee" had been advised of the substitution. We think this unimportant. Even if it did not, therefore, become a part of the agreement, it certainly expressed the purpose of the agreement. It was, however, considered by the parties as a part of the agreement.

The curriculum of the school from 1835 to 1863 is inserted in the findings, by which studies were arranged for a course of four years. This appears:

"The laws of the high school were read, amended, and the different articles adopted as follows:

"Whereas in the good providences of God, the experiment *of the high school es- [566] tablished by the mission in 1831 having proved successful, and having accomplished all that could reasonably have been expected, and the necessity of such an institution still continuing, the directors now lay before the mission a more definite and enlarged plan of operations, such as they suppose from actual experiment to be practicable, and of the highest interests to the moral, social, literary, and spiritual condition of this people."

The design of the high school is set forth in six chapters, which express provisions for teaching general literature and the sciences, and the following, being paragraphs one and four and paragraph five of chapter three:

"To aid the mission in accomplishing the great work for which they were sent hither, that is, to introduce and perpetuate the religion of our Lord and Saviour, Jesus Christ, with all its accompanying blessings, civil, literary, and religious.

"4. Another object, still more definite and of equal or greater importance, is to educate young men of piety and promising talents, with a view to their becoming assistant teachers of religion or fellow laborers with us in disseminating the gospel of Jesus Christ to their dying fellowmen.

"5. He shall also watch over the moral and spiritual interests of the scholars; he shall cause a portion of their weekly studies to be directed to the great truths of the Bible, that while they increase in science and literature, they may have the means of that knowledge which makes wise unto salvation."

It is found, however, that "so far as the

proposed curriculum contemplated the preparation of graduates of the school for immediate service in the ministry, it was never carried out, though frequently referred to by contemporaneous writers as the eventual design of the school."

It is further found that the main object of the school from 1835 to 1839 was the education of Hawaiian teachers for the common schools. The curriculums of other years are given, and it is found that, "after the transfer to the government, the *institution continued to be primarily for the education of teachers (Report Minister Public Instruction, 1850, p. 26; Report President Board of Education, 1872, p. 4), from the middle classes of the Hawaiian people (Report President Board of Education, 1886, p. 3). Education for the ministry is not referred to in any official report as one of the purposes of the school, but the most that could be said is the statement by Rufus Anderson, secretary of the A. B. C. F. M.: "A year spent in theological study with a missionary is thought sufficient to prepare a pious graduate of Lahainaluna for the pastoral office." Anderson, Hawaiian Islands, p. 189.

And there are findings as to the events of 1863, 1864, and 1865, the principal of which was the opinion of the attorney general, and a dispute between the mission and the board of education as to the right of appointment of teachers.

The opinion of the attorney general recognized that the school was received by the government and was held by it, under conditions which, if not performed, would require the government to reconvey the property or pay the mission \$15,000.

The dispute over the appointment of teachers arose in April, 1865. In a letter to the president of the board of education, the mission asserted the right to appoint, and suggested the names of certain persons. The board of education replied, asking for the grounds "on which any such claim to interfere in the internal management of said school appears to you to be founded." The mission replied, asserting the right of appointment as a means of accomplishing the purpose of the transfer. It was said that nothing was "more evident than that the mission intended carefully to guard against the introduction into the institution of any doctrine, practice, or influence antagonistic to its own faith and practice and form of Christian worship." And they asserted, further, that "nothing could be clearer than that the missionaries contemplated still to have this a co-operating institution to aid them, as it had already done in times past, 568] in the diffusion of *solid science and Christianity as they understood it, as benevolent Congregationalists and Presbyterians

of the United States, who had contributed to build and sustain the institution, understood and practised it." And it was said that "an object so dear to them would not have been given up without the intention of so guarding in the future as to have it continue to aid instead of defeat the purpose for which it was founded." In further emphasis of this intention the writer of the letter said that he knew "that the intention was to secure the continued co-operation of the seminary in the work which the American Board was prosecuting" there "through its mission." The board of education admitted that the institution was to be continued so as to "aid instead of defeating the purpose for which it was founded," and said "nothing had been done to justify the intimation that the board" had "any desire to defeat such purpose, or introduce any doctrine, practice, or influence antagonistic to the faith, practice, and forms of worship of the founders." The board dissented from the view expressed by the mission, that the appointment of any man not acceptable to it to the post of teacher was a "violation of the whole spirit of the agreement," and said that a full compliance with the agreement consisted "in appointing persons teaching in the doctrine and after the manner of the Congregational and Presbyterian churches of the United States." The board concluded by saying that they were aware that if they did not see fit to carry on the institution according to the terms of the contract they had to reconvey it or to pay the sum of \$15,000, and that, if the views expressed were not satisfactory, the board would think favorably of a proposition to reconvey it at once.

It will be seen, therefore, that from the agreement, as gathered from the correspondence and from the extrinsic evidence which we have detailed, there can be no doubt that the school was transferred by the mission and accepted by the government upon the condition that definite Christian doctrines should be taught; namely, doctrines which constituted *the belief of the Congregational and Presbyterian churches of the United States, and not merely some form of general, evangelical Christianity.

Religious instruction, "represented by the second or substituted confession of faith," according to finding 23, was continued from 1865 to 1877.

In December, 1876, upon the recommendation of Dr. Bishop, a change was made from the Hawaiian to English as a medium of instruction, comment upon which will be presently made. We omit, as not important, the curriculum as to secular studies after 1877. The findings as to religious instruction must, however, be given in full:

"There is no evidence that the substituted

confession of faith was in use at Lahainaluna as a creed, doctrine, or standard of religious instruction at any period. There is no evidence of any formal creed as a standard to which the pupils were required or instructed to adhere.

"(29) From 1877 until the present date the course of religious instruction has been substantially the same. This includes morning prayer, including occasional discussions of passages of the Scripture, compulsory attendance at Sunday school, with preparation of the international Sunday-school lessons furnished by the Hawaiian board itself, and compulsory attendance at Christian Endeavor exercises Sunday evenings, at which the pupils discuss biblical subjects based on the Christian Endeavor topic as given in the Christian Endeavor World. Nothing in this religious teaching is contrary to any religious tenet or doctrine expressed in the substituted confession of faith. Mr. Maedonald, who has been principal since 1903, testifies that no creed had been taught during that time at the school, but that he had tried to make upright, truthful Christian men, and held Christ up as the best example to follow; that he had taught nothing about the Pope, or the doctrine of the trinity, or the doctrine of Adam's fall, or that the descendants of Adam were without holiness and alienated from God until their hearts were renewed with divine grace; that on *Sunday there was a Sunday school and occasionally, in the morning, a preaching service, in the evening a Christian Endeavor meeting; that the first year he was in Lahainaluna the boys were allowed to go to Lahaina to their own churches, but since then, with the exception of the day scholars, numbering ten or twelve, they were required to stay on the ground on Sunday and attend Sunday school and the evening exercises; that the chapel exercises on week-day mornings lasted about ten minutes and consisted of a hymn, a portion of the Scripture, and a repeating of the Lord's Prayer in unison, and occasionally incidental remarks by the principal regarding the passage of the Scripture; that there was no direct Christian instruction given in the class-room exercises during the week days other than moral instruction, as teaching the boys to do their work honestly; that the Sunday morning exercises consisted of a regular system of Bible instruction following the international Sunday-school lesson series purchased from the Hawaiian Board; that the Sunday-school lessons were assigned in advance; that in the Christian Endeavor meetings the Christian Endeavor topic in a modified form as given in the Christian Endeavor World was usually taken, and prayers sometimes offered by the boys and the teachers.

"(30) There is no evidence of any protest with regard to Lahainaluna or the course of study there from the American Board or from the Hawaiian Evangelical Association as bodies, but first objection is from the plaintiffs, who are trustees of certain property rights under deed from the American Board."

It is further found that "technical and agricultural training have been prominent features of the school for over half of a century, and the emphasis laid on agricultural work in the past few years does not amount to a change in kind, but one in degree. There has been no change in the official designation of the school."

In 1903 there was a movement to obtain the Federal aid available for agricultural colleges, in connection with which the Deputy Attorney General gave an opinion as to the *character of the school, the conditions upon which the government of Hawaii had received it, and the effect of the provisions of the organic act of the territory, that no "public money be appropriated for the support or benefit of any sectarian, denominational, or private school." [31 Stat. at L. 150, chap. 339, § 55.] The opinion is quoted at length in the findings, but we are only concerned with parts of it. It recognizes that the school was received upon the condition of cultivating sound literature and solid science. This, it was said, was affirmative and could not be escaped. The provision for religious instruction, he declared, was negative and was satisfied by no religious teaching whatever. His conclusion was, and we quote his words: "So long as the government maintains this school, it shall not teach any doctrine contrary to the confession of faith, but it is not compelled to teach any religious doctrine whatever; and therefore, in my opinion, cannot be held to be a sectarian institution." And further, "that the school is not a sectarian institution under the prohibition stated in § 55 of the organic act."

As we have said, the supreme court of the territory gave especial prominence to the ruling on extrinsic evidence, and made it contradictory to the agreement as expressed in the correspondence. This result was worked out, as it seems to us, by giving too much effect to the curriculum of the school after 1877. That, indeed, might be considered as tending to show that the agreement had been abandoned or its conditions waived, but not that it did not exist. To this proposition of abandonment or waiver we then will address ourselves, and, as relevant to it, the views of the supreme court of the territory may be given. They are exhibited in the following paragraphs:

"Under the decision of the United States

Supreme Court we are to construe the condition of transfer in the light of the circumstances which preceded it and the immediate and long-continued practice under it. Confining ourselves for the present to the condition respecting religious instruction, read 572] ing, "it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission which we represent, a summary of which will be found in the confession of faith herewith inclosed," the following possible constructions of the language may be considered.

"(1) That the condition is purely negative in character, and does not require the teaching of any religious doctrine. This construction is precluded by the decision of the United States Supreme Court.

"(2) That the contents of the confession of faith should be taught as a formal doctrine or creed. There is no evidence that the parties ever acted upon this interpretation. No evidence has been presented that the substituted confession of faith was in use at Lahainaluna as a creed, doctrine, or standard of religious instruction at any period. Dr. Bishop, who was in the school from 1865 until 1877, testified that he had never seen it. (Transcript, p. 13.) In fact, there is no evidence of any formal creed as a standard to which the pupils were required or instructed to adhere.

"(3) That religion should be taught, and that, as taught, it should not be contrary to the doctrines mentioned. Thus construed, it is obvious that it allows considerable latitude in the amount of religious instruction. If it means that theology shall form part of the curriculum of the school, the condition was broken as early as 1877, and any action thereon is long since barred by the statute of limitations applicable to claims against the government. Rev. Laws, § 2004; Hartman v. United States, 35 Ct. Cl. 106. If, however, the acts and statements of the parties in 1865 are to be relied upon as contemporaneous construction, the same must be true of the acts of the parties in 1877, and from thence to the present day. The fact that the change from Hawaiian to English as a medium of instruction necessarily involved the discontinuance of abstract studies of a theological nature is obvious. The fact that this change was made upon the recommendation of Dr. Bishop, and with the full 573] acquiescence of all concerned *from 1877 until 1903, is surely as potent as the actions of the parties during the preceding years. To the present day there has been no protest from the American Board or from the Hawaiian Evangelical Association as bodies, but the first objection is from the plaintiffs, who are trustees of certain prop-

erty rights under deed from the American Board, the terms of which will be more fully considered later.

"Unless the condition prescribes the amount and extent of religious instruction, it has not been broken. From 1877 until the present date the course of religious instruction has been substantially the same." [19 Haw. 146.]

The first proposition, the court said, was precluded by our first decision; of the other two, the court felt free to exercise its judgment. In this it committed error. We have shown how antagonistic the contentions of the parties were, and we tried to be clear in our decision of them. We did more than decide that the condition as to religion was not negative. We gave it more force than simple inhibition of teaching something which was not inconsistent with the religion of the mission. We gave it the force of a requirement to teach that religion, and more, to educate young men to teach it. The supreme court, however, says that there is no evidence that the parties ever acted upon the interpretation "that the contents of the confession of faith should be taught as a formal doctrine or creed." Exactly what is meant by the words "formal doctrine or creed" is not clear, but if they mean the religion of the mission, the conclusion was not open to the court to draw nor do the findings sustain it. Dr. Bishop testified, it is true, that he had never seen the confession of faith until it was shown in the present case, but he also testified that "the system of doctrine which was taught was substantially the old orthodox Congregational or Presbyterian doctrine." As to the confession of faith, he said, "that it very well represented the form of doctrine taught at Lahainaluna." Nor do we draw the same conclusion from the change from Hawaiian to English as a medium of instruction that the supreme *court drew. Dr. Bishop did rec- [574] commend the change and he expressed a fear that the consequences might be an omission of studies of an abstract nature, in which he included "evidences of Christianity;" but he suggested such instruction could be committed to the "exceptionably" able Hawaiian teacher whom he mentioned. But there is nothing in that to show that a definite form of religion could not be taught. There might be difficulty in it, of course, but that such a difficulty could not be overcome would take all purpose or justification from missionary societies. Besides, because the school met difficulties, might have to yield temporarily to them for varying periods of time, cannot be considered as conclusive of the intention of the parties to abandon the purpose expressed in the agreement or to waive its ob-

ligations. And this is an answer to the other contentions of the territory. That the mission would encounter difficulties in its way was no doubt guessed when the school was founded. It was demonstrated by trial. For the better execution of the purpose of its foundation, the mission transferred it to the government. The government, too, met difficulties. Its duty was to strive against them, overcome them if possible, not to make them a reason to violate its contract. But it is said by the supreme court that if the condition be "that theology shall form part of the curriculum of the school, the condition was broken as early as 1877, and any action thereon is long since barred by the statute of limitations applicable to claims against the government." This might be if the obligation of the government had been to pay money simply. Its obligation was not that, as we have seen, but to perform a trust expressly assumed by it. In other words, it was the grantee of an estate upon condition, having the right, however, to elect to pay \$15,000 as an alternative of the performance of the condition. We find no evidence of such election in what occurred in 1877, nor indeed long subsequently to that date. The circumstances must be kept in mind and the relation of the parties. The government had received a gift of valuable property, the 575] *product of voluntary contributions. It was given and received for a special purpose,—the purpose for which the contributions were made. The government accepted it and pledged its faith for the execution of the purpose,—a faith, we may assume, which was as much relied on as the sanctions which accompanied it. It is not possible to believe that the government had so little sense of its obligations that, if it had intended to depart from its agreement, it would not have offered to reconvey the property or tender the execution of the alternative which it had reserved; and we certainly cannot hold that a mere change in the course of studies, which might have temporary excuse, instantly acted to make the grantors of the property claimants for money, against whom the statute of limitations would immediately begin to run. The government's right should not be overlooked in this connection. The following is the condition expressed in the proposal made to the government: "That in case of the non-fulfilment or violation of the conditions upon which this transfer is made by the said government, the whole property hereby transferred, hereinbefore specified, together with any additions or improvements which may have been made upon the premises, and all the rights and privileges hereby conveyed or transferred to the Hawaiian government, by

the said island mission, shall revert to the said mission, to have and to hold the same for and in behalf of the American Board of Commissioners of Foreign Missions." The acceptance of the government was as follows: "That, in case of nonfulfilment on the part of the government of the conditions specified, it shall be optional with this government to allow the institution, with all additions and improvements which may have been made upon the premises, and all rights and privileges connected therewith, to revert to the said mission, or pay the sum of \$15,000." The onus, therefore, was upon the government to act, not upon the mission. To avert the reversion of the property to the mission a way was provided, but it did not enter into the head of anybody that, by a failure *to adopt [576 it instantly upon a change of studies, the property passed back to the grantor. But such was the inevitable result if there was a breach of the conditions in 1877, and such was the result if there was a breach later than 1877. It might be contended that such result would not ensue without some action upon the part of the mission. But it was certainly optional with the mission to treat the breach, if there was a breach, as a forfeiture. It is said in *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75, that it is optional with the grantor of an estate upon condition, in case the breach of the condition occurs, whether he will avail himself of the same as a forfeiture of the estate. To do so, it is further said, requires action on his part, and, if he is not in possession, usually requires entry for breach of condition. Until such entry the grantee holds his estate liable only to be defeated, but it is not actually determined by the forfeiture.

It is said in *Carbon Block Coal Co. v. Murphy*, 101 Ind. 115, 117, 118: "A condition may be waived by one who has a right to enforce it . . . but a mere silent acquiescence in, or parol assent to, an act which has constituted a breach of an express condition in a deed, would not amount to a waiver of a right of forfeiture for such breach." *Lindsey v. Lindsey*, 45 Ind. 552, 567; 2 Washb. Real Prop. 16. A mere indulgence is never construed into a waiver of a breach of a condition. *Gray v. Blanchard*, 8 Pick. 284; *Jackson ex dem. Bronck v. Crysler*, 1 Johns. Cas. 125."

In *Union College v. New York*, 173 N. Y. 38, 93 Am. St. Rep. 569, 65 N. E. 853, a deed conveying land to Long Island City for the purpose of building a city hall contained the provision that, if the land should cease to be used for such or other similar buildings, the land should revert to the grantor as if the conveyance had not been made, was held to be a condition subsequent,

and required the grantee to comply therewith within a reasonable time. It was further held that ten years was a reasonable time for compliance with the covenant, and that the fact that the grantor did not assert 577] a right to re-enter for fifteen *years after the breach did not operate as an estoppel, or preclude him from insisting upon a forfeiture and claiming possession. It was also held that a grantor was not compelled to demand performance before bringing action of ejectment. The court said:

"The condition was the use and the continuing use of the land for the purpose of the grant. The long-continued silence of the plaintiff could not operate as an estoppel upon or preclude it from insisting upon a forfeiture and from claiming possession of the premises. The effect of an express condition in a deed cannot be destroyed by silent acquiescence. *Jackson ex dem. Bronck v. Crysler*, supra. The title to the property was vested in the grantee, and the plaintiff was entitled to assume that its grantee would comply with the condition of the grant. If it elected to await compliance as long as it did, that fact cannot be construed against its right to reclaim possession."

In *Coleman v. Whitney*, 62 Vt. 123, 9 L.R.A. 517, 20 Atl. 322, a mortgage deed was executed by a husband, the condition of which was a promise to support the wife of the grantor during her life. The condition was performed for a time and then violated. The wife brought suit to obtain a maintenance from the mortgaged premises. It was held that she was entitled to such relief, notwithstanding there had been successive conveyances of the property, and the successive owners had occupied the premises under their deeds, and had, in no way recognized her rights; and it was held further, that the obligation to support the wife was a continuing one, and that "the lapse of fifteen years without receiving support, simply because she did not ask it, would be no bar."

It was said in *Oliver v. Piatt*, 3 How. 333, 411, 11 L. ed. 622, 657, that the mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que* 578] trusts. *In *Tynan v. Warren*, 53 N. J. Eq. 313, 321, 31 Atl. 596, Vice Chancellor Green, speaking for the court, said: "I do not understand that mere delay in bringing a suit will deprive a party of his remedy, unless such neglect has so prejudiced the other party by loss of testimony or means of proof 54 L. ed.

or changed relations that it would be unjust to now permit him to exercise his right." It is certain that none of those conditions appear in the present case. A mere change of the curriculum was not, of itself, an unequivocal disavowal of the trust, or an assertion of adverse right or interest in the government, and we find nothing in the record tantamount to such disavowal and assertion until the governor of the territory and the superintendent of public instruction refused the demand of the plaintiffs' attorney to either pay the \$15,000 or reconvey the property. The grounds of their refusal we are not informed of, but it was a disavowal of the trust and a denial of the alternative obligation to pay the money. The right of election in the territory then passed to the plaintiffs, appellants here, and the bringing of the action was a sufficient exercise of it.

It is finally contended that the appellants cannot maintain this action. The supreme court of the territory sustained this contention, saying, however, that it based its "decision upon the consideration of the substantial rights involved." The right of the plaintiffs is derived from a deed executed July 25, 1903, by the American Board of Commissioners for Foreign Missions to the plaintiffs as "trustees." It recites that the grantor is desirous of contributing to the support and maintenance of the Board of Hawaiian Evangelical Association, an eleemosynary corporation organized and established "in the great work of propagating Protestant Christianity, and for that purpose the land and property particularly described and referred to in trust, in order to assist said intended beneficiary to effectually carry out its corporate powers and purposes in said Hawaiian Islands." The instrument revokes and annuls all powers of attorney and grants of authority theretofore given to any person or persons whomsoever, *and gives, grants, bargains and sells, [579 conveys and confirms, unto F. J. Lowrey, Henry Waterhouse, and William O. Smith, certain lands described in the schedule annexed to the instrument, together with "all other lands in the possession of or belonging to the said grantor, or to which said grantor has right, title, interest, claim, or demand whatsoever, at law or in equity, and whether held by it in fee simple, as lessee thereof, beneficiary therein, or otherwise, as fully and to all intent and purpose as though a particular description thereof was herein incorporated and included in said schedule . . ." to have and to hold the same "in trust, nevertheless for the following uses and purposes, that is to say: First. To hold, manage, and control the same, and receive and take the rents, issues, profits, in-

come, and proceeds of sales and authorized mortgages thereof, and hold such increment and realizations under the same trusts as the above granted trust property, using and applying the same, however, in the manner hereinafter provided. . . . Sixth. And generally to do and perform every act and thing, and exercise every power and authority whatsoever, not herein specifically denied or withheld from or herein directed to be otherwise done or exercised by said trustees, as fully and to every intent and purpose as though the said trustees were the absolute owners in fee in their own personal right of the property hereby conveyed. Seventh. Any and all moneys arising from or out of the property of the trust estate, whether by way of rents or other issues and income, or from sales or mortgages thereof, shall be received and held by said trustees; and after the payment of taxes and other expenses, "and until otherwise directed" by the grantor, shall be delivered "to said beneficiary, from time to time, any balance or portion of the moneys, then remaining in their hands over and above what may, in their judgment, be required for the current expenses connected with the said trust, any unapplied balance to be placed on general deposit, or the said trustees may invest the

same upon security, as they may approve." *And the grantor reserved "the full [580 right and authority, at any time or times, to direct any change or alteration in the disposition of the income and proceeds of the trust estate," or to remove any trustee or fill any vacancy however occurring.

It will be observed, therefore, that the instrument was designed to convey every interest in property that the grantor had. Considering its language and careful provisions, its purposes, and the control reserved to the grantor of the trust and the disposition of funds, it would be a narrow construction of it to hold that the interest of the grantor in the Lahainaluna school did not pass by it, whether such interest was a right to receive a conveyance of the school or of the \$15,000 which was to be in lieu of such conveyance. In other words, to completely enforce the rights and interests of the mission in the school, and devote it or the proceeds from it to the purposes of the trusts which were created.

The judgment is reversed and the cause is remanded with directions to enter judgment for appellants as prayed for.

Mr. Justice Brewer took no part in the decision.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

UNITED STATES OF AMERICA, Com-
plainant,
v.
JOSEPH F. SHIPP et al.

[No. 4, Original.]

November 15, 1909.

Information charging a contempt of the Supreme Court of the United States in murdering a prisoner under sentence of death in the Criminal Court of Hamilton County, in the State of Tennessee, after his appeal to the Federal Supreme Court from an order of the Circuit Court for the Northern Division of the Eastern District of Tennessee had been allowed and a stay of proceedings ordered.

Mr. Solicitor General Bowers announced to the court that the defendants, Joseph F. Shipp, Jeremiah Gibson, Luther Williams, Nick Nolan, Henry Padgett, and William Mayse, were present in court, in response to the rule issued against them, and asked that sentence be pronounced. These defendants were then called to the bar by the clerk.

The chief justice announced the judgment of the court as follows: "You, Joseph F. Shipp, Jeremiah Gibson, Luther Williams, Nick Nolan, Henry Padgett, and William Mayse, are before this court on an attachment for contempt.

"On return to a rule to show cause, you have presented such evidence as you were advised, and been fully heard orally and on printed briefs, and, after thorough consideration, you have been found guilty. You have also been permitted severally to present petitions for rehearing, and move that leave be granted to file them, which, after consideration, have been denied.

"The grounds upon which the conclusion was reached are set forth in the opinion filed herein on Monday, May 24, 1909, and need not be repeated, nor need we dwell upon the destructive consequences of permitting the transaction complained of to pass

into a precedent for unpunished contempt.

"It is considered by the court, and the judgment of the court is, that, as punishment for the contempt, you, Joseph F. *Shipp, Luther Williams, and Nick [582 Nolan, and each of you, be imprisoned for the period of ninety days, and that you, Jeremiah Gibson, Henry Padgett, and William Mayse, and each of you, be imprisoned for the period of sixty days, in the jail of the District of Columbia. The marshal of this court is charged with the execution of this judgment."

DAVID MACKENZIE, Plaintiff in Error, v.
GRACE MACKENZIE. [No. 465.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Appellate Court for the First District of that state, affirming an order of the Circuit Court of Cook County, committing plaintiff in error to jail for contempt of court in failing to pay alimony. A motion was made to dismiss the writ of error for lack of a Federal question.

See same case below, 238 Ill. 616, 87 N. E. 848.

Mr. R. G. Dyrenforth for plaintiff in error.

Mr. Harris F. Williams for defendant in error.

October 18, 1909. Dismissed for the want of jurisdiction.

RAND-MCNALLY & COMPANY et al., Plaintiffs in Error, v. COMMONWEALTH OF KENTUCKY, by H. C. Turner, County Superintendent of Schools of Barren County, Kentucky. [No. 136.]

Error to state court—frivolousness of Federal question—validity of state statute.

In Error to the Court of Appeals of the State of Kentucky to review a judgment which, on a second appeal, affirmed a judgment of the Barren Circuit Court, in that

state, in favor of a county superintendent of schools in an action on a bond executed to secure the furnishing of school text-books equal to samples filed in the office of the superintendent of public instruction. The Federal question raised was the alleged invalidity, under U. S. Const., 14th Amend., of the state statute under which the bond was required. A motion was made to dismiss or affirm.

See same case below on first appeal, 29 Ky. L. Rep. 696, 94 S. W. 643, on second appeal, 32 Ky. L. Rep. 441, 106 S. W. 238.

583] *Messrs. Amos C. Miller and William M. Beckner for plaintiffs in error.

Messrs. Frederick S. Tyler and James C. Sims for defendant in error.

November 1, 1909. *Per Curiam*: Judgment affirmed, with costs. *Channte v. Trader*, 132 U. S. 210, 33 L. ed. 345, 10 Sup. Ct. Rep. 67; *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *White v. Leovy*, 174 U. S. 91, 43 L. ed. 907, 19 Sup. Ct. Rep. 604; *Electric Co. v. Dow*, 166 U. S. 489, 41 L. ed. 1088, 17 Sup. Ct. Rep. 645; *Pierce v. Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Shepard v. Barron*, 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737; *Rand, McN. & Co. v. Com.* 32 Ky. L. Rep. 441, 106 S. W. 238, 32 Ky. L. Rep. 1168, 108 S. W. 892; *Com. v. Ginn*, 111 Ky. 110, 63 S. W. 467.

LEVI M. STRONG, Plaintiff in Error, v. ADAM GASSERT. [No. 401.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Montana, to review a decree which affirmed a decree of the District Court of Silver Bow County, in that state, in favor of plaintiff in a suit founded on an alleged conspiracy among defendants to defraud plaintiff of his interest in certain mining claims. A motion was made to dismiss the writ of error for lack of a Federal question.

See same case below, 38 Mont. 18, 98 Pac. 497.

Mr. M. S. Gunn for plaintiff in error.

Mr. W. C. Keegin for defendant in error.

November 8, 1909. *Per Curiam*: Writ of Error dismissed for want of jurisdiction. *McCorquodale v. Texas*, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146; *Cockran Oil & Development Co. v. Arnaudet*, 199 U. S. 182, 50 L. ed. 143, 26 Sup. Ct. Rep. 41; *Arkansas Southern R. Co. v. German Nat. Bank*, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78.

338

*MORRIS F. PFAELZER, Plaintiff in Error, v. BACH FUR COMPANY OF ILLINOIS. [No. 290.]

Appeal—final judgment below.

In Error to the Circuit Court of the United States for the Southern District of New York to review an order setting aside the summons and service thereof upon a foreign corporation in an action begun in the Supreme Court of the state in and for the county of New York, and removed to the Federal court.

Mr. A. S. Gilbert for plaintiff in error.

Mr. Benjamin N. Cardozo for defendant in error.

November 8, 1909. *Per Curiam*: Writ of Error dismissed for want of final judgment. *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118.

SAMUEL BARKER, Jr., Plaintiff in Error, v. BUTTE CONSOLIDATED MINING COMPANY. [No. 32.]

Error to state court—Federal question—mining location.

In Error to the Supreme Court of the State of Montana to review a decree which affirmed a decree of the District Court of Silver Bow County, in that state, in favor of plaintiff in an action to quiet title to a mining claim.

See same case below, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177.

*Mr. Lewis O. Evans for plaintiff [585 in error.

Mr. John J. McHatton for defendant in error.

November 15, 1909. *Per Curiam*: Writ of Error dismissed for want of jurisdiction. *Butte City Water Co. v. Baker*, 196 U. S. 119, 49 L. ed. 409, 25 Sup. Ct. Rep. 211; *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Moran v. Horsky*, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856; *Beals v. Cone*, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275; *Iowa v. Rood*, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49; *Stuart v. Hauser*, 203 U. S. 585, 51 L. ed. 328, 27 Sup. Ct. Rep. 783; *Gatewood v. North Carolina*, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 167; *Bachtel v. Wilson*, 204 U. S. 36, 51 L. ed. 357, 27 Sup. Ct. Rep. 243; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344.

JEROME H. REMICK & COMPANY, Plaintiff in Error, v. JOSEPH W. STERN and Edward B. Marks. [No. 352.]

Appeal—final judgment below.

In Error to the Circuit Court of the United States for the Southern District of New

215 U. S.

York to review an order denying a motion to set aside a writ of seizure issued by one of the judges of said court for the purpose of enforcing a penalty for the violation of a copyright.

See same case below, 164 Fed. 781.

Mr. Moses H. Grossman for plaintiff in error.

Mr. Julius Henry Cohen for defendants in error.

November 15, 1909. *Per Curiam*: Writ of Error dismissed for want of final judgment. *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *Pfaelzer v. Bach Fur Co.* 215 U. S. 584, ante, 338, 30 Sup. Ct. Rep. 403.

586] *NORTH CAROLINA MINING COMPANY, Appellant, v. G. R. WESTFELDT et al. [No. 580.]

Appeal—from circuit court of appeals—jurisdiction below depending upon citizenship.

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which reversed, with directions to dismiss for lack of jurisdiction, a decree of the Circuit Court for the Western District of North Carolina, granting the relief sought by a bill in equity to quiet title to land, filed by a foreign corporation while an action of ejectment between the same parties and involving the same subject-matter was pending in a state court.

See same case below, 92 C. C. A. 378, 166 Fed. 706.

Messrs. Joseph J. Hooker, James H. Merimon, Hannis Taylor, and Charles A. Moore for appellant.

Messrs. Alfred S. Barnard, Julius C. Martin, and F. A. Sondley for appellees.

November 15, 1909. *Per Curiam*: Appeal dismissed for want of jurisdiction. *Westfeldt v. North Carolina Min. Co.* 92 C. C. A. 378, 166 Fed. 706. Application for certiorari denied April 19, 1909 (214 U. S. 516, 53 L. ed. 1064, 29 Sup. Ct. Rep. 697). Application for appeal denied May 13, 1909, by the circuit court of appeals. Appeal granted June 12, 1909, by one of the circuit judges who had not sat as a member of the court of appeals on the hearing of the case or of the application for appeal. Motion to set aside the order denied August 21, 1909. **Macfadden v. United States*, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490; *Greeley v. Lowe*, 155 U. S. 58, 39 L. ed. 69, 15 Sup. Ct. Rep. 24; *Re Winn*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515; *Re Moore*, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 A. & E. Ann. Cas. 1164.

54 L. ed

GUARANTY TRUST COMPANY OF NEW YORK, Appellant, v. METROPOLITAN STREET RAILWAY COMPANY et al. [No. 607.]

Direct appeal from circuit court—Federal question.

Appeal from the Circuit Court of the United States for the Southern District of New York to review a decree for the foreclosure of a street railway mortgage.

See various opinions below, 166 Fed. 569, 168 Fed. 937, 170 Fed. 625, 171 Fed. 1014.

Messrs. Julien T. Davies, Brainard Tolles, and John C. Spooner for appellant.

Messrs. J. Parker Kirlin, Arthur H. Masten, Bronson Winthrop, Frank H. Platt, James Byrne, and Matthew C. Fleming for appellees.

November 15, 1909. *Per Curiam*: Appeal dismissed for want of jurisdiction. *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63; *Re Lennon*, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123; *Cornell v. Green*, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969; *Empire State-Idaho Min. & Developing Co. v. Hanley*, 205 U. S. 225, 51 L. ed. 779, 27 Sup. Ct. Rep. 476; *Goodrich v. Ferris*, 214 U. S. 71, 53 L. ed. 914, 29 Sup. Ct. Rep. 580; *Farrell v. O'Brien* (*O'Callaghan v. O'Brien*) 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727; *Louisville Trust Co. v. Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; *United States v. Larkin*, 208 U. S. 333, 52 L. ed. 517, 28 Sup. Ct. Rep. 417; *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, 52 L. ed. 528, 28 Sup. Ct. Rep. 406, 13 A. & E. Ann. Cas. 1155; *Bien v. Robinson*, 208 U. S. 423, 52 L. ed. 556, 28 Sup. Ct. Rep. 379; *Delmar Jockey Club v. Missouri*, 210 U. S. 324, 52 L. ed. 1080, 28 Sup. Ct. Rep. 732; and see *Re Metropolitan R. Receivership* (*Re Reisenberg*) 208 U. S. 90, 52 L. ed. 403, 28 Sup. Ct. Rep. 219; *Guaranty Trust Co. v. Metropolitan Street R. Co.* 166 Fed. 569, 168 Fed. 937, [588 170 Fed. 335, 625, 626, 171 Fed. 1014, 1015, 1019; *Morton Trust Co. v. Metropolitan Street R. Co.* 170 Fed. 336; *Guaranty Trust Co. v. Second Ave. R. Co.* 171 Fed. 1020; *Pennsylvania Steel Co. v. Metropolitan Street R. Co.* 170 Fed. 623.

HELVETIA-SWISS FIRE INSURANCE COMPANY, Plaintiff in Error, v. MAX J. BRANDENSTEIN et al., etc. [No. 481.]

Error to circuit court of appeals—jurisdiction below depending upon citizenship.

In Error to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York in favor of plaintiffs in an action to enforce the lien of an at-

tachment issued out of the Circuit Court for the Northern District of California in a suit in which both the principal debtor and the garnishee were alien corporations.

See same case below, 92 C. C. A. 614, 168 Fed. 1020.

589] *Mr. Frederick B. Campbell for plaintiff in error.

Messrs. William V. Rowe and Royall Victor for defendants in error.

November 29, 1909. *Per Curiam*: Writ of Error dismissed for want of jurisdiction. Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

KANSAS CITY STAR COMPANY, Plaintiff in Error, v. HENRY S. JULIAN. [No. 85.] Error to state court—Federal question.

In Error to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Ray County, in that state, in favor of plaintiff in an action for libel.

See same case below, 209 Mo. 35, 107 S. W. 496.

Messrs. Isaac N. Watson, Hannis Taylor, Wash. Adams, and Frank Hagerman for plaintiff in error.

Messrs. John H. Atwood, O. H. Dean, and Ira Julian for defendant in error.

December 6, 1909. *Per Curiam*: Writ of Error dismissed for want of jurisdiction. Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 307, 308, 47 L. ed. 480, 484, 485, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; State ex rel. Horton v. Bland, 590] 186 *Mo. 701, 85 S. W. 561; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 653, 41 L. ed. 1151, 17 Sup. Ct. Rep. 709.

The attention of the state supreme court was not called to any Federal question until in the petition for rehearing, and that was too late. Loeber v. Schroeder, 149 U. S. 580, 585, 37 L. ed. 856, 859, 13 Sup. Ct. Rep. 934, and cases.

The judgment rested on non-Federal grounds broad enough to sustain it. Cincinnati Street R. Co. v. Snell, 193 U. S. 30, 48 L. ed. 604, 24 Sup. Ct. Rep. 319; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370.

MRS. EMMA G. MILLS and Her Husband, Harry Mills, Plaintiffs in Error, v. MRS. M. E. V. JOHNSON and Husband, L. A. Johnson, J. H. H. Burk, et al. [No. 36.] Error to state court—Federal question.

In Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Navarro County, in that state, in

favor of plaintiffs in an action of trespass to try title.

See same case below, 45 Tex. Civ. App. 119, 99 S. W. 1045.

Messrs. Frederic D. McKenney and R. S. Neblett for plaintiffs in error.

Messrs. Richard Mays, Robert E. Prince, and W. S. Simpkins for defendants in error.

December 13, 1909. *Per Curiam*: Writ of Error dismissed for want of jurisdiction. Beale v. Johnson, 45 Tex. Civ. App. 119, 99 S. W. 1045; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227; McCorquodale v. Texas, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146; Cox v. Texas, 202 U. S. 446, 50 L. ed. 1099, 26 Sup. Ct. Rep. 671; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; Arbuckle v. Blackburn, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148.

*CHARLES THOMAS, Plaintiff in Error, v. STATE OF IOWA. [No. 448.] Error to state court—Federal question.

In Error to the Supreme Court of the State of Iowa to review a judgment which affirmed a conviction of murder in the District Court of Polk County, in that state.

See same case below, 135 Iowa, 717, 109 N. W. 900.

Mr. J. T. Mulvaney for plaintiff in error.

Mr. Charles W. Lyon for defendant in error.

December 20, 1909. *Per Curiam*: Writ of Error dismissed for want of jurisdiction. No further opinion will be filed.

EX PARTE: IN THE MATTER OF THE UNITED STATES CONSOLIDATED SEEDED RAISIN COMPANY, Petitioner. [No. — Original.] Motion for leave to file petition for a Writ of Mandamus or Certiorari.

See same case below, 97 C. C. A. 527, 173 Fed. 577.

Mr. John H. Miller for petitioner.

January 3, 1910. Denied.

*A. H. HUSTON, Judge, etc., et al., [592] Plaintiffs in Error, v. STATE OF OKLAHOMA EX REL. C. N. HASKELL, Governor. [No. 325.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Oklahoma to review a judgment granting, on relation of the governor of the state, a writ of prohibition restraining the further prosecution in the Logan County District Court of an action begun by the attorney general in the name of the state, over the protest and objection of the governor. In their return to the order to show cause, the respondents asserted that the

granting of the writ would be necessarily in contravention of the fundamental principles of the Republican form of government guaranteed to the state by the Federal Constitution, would deny the state the sovereignty guaranteed to it by such Constitution, and would amount to a taking of the common property of the citizens of the state in its highways without due process of law.

See same case below, 21 Okla. 782, 97 Pac. 982.

Mr. E. G. Spilman for plaintiffs in error.

Mr. A. C. Cruce for defendant in error.

January 3, 1910. *Per Curiam*: Writ of Error dismissed for want of jurisdiction.

PERTH AMBOY DRY DOCK COMPANY, Appellant, v. MONMOUTH STEAMBOAT COMPANY. [No. 609.]

Admiralty—opening default.

Appeal from the District Court of the United States for the District of New Jersey to review a decree dismissing a libel in admiralty for repairs to a vessel, after opening a final decree which had been entered on the respondent's default.

593] *Messrs. James D. Dewell, Jr., and Avery Fayette Cushman for appellant.

Mr. Charles R. Snyder for appellee.

January 3, 1910. *Per Curiam*: Decree affirmed with costs.

OTIS W. KENYON, Plaintiff in Error, v. ALBERT P. FOWLER, as Receiver of the American Exchange National Bank of Syracuse. [No. 87.]

National banks—stockholders' liability.

In Error to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the District Court for the Northern District of New York, enforcing an assessment made by the Comptroller of the United States upon the shareholders of an insolvent national bank.

See same case below, 83 C. C. A. 567, 155 Fed. 107.

Mr. Dorr Raymond Cobb for plaintiff in error.

Mr. Leonard C. Crouch for defendant in error.

January 24, 1910. *Per Curiam*: Judgment affirmed with costs, and cause remanded to the Circuit Court of the United States for the Northern District of New York. *Keyser v. Hitz*, 133 U. S. 138, 33 L. ed. 531, 10 Sup. Ct. Rep. 290; *Finn v. Brown*, 142 U. S. 56, 35 L. ed. 936, 12 Sup. Ct. Rep. 136; *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Matteson v. Dent*, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419.

54 L. ed.

*N. MAYO DYER, Plaintiff in Error, v. CITY OF MELROSE. [No. 93.]

Taxes—what taxable—income of naval officer.

In Error to the Superior Court of the State of Massachusetts to review a judgment rejecting the claim that the salary of a naval officer, on deposit in a bank, is exempt from state taxation, entered pursuant to the mandate of the Supreme Judicial Court of that state.

See same case below, 197 Mass. 99, — L.R.A.(N.S.) —, 125 Am. St. Rep. 330, 83 N. E. 6.

Mr. Chester M. Pratt for plaintiff in error.

Mr. Claude L. Allen for defendant in error.

January 24, 1910. *Per Curiam*: Judgment affirmed with costs. *Hibernia Sav. & L. Soc. v. San Francisco*, 200 U. S. 310, 50 L. ed. 495, 26 Sup. Ct. Rep. 265, 4 A. & E. Ann. Cas. 934; *McIntosh v. Aubrey*, 185 U. S. 122, 46 L. ed. 834, 22 Sup. Ct. Rep. 561; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 787.

MARIA BERGER, Plaintiff in Error, v. Will Tracy et al., Trustees, etc. [No. 97.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Iowa to review a decree which affirmed a decree of the District Court of Jackson County, in that state, refusing to enjoin the opening of a highway through plaintiff's lands.

*See same case below, 135 Iowa, [595] 597, 113 N. W. 465.

Mr. Chester C. Cole for plaintiff in error.

No appearance for defendants in error.

January 24, 1910. *Per Curiam*: Writ of Error dismissed for want of jurisdiction. *Castillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229. No Federal question suggested prior to petition for Writ of Error.

UNITED STATES v. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al. [No. 597.]

On a Certificate from the Circuit Court of the United States for the Eastern District of Missouri.

The Attorney General and the Solicitor General for the United States.

No appearance for the Terminal R. Association et al.

January 31, 1910. *Per Curiam*: Certificate dismissed on the authority of *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 215 U. S. 216, ante, 164, 30 Sup. Ct. Rep. 86.

596] *AMERICAN WOODWORKING MACHINERY COMPANY et al., Petitioners, v. UNION TRUST COMPANY et al. [No. 457.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 92 C. C. A. 101, 166 Fed. 193.

Mr. Charles A. Douglas for petitioners.

No appearance for respondents.

October 18, 1909. Denied.

WILLIAM F. GOESSLING, Petitioner, v. THOMAS B. COLLIER. [No. 458.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 87 C. C. A. 506, 160 Fed. 604.

Messrs. Edward S. McCalmont and L. P. Loving for petitioner.

No appearance for respondent.

October 18, 1909. Denied.

NOVELTY INCANDESCENT LAMP COMPANY, Petitioner, v. EDISON ELECTRIC LIGHT COMPANY. [No. 464.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 93 C. C. A. 387, 167 Fed. 977.

Mr. A. Parker Smith for petitioner.

Messrs. Richard N. Dyer and John Robert Taylor for respondent.

October 18, 1909. Denied.

HENRY DUBOIS SONS COMPANY, Claimant, etc., Petitioner, v. STEAM TUG EUGENE F. MORAN, MICHAEL MORAN, Claimant et al. [No. 471]; HENRY DUBOIS SONS COMPANY, Claimant, etc., Petitioner, v. NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY et al. [No. 472.]

597] Petitions for *Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 96 C. C. A. 144, 170 Fed. 928.

Messrs. James Emerson Carpenter and Samuel Park for petitioner.

Messrs. William S. Montgomery, Archibald G. Thacher, and C. C. Burlingham for respondents.

October 18, 1909. Denied.

PYMAN STEAMSHIP COMPANY, LIMITED, Petitioner, v. MEXICAN CENTRAL RAILWAY COMPANY, LIMITED. [No. 475.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 94 C. C. A. 557, 169 Fed. 281.

Mr. J. Parker Kirlin for petitioner.

Mr. Joseph H. Choate, Jr., for respondent.

October 18, 1909. Denied.

AMERICAN MANUFACTURING COMPANY, Petitioner, v. STEAMSHIP WILDENFELS, etc., et al. [No. 476.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 89 C. C. A. 58, 161 Fed. 864.

Mr. Frederick M. Brown for petitioner.

Messrs. James J. Macklin and De Lagnel Berier for respondents.

October 18, 1909. Denied.

CHARLES F. HARRIS, Late Owner of the Steam Tug De Veaux Powel, Petitioner, v. FERRYBOAT LACKAWANNA, etc., HOBOKEN FERRY COMPANY, Claimant. [No. 477.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 92 C. C. A. 54, 165 Fed. 634.

Mr. Frederiek M. Brown for petitioner.

Messrs. James J. Macklin and De Lagnel Berier for respondents.

October 18, 1909. Denied.

BETTIS MAJORS and A. T. Ball, Trustee, *Petitioners, v. H. C. WILLIAMSON. [598 [No. 479.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 95 C. C. A. 186, 169 Fed. 754.

Messrs. E. D. Saunders, Murray F. Smith, and Joseph Hirsch for petitioners.

Mr. George Anderson for respondent.

October 18, 1909. Denied.

HUB CONSTRUCTION COMPANY, Petitioner, v. NATHANIEL W. HOBBS, Trustee. [No. 517.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 95 C. C. A. 84, 169 Fed. 586.

Mr. Thomas G. Frost for petitioner.

Mr. Edwin G. Eastman for respondent.

October 18, 1909. Denied.

CITY OF NEWBURYPORT, Petitioner, v. CITIZENS SAVINGS BANK. [No. 587.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 95 C. C. A. 232, 169 Fed. 766.

Mr. William R. Harr for petitioner.

Mr. Edward F. McClellan for respondent.
October 18, 1909. Denied.

WM. G. HUEY et al., Petitioners, v. ARTHUR K. BROWN, Surviving Receiver, etc. [No. 596.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 96 C. C. A. 443, 171 Fed. 641.

Mr. Samuel W. Pennypacker for petitioners.

Messrs. Charles H. Burr, Reynolds D. Brown, and Malcolm Lloyd, Jr., for respondent.

October 18, 1909. Denied.

ADELBERT COLLEGE OF THE WESTERN RESERVE UNIVERSITY et al., Petitioners, v. WABASH RAILROAD COMPANY et al. [No. 599] 600]; CYRUS F. PIERSON *et al., Petitioners, v. WABASH RAILROAD COMPANY et al. [No. 601.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 96 C. C. A. 465, 171 Fed. 805.

Messrs. Lawrence Maxwell, Murray Seasongood, and John C. F. Gardner for petitioners.

Messrs. Judson Harmon, John G. Milburn, Rush Taggart, and John H. Doyle for respondents.

October 18, 1909. Denied.

JOHN J. BOLAND et al., Petitioners, v. STEAM VESSEL OCEANICA, etc. [No. 608.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 96 C. C. A. 69, 170 Fed. 893.

Mr. George Clinton for petitioners.

Mr. Thomas C. Burke for respondent.

October 18, 1909. Denied.

DUDLEY O. WATSON et al., Petitioners, v. ERNEST H. GREENWOOD et al. [No. 610.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 96 C. C. A. 421, 171 Fed. 619.

Mr. Edgar J. Pershing for petitioners.

Messrs. Joseph de F. Junkin, G. W. Pepper, and W. B. Bodine, Jr., for respondents.

October 18, 1909. Denied.

54 L. ed.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, Claimant, etc., Petitioner, v. STEAMSHIP CALDERON, etc. [No 616.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 96 C. C. A. 154, 170 Fed. 944.

Mr. William S. Montgomery for petitioner.

Mr. Harrington Putnam for respondent.

October 18, 1909. Denied.

EDWARD CARDWELL, Petitioner, v. UNITED STATES. [No. 617.]

Petition for a Writ of Certiorari *to [600 the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 95 C. C. A. 90, 169 Fed. 592.

Mr. Arthur A. Birney for petitioner.

The Attorney General and the Solicitor General for respondent.

October 18, 1909. Denied.

E. E. ANDROVETTE, Petitioner, v. STEAMSHIP BARALONG, etc. [No. 618.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 97 C. C. A. 24, 172 Fed. 220.

Mr. William S. Montgomery for petitioner.

Messrs. J. Parker Kirlin and John M. Woolsey for respondent.

October 18, 1909. Denied.

AMERICAN TRUST COMPANY OF BOSTON, MASS., Petitioner, v. W. & A. FLETCHER COMPANY. [No. 619.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 97 C. C. A. 477, 173 Fed. 471.

Messrs. William Arthur Sargent and Elmer P. Howe for petitioner.

Messrs. Harrington Putnam and Edward S. Dodge for respondent.

October 18, 1909. Denied.

ALFRED L. SWEENEY, Petitioner, v. EDWARD B. SMITH et al. [No. 620.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 96 C. C. A. 91, 171 Fed. 645.

Messrs. William L. Royall and George Demming for petitioner.

William A. Glasgow, Jr., for respondents.

October 18, 1909. Denied.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Petitioner, v. ADOLPH C. GRIESA et al. [No. 621.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 94 C. C. A. 635, 169 Fed. 509.

601] Mr. *Thomas F. Doran for petitioner.

No appearance for respondents.

October 18, 1909. Denied.

HOOD RUBBER COMPANY, Petitioner, v. ATLANTIC MUTUAL INSURANCE COMPANY. [No. 625.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 96 C. C. A. 99, 170 Fed. 939.

Mr. Harrington Putnam for petitioner.

Messrs. John G. Milburn and Walter F. Taylor for respondent.

October 18, 1909. Denied.

ÆTNA INDEMNITY COMPANY, Petitioner, v. FARMERS NATIONAL BANK OF BOYERTOWN. [No. 626.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 95 C. C. A. 169, 169 Fed. 737.

Messrs. George M. Mackellar and Gustavus Remak, Jr., for petitioner.

Messrs. S. H. Alleman, Albert L. Maïse, and Alexander Simpson, Jr., for respondent.

October 18, 1909. Denied.

DELAWARE & HUDSON COMPANY, Petitioner, v. ALBANY & SUSQUEHANNA RAILROAD COMPANY et al. [No. 627.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 95 C. C. A. 393, 170 Fed. 1019.

Messrs. James M. Beck and Charles F. Brown for petitioner.

Messrs. George Wellwood Murray, E. Parmelee Prentice, and Charles P. Howland for respondents.

October 18, 1909. Denied.

YELLOW POPLAR LUMBER COMPANY, Petitioner, v. S. F. CHAPMAN. [No. 407.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 94 C. C. A. 452, 169 Fed. 81.

Mr. George S. Wright for petitioner.

Mr. J. F. Bullitt for respondent.

November 1, 1909. Denied, and parts of petition and brief of *petitioner [602 stricken from the files on account of impertinent and improper matter.

JOHN A. KUYKENDALL, Administrator, etc., Petitioner, v. UNION PACIFIC RAILROAD COMPANY. [No. 520.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 90 C. C. A. 125, 163 Fed. 819.

Mr. D. W. Wood for petitioner.

Mr. Robert S. Lovett for respondent.

November 1, 1909. Denied.

UNITED STATES, Petitioner, v. AUTHEL H. FREEMAN et al. [No. 643.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 93 C. C. A. 672, 168 Fed. 1022.

The Attorney General and the Solicitor General for petitioner.

Charles A. Moore for respondents.

November 1, 1909. Denied.

THOMAS S. NOWELL et al., Petitioners, v. J. C. MCBRIDE, Receiver, etc., et al. [No. 644.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 89 C. C. A. 318, 162 Fed. 432.

Mr. George M. Nowell for petitioners.

Mr. E. S. Pillsbury for respondents.

November 1, 1909. Denied.

JACOB KERRCH et al., Petitioners, v. UNITED STATES. [No. 646.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 96 C. C. A. 258, 171 Fed. 366.

Messrs. James E. Cotter and Conrad Reno for petitioners.

The Attorney General, the Solicitor General, and Assistant Attorney General Harr for respondent.

November 1, 1909. Denied.

603] *PETER T. COFFIELD et al., Petitioners, v. FLETCHER MANUFACTURING COMPANY. [634.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 93 C. C. A. 25, 167 Fed. 321.

Mr. Richard J. McCarty for petitioners.

Mr. Edmund E. Wood for respondent.

November 8, 1909. Denied.

TUNIS LUMBER COMPANY et al., Petitioners v. CUMBERLAND LUMBER COMPANY. [No. 642.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 96 C. C. A. 244, 171 Fed. 352.

Mr. Robert M. Hughes for petitioners.

No appearance for respondent.

November 8, 1909. Denied.

GUARANTY TRUST COMPANY OF NEW YORK, Petitioner, v. METROPOLITAN STREET RAILWAY COMPANY et al. [No. 635]; MORTON TRUST COMPANY, Petitioner, v. GUARANTY TRUST COMPANY OF NEW YORK et al. [No. 636]; METROPOLITAN SECURITIES COMPANY, Petitioner, v. WILLIAM W. LADD, Receiver, etc. [No. 654.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, No. 654, 97 C. C. A. 435, 173 Fed. 269.

Messrs. Julien T. Davies, Brainard Tolles, and John C. Spooner for petitioner in No. 635.

Messrs. Arthur H. Masten, James Byrne, Wm. M. Coleman, Wm. M. Chadbourne, Matthew C. Fleming, Frank H. Platt, and J. Parker Kirlin for respondents in No. 635.

Messrs. Bronson Winthrop and Charles Thomas Payne for petitioner in No. 636.

Same counsel for respondents as in No. 635.

Messrs. Richard Reid Rogers, DeLaney Nicoll, and Paul D. Cravath for petitioner in No. 654.

Messrs. Joseph H. Choate, Arthur H. Masten, and Robert C. Beatty for respondent in No. 654.

November 15, 1909. Denied.

CALIFORNIA DEVELOPMENT COMPANY, Petitioner, v. NEW LIVERPOOL SALT COMPANY. [No. 656.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 97 C. C. A. 214, 172 Fed. 792.

Messrs. Maxwell Evarts and Eugene S. Ives for petitioner.

54 L. ed.

Messrs. Charles Page, Edward J. McCutchen, and Samuel Knight for respondent.

November 15, 1909. Denied.

SARAH J. EDDY, Petitioner, v. CITY AND COUNTY OF SAN FRANCISCO. [No. 431.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 89 C. C. A. 327, 162 Fed. 441.

Mr. Julius H. Kahn for petitioner.

Mr. A. B. Browne for respondent.

November 15, 1909. Denied.

DERING COAL COMPANY, Petitioner, v. H. ERNEST HUTTON, Administrator, etc. [No. 665.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. J. G. Thompson and Charles Troup for petitioner.

Mr. Lincoln B. Smith for respondent.

November 15, 1909. Denied.

COMMERCIAL MICA COMPANY, Petitioner, v. MICA INSULATOR COMPANY. [No. 662.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 92 C. C. A. 292, 166 Fed. 440.

Messrs. Joseph R. Edson and William R. Rummel for petitioner.

Mr. William H. Kenyon for respondent.

November 29, 1909. Denied.

LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, Petitioner, v. GEORGE H. McFADDEN et al. [No. 671.]

*Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 27 L.R.A.(N.S.) 1095, 95 C. C. A. 429, 170 Fed. 179.

Mr. Frederick B. Campbell for petitioner.

Mr. John G. Johnson for respondents.

November 29, 1909. Denied.

FRANK J. PRAME, Petitioner, v. Albert T. FERRELL. [No. 666.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 92 C. C. A. 374, 166 Fed. 702.

Mr. Jesse A. Feuner for petitioner.

Mr. William Howell for respondent.

December 6, 1909. Denied.

SAMUEL GOMPERS et al., Petitioners, v. BUCK'S STOVE & RANGE COMPANY. [No. 685.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Messrs. J. H. Ralston, F. L. Siddons, W. E. Richardson, and Alton B. Parker for petitioners.

No appearance for respondent.

December 6, 1909. Granted.

HENRY D. SPENCER et al., Petitioners, v. VICTOR M. WATKINS et al. [No. 639.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 94 C. C. A. 659, 169 Fed. 379.

Messrs. Newel H. Clapp, Edward F. Treadwell, and John S. Partridge for petitioners.

Messrs. Frank B. Kellogg and C. A. Severance for respondents.

December 6, 1909. Denied.

CHARLES W. MORSE, Petitioner, v. UNITED STATES. [No. 670.]

606 Petition for a Writ of Certiorari *to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 174 Fed. 539.

Mr. Martin W. Littleton for petitioner.

The Attorney General, the Solicitor General, and Mr. Henry L. Stimson for respondent.

December 6, 1909. Denied.

NELLIE F. KEIPER, Administratrix, etc., Petitioner, v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. [No. 673.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 91 C. C. A. 433, 165 Fed. 595.

Mr. J. Claude Bedford for petitioner.

Mr. Thomas DeWitt Cuyler for respondent.

December 6, 1909. Denied.

MAX WEBER et al., Petitioners, v. GRAND LODGE OF KENTUCKY FREE AND ACCEPTED MASONS. [No. 682.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 95 C. C. A. 20, 169 Fed. 522.

Messrs. Louis J. Blum and Edgar C. Blum for petitioners.

Messrs. Charles H. Fisk and Alex. P. Humphrey for respondent.

December 6, 1909. Denied.

JACKSONVILLE TOWING & WRECKING COMPANY et al., Petitioners, v. STEAMSHIP BAYAMO, etc. [No. 683.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 96 C. C. A. 1, 171 Fed. 65.

Messrs. H. Bisbee and George C. Bedell for petitioners.

Mr. Charles S. Haight for respondent.

December 13, 1909. Denied.

NEW LIVERPOOL SALT COMPANY, Petitioner, v. CALIFORNIA DEVELOPMENT COMPANY et al. [No. 691.]

Petition for a Writ of Certiorari to the United States *Circuit Court of Ap- **[607]** peals for the Ninth Circuit.

See same case below, 97 C. C. A. 242, 172 Fed. 820.

Messrs. Edward J. McCutchen, Charles Page, and Samuel Knight for petitioner.

No appearance for respondents.

December 13, 1909. Denied.

C. L. VAN SICE, Petitioner, v. IBEX MINING COMPANY. [No. 703.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 97 C. C. A. 587, 173 Fed. 895.

Messrs. Edwin H. Park and Samuel Herriek for petitioner.

Messrs. Charles J. Hughes, Jr., and Charles Cavender for respondent.

January 3, 1910. Denied.

ABRAHAM ACORD et al., Petitioners, v. WESTERN POCAHONTAS CORPORATION. [No. 698.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 174 Fed. 1019.

Mr. Arthur English for petitioners.

Messrs. J. L. Bumgardner and F. B. Enslow for respondent.

January 3, 1910. Denied.

CHARLES E. DAVIS, Petitioner, v. UNITED STATES. [No. 709.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Jackson H. Ralston and Joel Branham for petitioner.

The Attorney General and the Solicitor General for respondent.

January 3, 1910. Denied.

PEALE, PEACOCK, & KERR, OF NEW YORK, Petitioner, v. JOHN M. GRAHAM. [No. 711.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals 608] *for the First Circuit.

See same case below, 97 C. C. A. 311, 173 Fed. 9.

Mr. Ezra R. Thayer for petitioner.

Messrs. Robert M. Morse and Wm. M. Richardson for respondent.

January 3, 1910. Denied.

STEAMSHIP FOLMINA, etc., Petitioner, v. GUSTAVE A. JAHN et al. [No. 717.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 97 C. C. A. 557, 173 Fed. 615.

Messrs. J. Parker Kirlin and John M. Woolsey for petitioner.

Mr. Frederick M. Brown for respondents.

January 10, 1910. Denied.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, Petitioner, v. WAGNER ELECTRIC MANUFACTURING COMPANY. [No. 719.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Paul Bakewell and Thomas B. Kerr for petitioner.

No appearance for respondent.

January 17, 1910. Granted.

HARRY HAYNES, Petitioner, v. BALTIMORE & OHIO RAILROAD COMPANY. [No. 586.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Orville S. Brumback for petitioner.

Mr. F. A. Durban for respondent.

January 17, 1910. Denied. (Mr. Justice Lurton did not participate in the disposition of this application.)

METROPOLITAN LIFE INSURANCE COMPANY, Petitioner, v. ELIZA A. WILLIAMSON. [No. 701.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 174 Fed. 116.

609] Messrs. W. G. M. Thomas *and Richard W. Walker for petitioner.

No appearance for respondent.

January 17, 1910. Denied.

54 L. ed.

JOHN R. WALSH, Petitioner, v. UNITED STATES. [No. 710.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 174 Fed. 615.

Messrs. John S. Miller, Merritt Starr, and E. C. Ritsher for petitioner.

The Attorney General, the Solicitor General, and Mr. E. W. Sims for respondent.

January 17, 1910. Denied.

COMMERCIAL UNION ASSURANCE COMPANY LIMITED, OF LONDON, ENGLAND, Petitioner, v. RICHMOND COAL COMPANY. [No. 658.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 95 C. C. A. 178, 169 Fed. 746.

Messrs. Walter D. Davidge and T. C. Van Ness for petitioner.

Mr. Emery H. Sykes for respondent.

Messrs. E. S. Pillsbury and William A. Maury, as *amici curiæ*.

January 24, 1910. Denied.

FRIES-BRESLIN COMPANY, Petitioner, v. WILLIAM BERGAN et al. [No. 732.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 176 Fed. 76.

Mr. Roger Foster for petitioner.

Messrs. Ira Jewell Williams and F. R. Shattuck for respondents.

January 24, 1910. Denied.

HENRY G. THOMAS, Petitioner, v. FLORENCE HUNT DE WINTER et al. [No. 730.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of *Columbia. [610]

See same case below, 34 App. D. C. 80.

Messrs. Conrad H. Syme and James W. Beller for petitioner.

Mr. P. H. Marshall for respondents.

January 31, 1910. Denied.

COMMISSIONERS OF LINCOLN PARK, Petitioners, v. WESTRUMITE COMPANY OF AMERICA. [No. 733.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 174 Fed. 144.

Messrs. William R. Ruminler and Eugene G. Mason for petitioners.

Mr. Walter H. Chamberlin for respondent.

January 31, 1910. Denied.

VIRGINIA PASSENGER & POWER COMPANY et al., Petitioners, v. LANE BROS. CO. [No. 745.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 174 Fed. 513.

Messrs. Henry W. Anderson and Eppa Hunton, Jr., for petitioners.

Mr. Thomas S. Martin for respondent.

January 31, 1910. Denied.

UNITED STATES, Petitioner, v. J. R. SIMON & COMPANY. [No. 748.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 95 C. C. A. 434, 169 Fed. 106.

The Attorney General, the Solicitor General, and Assistant Attorney General D. Frank Lloyd for petitioner.

Messrs. W. Wickham Smith, Howard T. Walden, and Henry J. Webster for respondent.

January 31, 1910. Denied.

UNITED STATES, Petitioner, v. LEOPOLD BARUCH. [No. 749.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for 611] the Second *Circuit.

The Attorney General, the Solicitor General, and Assistant Attorney General D. Frank Lloyd for petitioner.

Mr. Albert H. Washburn for respondent.

January 31, 1910. Granted.

UNITED STATES OF AMERICA FOR PENN IRON COMPANY, LTD., Plaintiff in Error, v. WILLIAM R. TRIGG COMPANY and Virginia Trust Company. [No. 3.]

In Error to the Supreme Court of Appeals of the State of Virginia.

See same case below, 106 Va. 557, 56 S. E. 329.

Mr. George Bryan for plaintiff in error.

Messrs. Frank W. Christian and Leigh Robinson for defendants in error.

October 11, 1909. Dismissed with costs, on motion of counsel for the plaintiff in error.

PEOPLE OF PORTO RICO, Appellants, v. ROMAN CATHOLIC APOSTOLIC CHURCH IN PORTO RICO. [No. 10.]

Appeal from the Supreme Court of Porto Rico.

Messrs. Frank Fenille, Charles Hartzell, and Henry M. Hoyt, 2d, for appellants.

Messrs. Paul Fuller and Frederic R. Couderd for appellee.

October 11, 1909. Dismissed, per stipulation.

348

ROMAN CATHOLIC APOSTOLIC CHURCH IN PORTO RICO, Appellant, v. PEOPLE OF PORTO RICO. [No. 14.]

Appeal from the Supreme Court of Porto Rico.

Messrs. Paul Fuller and Frederic R. Couderd for appellant.

Messrs. Frank Feuille, Charles Hartzell, and Henry M. Hoyt, 2d, for appellees.

October 11, 1909. Dismissed, per stipulation.

*W. B. HADLEY, Acting Auditor of [612 Porto Rico, Appellant, v. H. H. SCOVILLE, Clérk, et al. [No. 78.]

Appeal from the District Court of the United States for Porto Rico.

Mr. Henry M. Hoyt, 2d, for appellant.

Mr. N. B. K. Pettingill for appellees.

October 11, 1909. Dismissed with costs, on motion of counsel for the appellant.

SUPREME COUNCIL OF THE ROYAL ARCANUM, Plaintiff in Error, v. A. G. BRENIZER. [No. 82.]

In Error to the Supreme Court of the State of North Carolina.

Messrs. F. H. Busbee and Charles W. Tillett for plaintiff in error.

No appearance for defendant in error.

October 11, 1909. Dismissed with costs, on motion of counsel for the plaintiff in error.

JULIO O. ABRIL, as Attorney in fact of José T. Silva, Appellant, v. MODESTO COBIAN Y MUNIZ. [No. 170.]

Appeal from the Supreme Court of Porto Rico.

Mr. John Larkin for appellant.

Mr. Charles F. Carusi for appellee.

October 11, 1909. Dismissed with costs, on motion of counsel for the appellant.

ATCHISON, TOPEKA, & SANTA FÉ RAILWAY COMPANY, Plaintiff in Error, v. EMMA M. SEWELL. [No. 216.]

In Error to the Supreme Court of the State of Kansas.

Mr. Robert Dunlap for plaintiff in error.

Mr. Charles F. Hutchings for defendant in error.

October 11, 1909. Dismissed with costs, on motion of counsel for the plaintiff in error.

WARD LUMBER COMPANY, INCORPORATED, 613] *Plaintiff in Error, v. HENDERSON-WHITE MANUFACTURING COMPANY, INCORPORATED. [No. 326.]

In Error to the Supreme Court of Appeals of the State of Virginia.

Mr. Aubrey E. Strode for plaintiff in error.

No appearance for defendant in error.

October 11, 1909. Dismissed with costs, on motion of counsel for the plaintiff in error.

HARRISON CROOK, Plaintiff in Error, v. INTERNATIONAL TRUST COMPANY OF MARYLAND. [No. 403.]

In Error to the Court of Appeals of the District of Columbia.

Mr. Wilton J. Lambert for plaintiff in error.

Messrs. Walter C. Clephane and W. Calvin Chesnut for defendant in error.

October 11, 1909. Dismissed with costs, on motion of counsel for the plaintiff in error.

HARRISON CROOK, Plaintiff in Error, v. INTERNATIONAL TRUST COMPANY OF MARYLAND. [No. 404.]

In Error to the Court of Appeals of the District of Columbia.

Mr. Wilton J. Lambert for plaintiff in error.

Messrs. Walter C. Clephane and W. Calvin Chesnut for defendant in error.

October 11, 1909. Dismissed with costs, on motion of counsel for the plaintiff in error.

IRRIGATION, LAND, & IMPROVEMENT COMPANY, Appellant, v. ETHAN ALLEN HITCHCOCK, Secretary of the Interior. [No. 17.]

Appeal from the Court of Appeals of the District of Columbia.

See same case below, 28 App. D. C. 587.

Messrs. George Turner and George H. Patrick for appellant.

The Attorney General, the Solicitor General, and Joseph R. Webster for appellee.

October 22, 1909. Dismissed, on motion of Mr. George H. Patrick, for the appellant.

614] *INTERNATIONAL TEXT-BOOK COMPANY, Appellant, v. CITY OF OTTUMWA. No. 33.]

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

Mr. David C. Harrington for appellant.

No appearance for appellee.

November 1, 1909. Dismissed with costs, on motion of counsel for the appellant.

54 L. ed.

FAIRMONT COAL COMPANY et al., Appellants, v. MERCHANTS' COAL COMPANY. [No. 83.]

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

See case below, 88 C. C. A. 23, 160 Fed. 769.

Mr. Edgar H. Gans for appellants.

Messrs. William A. Glawgow, Jr., Frank Gosnell, and George Weems Williams for appellee.

November 1, 1909. Dismissed with costs, on motion of counsel for the appellants.

WASHINGTON GASLIGHT COMPANY et al., Appellants and Plaintiffs in Error, v. HENRY B. F. MACFARLAND et al., Commissioners of the District of Columbia. [No. 84.]

Appeal from and in error to the Court of Appeals of the District of Columbia.

See same case below, 30 App. D. C. 365.

Messrs. R. Ross Perry, R. Ross Perry, Jr., and Wilton J. Lambert for appellants and plaintiffs in error.

Mr. Edward H. Thomas for appellees and defendants in error.

November 1, 1909. Dismissed with costs, on motion of counsel for the appellants and plaintiffs in error.

MARY HALLIGAN, as Administratrix, etc., Appellant, v. TRINIDAD SHIPPING & TRADING COMPANY, LIMITED, et al. [No. 304.]

Appeal from the District Court of the United States for the Southern District of New York.

Messrs W. W. Gooch and *Frederic [615 C. Scofield for appellant.

Messrs. J. Parker Kirlin and Charles R. Hickox for appellees.

November 1, 1909. Dismissed, per stipulation.

R. G. MULLEN, Appellant, v. FRED FORNOFF, Captain, etc. [No. 502.]

Appeal from the District Court for the First Judicial District of the Territory of New Mexico.

Mr. William P. Borland for appellant.

No appearance for appellee.

November 1, 1909. Dismissed with costs, on motion of counsel for appellant.

OSWALD C. LUDWIG, as Secretary of State of the State of Arkansas, Appellant, v. CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY. [No. 44.]

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

See same case below, 156 Fed. 152.

Messrs. Hal L. Norwood, William F. Kirby, William H. Arnold, and George W. Hendricks for the appellant.

Mr. Thomas S. Buzbee for appellee.

November 11, 1909. Dismissed, per stipulation.

ALPHOSE DUFAUR et al., Appellants, v. UNITED STATES. [No. 219.]

Appeal from the District Court of the United States for the Northern District of Illinois.

Mr. Holmes Conrad for appellants.

The Attorney General for appellee.

November 29, 1909. Dismissed, per stipulation, on motion of Mr. Solicitor General Bowers, for the appellee.

FRANK P. PLAMONDON, Plaintiff in Error, v. State of Kansas.

In Error to the Supreme Court of the 616] *State of Kansas.

Mr. C. A. Magaw for plaintiff in error.

Mr. Fred S. Jackson for defendant in error.

December 2, 1909. Dismissed with costs, pursuant to the Tenth Rule.

HENRY C. KING, Plaintiff in Error, v. STATE OF WEST VIRGINIA et al. [No. 444.]

In Error to the Supreme Court of Appeals of the State of West Virginia.

Messrs. Maynard F. Stiles and John G. Carlisle for plaintiff in error.

Messrs. John F. Dillon, Harry Hubbard, William G. Conley, Edward C. Lyon, Malcolm Jackson, John A. Sheppard, C. W. Campbell, D. J. F. Struther, L. C. Anderson, Wells Goodykoontz for defendants in error.

December 14, 1909. Dismissed with costs, pursuant to the Tenth Rule.

ATLANTIC COAST LINE RAILROAD COMPANY, Plaintiff in Error, v. W. C. GERATY. [No. 227.]

In Error to the Supreme Court of the State of South Carolina.

Messrs. P. A. Willeox and Frederic D. McKenney for plaintiff in error.

No appearance for defendant in error.

December 20, 1909. Dismissed with costs, on motion of Mr. Frederic D. McKenney of counsel for the plaintiff in error.

UNITED STATES, Plaintiff in Error, v. AMERICAN BONDING COMPANY OF BALTIMORE. [No. 539.]

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

The Attorney General for plaintiff in error.

No appearance for defendant in error.

January 3, 1910. Dismissed on motion of Mr. Solicitor General Bowers for the plaintiff in error.

*UNITED STATES, Plaintiff in Error, v. [617] RUDOLPH AXMAN. [No. 540.]

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

The Attorney General for plaintiff in error.

No appearance for defendant in error.

January 3, 1910. Dismissed on motion of Mr. Solicitor General Bowers for the plaintiff in error.

ATCHISON, TOPEKA, & SANTA FÉ RAILWAY COMPANY, Plaintiff in Error, v. MITCHELL E. PICKENS. [No. 528.]

In Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

Messrs. Andrew H. Culwell and Gardiner Lathrop for plaintiff in error.

Mr. Waters Davis for defendant in error.

January 3, 1910. Dismissed with costs, on motion of Mr. Evans Browne, in behalf of counsel for the plaintiff in error.

CENTRAL OF GEORGIA RAILWAY COMPANY, Appellant, v. WILLIAM A. WRIGHT, Comptroller General of Georgia, et al. [No. 341.]

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

Messrs. Alexander R. Lawton, Henry C. Cunningham, and T. M. Cunningham, Jr., for appellant.

No appearance for appellee.

January 3, 1910. Dismissed with costs, on motion of counsel for appellant.

JOHN HOBSON NELSON, Appellant, v. CITY OF MURFREESBORO et al. [No. 420.]

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

Mr. John J. Vertrees for appellant.

No appearance for appellees.

January 4, 1910. Dismissed with costs, on motion of counsel for the appellant.

618] *J. A. HUGHES, Plaintiff in Error, v. COLLIN COUNTY NATIONAL BANK. [No. 76.]

In Error to the Circuit Court of the United States for the District of Colorado. Messrs. Clayton C. Dorsey and William C. Hodges for plaintiff in error.

No appearance for defendant in error.

January 7, 1910. Dismissed with costs, pursuant to the Tenth Rule.

CUDAHY PACKING COMPANY, Plaintiff in Error, v. STATE OF MINNESOTA. [No. 175.]

In Error to the Supreme Court of the State of Minnesota.

Mr. Moritz Heim for plaintiff in error.

Messrs. George W. Peterson, E. T. Young, and Al. J. Smith for defendant in error.

January 18, 1910. Dismissed, per stipulation.

WOODWARD CARRIAGE COMPANY et al., Appellants, v. PITTS LIVERY COMPANY et al. [No. 507.]

Appeal from the District Court of the United States for the Western District of Texas.

Mr. T. D. Cobbs for appellants.

No appearance for appellees.

January 19, 1910. Dismissed with costs, on motion of counsel for appellants.

UNITED STATES, Plaintiff in Error, v. CHARLES S. SARGENT. [No. 338.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 89 C. C. A. 81, 162 Fed. 81.

The Attorney General for plaintiff in error.

Mr. Luther C. Harris for defendant in error.

January 24, 1910. Dismissed on motion of Mr. Solicitor General Bowers for plaintiff in error.

54 L. ed.

FRED ANDERSON, Plaintiff in Error, v. *UNITED STATES. [No. 750.] **[619]**

In Error to the District Court of the United States for the District of Minnesota.

The Attorney General and the Solicitor General for defendant in error.

January 24, 1910. Docketed and dismissed on motion of Mr. Solicitor General Bowers for the defendant in error.

T. M. STANCLIFT et al., etc., Appellants, v. CHARLIE FOX et al. [No. 109.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. William T. Hutchings for appellants.

Mr. Preston C. West for appellees.

January 24, 1910. Dismissed with costs, pursuant to the Tenth Rule.

RACHEL A. RICHARDSON, Claiming to be Rachel A. Brown, Plaintiff in Error, v. MARY S. REEVES et al. [No. 695.]

In Error to the Court of Appeals of the District of Columbia.

Mr. Tracy L. Jeffords for plaintiff in error.

Messrs. Benjamin H. Schwartz and Milton Strasburger for defendants in error.

January 26, 1910. Dismissed with costs, on motion of counsel for the plaintiff in error.

PATRICK COX, Appellant, v. LUMAN T. HOY, U. S. Marshal for Northern District of Illinois. [No. 65.]

Appeal from the District Court of the United States for the Northern District of Illinois.

Mr. William Dillon for appellant.

Mr. William G. Johnson for appellee.

July 7, 1909. Dismissed pursuant to Twenty-eighth Rule.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

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OCTOBER TERM, 1909.

Vol. 216.

REFERENCE TABLE
OF SUCH CASES
DECIDED IN U. S. SUPREME COURT,
OCTOBER TERM, 1909,
AND REPORTED HEREIN,
VOLUME 216,
AS ALSO APPEAR IN
OFFICIAL REPORTER'S EDITION.

Off. Rep. No U. S.	Title.	Here in.	Off. Rep. 216 U. S.	Title.	Here in.
1-3	Western U. Teleg. Co. v. Kansas ex rel. Coleman	355	93-94	King v. West Virginia (3 cases)	398
3-6	"	356	94-97	"	399
6-8	"	357	97-99	"	400
8-11	"	358	99-101	"	401
11	"	359	102-103	Babbitt v. Dutcher	402
18-19	"	362	105-106	"	403
19-22	"	363	106-109	"	404
22-24	"	364	109-111	"	405
24-26	"	365	111-114	"	406
26-29	"	366	114-115	"	407
29-31	"	367	115-116	Re Elkus, Matter of Madson Steele Co.	407
31-33	"	368	116-117	"	408
33-36	"	369	117	Woodside v. Beckham	408
36-38	"	370	118	"	409
38-40	"	371	118-121	"	410
40-43	"	372	121	"	411
43-45	"	373	122-123	Atlantic C. L. R. Co. v. Mazursky	411
45-48	"	374		Southern Exp. Co. v. McTeer	412
48-50	"	375		Atlantic C. L. R. Co. v. Charles	413
50-53	"	376		Atlantic C. L. R. Co. v. Von Lehe (2 cases)	415
53-55	"	377		"	416
55-56	"	378		"	417
56	Pullman Co. v. Kansas ex rel. Coleman	378	123-125	Zartman v. First Nat. Bank	418
58-59	"	382	125	"	419
59-61	"	383	129	"	420
62-64	"	384	129-132	Childers v. McClaughry	421
64-66	"	385	132-134	"	422
66-69	"	386	134-135	"	423
69-71	"	387	138	Ludwig v. Western U. Teleg. Co.	423
71-74	"	388	139-140	"	425
74-76	"	389	140-143	"	426
76-77	"	390	143-145	"	427
78	Cincinnati, N. O. & T. P. R. Co. v. Slade	390	145	"	428
78-81	"	391	146	"	429
81-83	"	392	151-152	"	430
83-84	"	393	152-155		
84	Conley v. Ballinger	393	155-157		
88	"	394	157-160		
88-90	"	395	160-162		
90-91	"	396	162-164		
92	King v. West Virginia (3 cases)	396			

REFERENCE TABLE.

Off. Rep. 216 U. S.	Title.	Here in.	Off. Rep. 216 U. S.	Title.	Here in.
165	Western U. Teleg. Co. v. Andrews	430	303-304	Fraenkl v. Cerecedo	491
165-167	"	431	305-306	Pendleton v. United States	491
167	Alvarez y Sanchez v. United States	432	306-309	"	492
171-173	"	433	309-311	"	493
173-176	"	434	311	Penman v. St. Paul F. & M. Ins. Co.	493
176	"	435	314-316	"	495
177	Monongahela Bridge Co. v. United States	435	316-318	"	496
185-188	"	439	318-321	"	497
188-190	"	440	321-322	"	498
190-192	"	441	322	Blake v. Openhym	498
192-195	"	442	324-325	"	499
195	"	443	325-327	"	500
196	Citizens Central Nat. Bank v. Appleton	443	327-330	"	501
200-201	"	444	330	"	502
201-204	"	445	331	{ Albright v. Sandoval	502
204-206	"	446	335-336	{ Sandoval v. Albright	506
206	Great Northern R. Co. v. Minnesota	446	336-338	"	507
211-212	"	451	338-341	"	508
212-215	"	452	341	"	509
215-217	"	453	342-343	Albright v. Sandoval	509
217-220	"	454	343-344	"	510
220-222	"	455	344	Maxley v. Hertz	510
222-224	"	456	348-349	"	511
224-227	"	457	349-351	"	512
227-229	"	458	351-354	"	513
229-232	"	459	354-356	"	514
232-233	"	460	356-357	"	515
234	Chicago G. W. R. Co. v. Minnesota	460	358	Laurel Hill Cemetery v. San Francisco	515
234-236	"	461	363-365	"	518
236-239	"	462	365-366	"	519
239-240	"	464	367	Hawaiian Trust Co. v. Von Holt (2 cases)	519
240	Ballinger v. United States ex rel. Frost	464	368	"	521
244-245	"	466	368-370	"	522
245-248	"	467	370-371	"	523
248-250	"	468	372	United States v. Plowman	523
250-251	"	469	372-374	"	524
251-253	Central Trust Co. v. Central Trust Co.	469	374-375	"	525
253-254	"	470	375	Saxlehner v. Wagner	525
259-261	"	471	379-380	"	527
261-262	"	472	380-381	"	528
266-267	Missouri P. R. Co. v. Kansas ex rel. Taylor	472	382	Harris v. First Nat. Bank	528
267-269	"	474	382-385	"	529
269-272	"	475	385	"	530
272-274	"	476	386	Olmsted v. Olmsted	530
274-277	"	477	390	"	531
277-279	"	478	390-393	"	532
279-282	"	479	393-395	"	533
282-284	"	480	396	Forbes v. State Council of Va.	534
284	"	481	396-399	"	535
285-286	Hannis Distilling Co. v. Baltimore	482	399	"	536
286-289	"	483	400-401	Southern R. Co. v. Greene	536
289-291	"	484	401-403	"	537
291-294	"	485	403-404	"	538
294-295	"	486	411-412	"	539
295	Fraenkl v. Cerecedo	486	412-415	"	540
295-297	"	487	415-417	"	541
297-300	"	488	417-418	"	542
300	"	489	418	{ Louisville & N. R. Co. v. Gaston	542
301-303	"	490	419-429	{ Central of Ga. R. Co. v. Gaston	544
54 L. ed.			420	Wright v. Georgia R. & Bkg. Co.	544
			422-424	"	552

REFERENCE TABLE.

Off. Rep. 216 U. S.	Title.	Here in.	Off. Rep. 216 U. S.	Title.	Here in.
424-426	Wright v. Georgia R. & Bkg. Co.	553	517	Board of Assessors v. New York L. Ins. Co.	597
426-429	" "	554	521-523	" "	601
429-431	" "	555	523	" "	602
431-434	" "	556	524	Starkweather v. Jenner	602
434-436	" "	557	524-526	" "	603
436-438	" "	558	526-528	" "	604
439	Toxaway Hotel Co. v. Smath- ers	558	528-531	" "	605
439-441	" "	559	531	Interstate Commerce Com. v. Delaware, L. & W. R. Co.	605
441	" "	560	535	" "	606
445-447	" "	561	535-538	" "	607
447-449	" "	562	538-543	Interstate Commerce Com. v. Northern P. R. Co.	608
449	Friday v. Hall & Kaul Co.	562	543-545	" "	609
450	" "	563	545	Knapp v. Milwaukee Trust Co.	610
453-454	" "	564	545	" "	612
454-456	" "	565	552	" "	613
456	" "	566	552-554	" "	614
456	Pickett v. United States	566	554-557	" "	615
457-458	" "	567	557-559	" "	615
458-460	" "	568	559	Franklin v. United States	616
460-462	" "	569	559-561	" "	617
462	Haas v. Henkel	569	561-567	" "	618
471-473	" "	574	567-569	" "	619
473-475	" "	575	570	" "	619
475-477	" "	576	571	Osborn v. Froyseth	620
477-480	" "	577	571-573	" "	621
480-482	" "	578	573-574	" "	622
482-483	" "	579	574-576	" "	623
483-484	Peckham v. Henkel	579	576-578	" "	624
484-486	" "	580	578	" "	624
486-487	" "	581	579-580	Northern P. R. Co. v. North Dakota ex rel. McCue	624
488	Price v. Henkel	581	584	" "	625
488-489	" "	584	580-581	Williams v. First Nat. Bank	625
489-491	" "	585	582	" "	626
491-494	" "	586	582-583	" "	627
494	" "	587	584-585	" "	628
494	Wm. Cramp & Sons S. & E. Bldg. Co. v. United States	587	585-587	" "	629
498-500	" "	588	587-588	" "	630
500-502	" "	589	592-593	" "	631
502-504	" "	590	593-596	" "	632
504	J. J. McCaskill Co. v. United States	590	596-598	" "	632
505-506	" "	590	598	{ Maytin v. Vela	632
506-508	" "	592	599-600	{ de los Angeles v. Maytin	633
508-510	" "	593	600-603	" "	634
510-513	" "	594	603-625	Memorandum Decisions	635-642
513-515	" "	595			
515-517	" "	596			
515-517	" "	597			

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1909.

1] *WESTERN UNION TELEGRAPH COMPANY, Plff. in Err.,
v.

STATE OF KANSAS ON THE RELATION
OF C. C. COLEMAN, Attorney General.

(See S. C. Reporter's ed. 1-56.)

**Foreign corporations — state exclusion
from doing local business — commerce
— due process of law.**

The exaction from a foreign telegraph company for the benefit of the permanent school fund, under the authority of Kan. Gen. Stat. 1901, p. 280, of a "charter fee" of a given per cent of its entire authorized capital stock, as a condition of continuing to do local business in the state, is invalid under the commerce and due-process-of-law clauses of the Federal Constitution, as necessarily amounting to a burden and tax on the company's interstate business and on its property located or used outside the state. [For other cases; see Corporations, XII. b, 2; Commerce, 273-287, 368-375; Constitutional Law, 536-540, in Digest Sup. Ct. 1908.]

[No. 4.]

NOTE.—State licenses or taxes, as affecting interstate commerce—see notes to *Rothermel v. Meyerle*, 9 L.R.A. 366; *American Fertilizing Co. v. Board of Agriculture*, 11 L.R.A. 179; *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Brown v. Maryland*, 6 L. ed. U. S. 678; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 217; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041; *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311; and *Pittsburgh & S. Coal Co. v. Bates*, 39 L. ed. U. S. 538.

On exclusion, regulation, and taxation of foreign corporations—see note to *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13.

On corporate taxation and the commerce clause—see note to *Sandford v. Poe*, 60 L.R.A. 641.

On the taxation of corporate capital stock generally—see note to *State Bd. of Equalization v. People*, 58 L.R.A. 513.

54 L. ed.

Argued March 17, 18, 1909. Decided January 17, 1910.

IN ERROR to the Supreme Court of the State of Kansas to review a decree restraining a foreign telegraph company from transacting local business in the state, except so far as the company's duties to or contracts with the United States should be affected. Reversed.

See same case below, 75 Kan. 609, 90 Pac. 299.

Statement by Mr. Justice Harlan:

*This action was brought by the state [3 of Kansas in one of its courts against the Western Union Telegraph Company, a New York corporation, to obtain a decree ousting and restraining that corporation from doing, in Kansas, any telegraphic business that was wholly internal to that state, and not pursuant to some arrangement, or to meet its contracts with, or obligations to, the government of the United States. Upon the petition of the telegraph company the case was removed to the circuit court of the United States for the district of Kansas. But it was thereafter remanded to the state court, where, upon a demurrer to the answer, a final decree was rendered, prohibiting and enjoining the telegraph company from transacting intrastate business in Kansas as a corporation, the decree, however, not to affect the company's duties to or contracts with the United States. From that decree the present writ of error was prosecuted.

The state contends that the decree is in exact conformity with certain provisions of the Kansas statutes to be found in the General Statutes of that state of 1901, title, "Corporations," p. 380, and the General Statutes of 1905, p. 284. Those provisions, or the ones directly involved here, originated in an act known as the Bush act, passed

at a special session of the legislature in 1898. Laws of Kansas, Special Session, p. 27.

The issues raised by the pleadings arise out of the above statutes. Under those statutes, a state charter board was organized and its powers defined. That board was authorized to receive applications from corporations of other states, territories, or countries seeking permission to engage in business as foreign corporations in Kansas. Any such corporation was required in its application to set forth a certified copy of its charter or articles of incorporation, the place where its principal office or place of business was to be located, the full nature and character of the business in which it proposed to engage, the names and addresses of its officers, trustees, or directors and stockholders, with a detailed statement of its assets and liabilities, and such other information as the board might require in 4] *order to determine the solvency of the corporation. The statute further provided that the application should be accompanied by a fee of \$25, to be known as an application fee, and that it should be a condition precedent to obtaining authority to transact business in the state that the corporation should file in the office of the secretary of state its written consent, irrevocable, that actions might be brought against it in the proper court of any county in the state (in which the cause of action arose, or in which the plaintiff resided), by service of process on the secretary of state, and stipulating that such service should be valid and binding as if due service had been made upon the president or chief officer of the corporation. Every foreign corporation then doing business in the state was required, within thirty days from the taking effect of the act, to file with the secretary of state the specified written consent. Kan. Gen. Stat. 1901, § 1261. If the charter board determined that the foreign company seeking to do business in the state was organized in accordance with the laws under which it was created, that its capital was unimpaired, and that it was organized for a purpose for which a domestic corporation might be organized in Kansas, then the board was directed to grant the application, and by its secretary issue a certificate, setting forth the granting of the application to engage in business in the state, as provided in the statute. *Id.* § 1262.

Then come these important sections:

"Each corporation which has received authority from the charter board to organize shall, before filing its charter with the secretary of state, as provided by law, pay to the state treasurer of Kansas, for the benefit of the permanent school fund, a charter

fee of $1/10$ of 1 per cent of its authorized capital, upon the first \$100,000 of its capital stock, or any part thereof; and upon the next \$400,000, or any part thereof, $1/20$ of 1 per cent; and for each million or major part thereof over and above the sum of \$500,000, \$200. . . . In addition *to [5 the charter fee herein provided, the secretary of state shall collect a fee of \$2.50 for filing and recording each charter containing not to exceed ten folios, and an additional fee of 25 cents for each folio in excess of ten contained in any charter. The fee for filing and recording a charter shall also entitle the corporation to a certified copy of its charter. All the provisions of this act, including the payment of the fees herein provided, shall apply to foreign corporations seeking to do business in this state, except that, in lieu of their charter, they shall file with the secretary of state a certified copy of their charter, executed by the proper officer of the state, territory, or foreign country under whose laws they are incorporated; and any corporation applying for a renewal of its charter shall comply with all the provisions of this act in like manner, and to the same extent, as is herein provided for the chartering and organizing of new corporations." "Any corporation organized under the laws of another state, territory, or foreign country, and authorized to do business in this state, shall be subject to the same provisions, judicial control, restrictions, and penalties, except as herein provided, as corporations organized under the laws of this state." *Id.* §§ 1264, 1267.

By another section it is made the duty of each corporation doing business for profit in Kansas, except banking, insurance, and railroad corporations, annually, on or before August 1st, "to prepare and deliver to the secretary of state a complete detailed statement of the condition of such corporation on the 30th day of June next preceding. Such statement shall set forth and exhibit the following, namely: 1st. The authorized capital stock. 2d. The paid-up capital stock. 3d. The par value and the market value per share of said stock. 4th. A complete and detailed statement of the assets and liabilities of the corporation. 5th. A full and complete list of the stockholders, with the postoffice address of each, and the number of shares held and paid for by each. 6th. The names and postoffice addresses of the officers, trustees, or directors and manager *elected for the ensuing year, together with a certificate of the time and manner in which such election was held. . . . And such failure to file such statement by any corporation doing business in this state, and not organized under the laws of this

state, shall work a forfeiture of its right or authority to do business in this state, and the charter board may, at any time, declare such forfeiture, and shall forthwith publish such declaration in the official state paper. . . . No action shall be maintained or recovery had in any of the courts of this state by any corporation doing business in this state without first obtaining the certificate of the secretary of state that statements provided for in this section have been properly made." § 1283.

Under this statute, the Western Union Telegraph Company made application to the charter board for permission to engage in business in Kansas as a foreign corporation, stating that the amount of its capital stock, fully paid up in cash, was \$100,000,000. With that application the company deposited with the secretary of state the specified fee of \$25, and also its written consent, irrevocable, in the prescribed form, as to suits brought against it, in the courts of the state, by service of process on that officer. In reference to that consent, the company, in its answer, said: "It made such written submission to service and paid such application fee voluntarily, and *ex gratia*, and out of a desire to avoid the appearance of not complying with the reasonable regulations of the state of Kansas, made with reference to its own corporations; but denies that said payment and that said written submission were obligatory upon it, or were necessary or essential as a condition precedent to its continuing to transact business within the state of Kansas, both state and interstate."

The charter board granted the application of the telegraph company, but its order to that effect, made April 5th, 1905, recited that the application be granted and the applicant 7] authorized *and empowered to transact the business of receiving and transmitting messages by telegraph within the state of Kansas, and transacting within the said state its business of a telegraph company, provided that the order should not take effect and no certificate of authority should issue or be delivered to the company "until such applicant shall have paid to the state treasurer of Kansas, for the benefit of the permanent school fund, the sum of twenty thousand one hundred dollars (\$ 0,100), being the charter fee provided by law necessary to be paid by a foreign corporation having a capital of \$100,000,000. It is further understood, ordered, and provided that nothing herein contained shall apply to nor be construed as restricting in any wise the transaction by the said applicant of its interstate business nor its business for the Federal government; but that this grant of authority and requirement as to

payment relate only to the business transacted wholly within the state of Kansas." The above fee of \$20,100 was the specified per cent of the *authorized capital* of the company which the statute required it to pay before doing or continuing to do any local business in Kansas.

The company refused to pay the fee thus required, and continued, as before, to do telegraph business of all kinds in Kansas. Thereupon the present action was brought, the sole ground of complaint being that, in consequence of the failure of the telegraph company to pay the charter fee of \$20,100, it was without authority to continue doing any *intrastate* or local business in Kansas. The relief sought by the state, as shown by the prayer of its petition, was that the defendant be required to show by what authority it exercised within Kansas the corporate right and power of receiving, transmitting, and delivering telegraphic messages within its limits and receiving compensation therefor; that it be adjudged by the court that the defendant had no authority of law for the performance of such corporate acts, and the exercise of such corporate powers and franchises, and the carrying on of said corporate business within the state; and that it be decreed and adjudged that the *defendant "be ousted [8 of and from the exercise within the state of Kansas of the said corporate rights and franchises of receiving, transmitting, and delivering within the state of Kansas of telegraphic messages and communications and of receiving compensation therefor."

The reasons given by the telegraph company for its refusal to pay the required fee are set forth in its answer, to which a demurrer was sustained, and may be summarized as follows: 1. That the company had the right to transact both interstate and local business in Kansas without paying the fee of \$20,100. 2. That by the laws of Kansas, enacted while it was a territory and after it became a state, telegraph companies were invited to come into it and do both domestic and interstate business there, and in consequence of such invitation the company had established between eight hundred and nine hundred offices in Kansas at great expense, all of which was done in the full faith that it would receive the equal protection of the laws under the Constitution of the United States. 3. That it had been doing a general telegraph business in Kansas ever since its organization as a territory. 4. That on the 7th day of June, 1867, it duly accepted the conditions of the act of Congress of July 24th, 1866 [14 Stat. at L. 221, chap. 230], entitled, "An Act to Aid in the Construction of Telegraph Lines, and to Secure to the Gov-

ernment the Use of the Same for Postal, Military, and Other Purposes" (Rev. Stat. §§ 5263 et seq., U. S. Comp. Stat. 1901, p. 3580), whereby it became and is now an instrument of interstate commerce and an agency of the United States for the transaction of public business, and subject to all the duties imposed, and entitled to all the rights, benefits, and privileges conferred, by said act of Congress. 5. That its lines were originally constructed in the territory of Kansas by the authority of an arrangement made with the Secretary of the Treasury in conformity with certain acts of Congress, one of which was enacted June 16th, 1860, and was entitled, "An Act to Facilitate Communication between the Atlantic and Pacific States by Electric Telegraph" [12 Stat. at L. 41, chap. 137], the other, 9] enacted July 2d, 1864, entitled "An Act for Increased Facilities of Telegraph Communication between the Atlantic and Pacific States and the Territory of Idaho" [13 Stat. at L. 373, chap. 220]; and the telegraph company, therefore, "has always been in the state of Kansas rightfully for the purpose of the transaction of governmental business and for the public generally, and that it cannot be now excluded therefrom." 6. That the company's lines of telegraph within Kansas are upon the public domain and upon military and post roads of the United States, and are part of the postal system of the United States, and that the defendant has, therefore, under the Constitution and laws of the United States, the power, and is under the duty and obligation, to transmit all messages for the government and for the public generally just as much and as fully with respect to messages between points within Kansas as to interstate messages. 7. That the enforcement of the statute of Kansas would seriously affect and cripple the company's efficiency as an instrument of interstate commerce and as an agency of the government for transacting both interstate and domestic business in that state, because the receipts derived from interstate and governmental business alone would, in many offices in Kansas, not be equal to the expense of keeping such offices open, and that the closing of them on that account would be detrimental to the governmental service, as well as to interstate commerce. 8. That by the statutes in question "any corporation, including telegraph companies, organized in the state, is authorized to do business in Kansas upon paying a charter fee based on the actual capital of such corporation employed in the state of Kansas, whereas, in respect to the defendant company, the charter board requires and is attempting to exact from the defendant company, by this

proceeding, a charter fee based upon the defendant's *entire capitalization*, to wit, \$100,000,000, which \$100,000,000 *represents the property and lines of telegraph of the defendant company in the forty-five states of the American Union, in the Dominion of Canada, and lines under the Atlantic and Pacific oceans and in foreign countries.*" 9. That such tax is *upon property and [10 rights outside of Kansas, and, therefore, *beyond its jurisdiction for purposes of taxation.* 10. That "by laws passed relating to private corporations, and especially by laws having reference to telegraph companies, some enacted by the legislature of the territory of Kansas and many since the creation and organization of the state of Kansas, telegraph companies, including the Western Union, were invited to come into the state of Kansas, and build and construct their lines therein, and to connect said lines with other telegraph lines then or thereafter constructed, and to do a general telegraph business, both domestic and interstate, throughout the state of Kansas, and to thereby place the citizens of the state of Kansas, wherever the lines reached, in direct telegraphic communication with all parts of the United States; that said telegraph companies, including the Western Union Telegraph Company, were, by the laws of the state of Kansas, authorized to go upon the public highways of the state, and thereon place their poles and wires; that, in pursuance of such invitation, and before the admission of the state of Kansas to the Union, the Western Union Telegraph Company entered the state of Kansas and extended its lines to all points where the same might be needed, and subsequent to the admission of the state, by construction and purchase, lines of the Western Union Telegraph Company were extended to all parts of the state of Kansas, and between eight hundred and nine hundred offices established for the use and convenience of the public; that there had been expended by the defendant at the time of the enactment of the so-called Bush corporation act, under which the present proceeding is brought, many thousands of dollars in the construction of lines and wires and in the other appurtenances of the telegraphic business and in the establishment of offices; that all of this money was expended in full faith and confidence in the laws already enacted by the state of Kansas for the furtherance and encouragement of telegraphic business, and also in the full faith that said company would have the equal protection of the laws of the state of Kansas, and the fair, *equitable, and [11 equal treatment required by the Constitution of the state of Kansas in the matter of taxes

and other public charges imposed upon it.”
 11. That the statute in question, so far as it prevents the company from using its property in the state for all purposes of its business, would operate as a taking of such property without due process of law.
 12. That the statute is in contravention of the power of Congress to regulate commerce among the several states and with foreign countries, with its power to establish post-offices and post roads, and with its authority to pass all laws necessary and proper to carry into execution the powers vested in the government of the United States.

Messrs. **Rush Taggart** and **Henry D. Estabrook** argued the cause, and, with Messrs. Charles Blood Smith, John F. Dillon, and George H. Fearons, filed a brief for plaintiff in error:

The action of the state of Kansas violates the contract under which the Western Union Telegraph Company for many years constructed and maintained lines of telegraph within the state, and amounts to a taking of the telegraph company's property without due process of law.

American Smelting & Ref. Co. v. Colorado, 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198, 9 A. & E. Ann. Cas. 978; 3 *Clark & M. Priv. Corp.* § 845, ¶ d, pp. 2704, 2705; *United States v. Cruikshank*, 92 U. S. 542, 555, 23 L. ed. 588, 592; *Seaboard Air Line R. Co. v. Railroad Commission*, 155 Fed. 792; *Chicago, R. I. & P. R. Co. v. Swanger*, 157 Fed. 783; *Chicago, R. I. & P. R. Co. v. Ludwig*, 156 Fed. 152; *People v. Fire Asso. of Philadelphia*, 92 N. Y. 311, 44 Am. Rep. 380, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *United States v. Central P. R. Co.* 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038; *St. Louis v. Western U. Teleg. Co.* 148 U. S. 103, 37 L. ed. 385, 13 Sup. Ct. Rep. 485; *New Orleans y. Southern Teleph. & Teleg. Co.* 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533; *Monongahela Nav. Co. v. United States*, 148 U. S. 329, 37 L. ed. 469, 13 Sup. Ct. Rep. 622; *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 58, 20 Atl. 407; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 9, 43 L. ed. 341, 345, 19 Sup. Ct. Rep. 77; *Pearshall v. Great Northern R. Co.* 161 U. S. 661, 40 L. ed. 843, 16 Sup. Ct. Rep. 705; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Powers v. Detroit, G. H. & M. R. Co.* 201 U. S. 544, 50 L. ed. 861, 26 Sup. Ct. Rep. 556; *Dartmouth College v. Woodward*, 4 Wheat. 637, 4 L. ed. 659; *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 54 L. ed.

U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952.

The state cannot exact from the telegraph company as a condition precedent to its doing business in the state a tax or license fee based upon the entire capital stock of the company, when more than 99 per cent of its capital stock is in use elsewhere than in the state of Kansas, and is largely employed in interstate commerce.

Judson, Taxn. § 169; *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Lafayette Ins. Co. v. French*, 18 How. 404, 407, 15 L. ed. 451, 452; *St. Clair v. Cox*, 106 U. S. 350, 356, 27 L. ed. 222, 225, 1 Sup. Ct. Rep. 354; *Barron v. Burnside*, 121 U. S. 186, 200, 30 L. ed. 915, 919, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 120, 34 L. ed. 394, 397, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Fargo v. Hart*, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 696, 39 L. ed. 311, 315, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *Colorado v. Pullman Co.* (1905; Dist. Colo.); *State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 146; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Leloup v. Mobile*, 127 U. S. 640, 644, 32 L. ed. 311, 313, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Bateman v. Western Star Mill. Co.* 1 Tex. Civ. App. 90, 4 Inters. Com. Rep. 260, 20 S. W. 931.

A tax on the capital stock of a corporation is a tax on the property of the corporation represented by the capital stock.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Union Refrigerator Transit Co. v. Kentucky*, supra; *Gray, Limitations of Taxing Power*, p. 53.

The court will look to the substance rather than to forms,—to what an enforcement of the law would really do, rather than to what the law itself may say it would do.

Ashley v. Ryan and *Galveston, H. & S.*

A. R. Co. v. Texas, *supra*; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Postal Teleg. Cable Co. v. Taylor, 192 U. S. 64, 73, 48 L. ed. 342, 346, 24 Sup. Ct. Rep. 208; Postal Teleg. Cable Co. v. Adams, *supra*; Home Ins. Co. v. New York, 134 U. S. 594, 598, 33 L. ed. 1025, 1029, 10 Sup. Ct. Rep. 593.

The protection from state interference with interstate commerce, secured by the Constitution, ceases to be of force if the state may do indirectly that which it may not do directly.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Home Ins. Co. v. New York, *supra*; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23.

A state cannot tax interstate commerce; it cannot tax the earnings therefrom; it cannot tax for the privilege of carrying it on; nor can it exercise its powers of taxation beyond its geographical limits.

Ashley v. Ryan; Union Refrigerator Transit Co. v. Kentucky; and Postal Teleg. Cable Co. v. Adams,—*supra*.

A state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits.

Norfolk & W. R. Co. v. Pennsylvania, *supra*; see also Pickard v. Pullman Southern Car Co. *supra*; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; McCall v. California, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Lyng v. Michigan, 135 U. S. 161, 166, 34 L. ed. 150, 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725.

It is as surely a burden on interstate commerce to tax that commerce for the privilege of doing something else as it is to tax one engaged in interstate commerce for the privilege of carrying it on. Such a tax would burden and regulate commerce equally with what was held to be such regulation in case of the State Freight Tax Case and Norfolk & W. R. Co. v. Pennsylvania, *supra*; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Pickard v. Pullman Southern Car Co.; Gloucester Ferry Co. v. Pennsylvania; and Philadelphia & S. Mail S. S. Co. v. Pennsylvania,—*supra*; or any of the other cases in which the attempts of a state to

tax interstate commerce have not been sustained.

This court has plainly pointed out the distinction between corporations engaged in interstate commerce and having a quasi public character, and corporations organized to conduct strictly private business.

New York v. Roberts, 171 U. S. 658, 661, 43 L. ed. 323, 324, 19 Sup. Ct. Rep. 58.

It is held not to be a violation of the commerce clause of the Constitution for a state to tax, as property, the instrumentalities of interstate commerce having a fixed situs within her limits, or an average quantity, as in Pullman's Palace Car Co. v. Pennsylvania, *supra*, but to entitle a state to tax such instrumentalities there must be attached to them all the conditions necessary to render property subject to taxation, as location and jurisdiction of the taxing power.

St. Louis v. Wiggins Ferry Co. 11 Wall. 423, 20 L. ed. 192; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Fargo v. Hart; Union Refrigerator Transit Co. v. Kentucky; and Gloucester Ferry Co. v. Pennsylvania,—*supra*.

Any burden laid on such instrumentalities, except under the rule as laid down by this court, is an interference with and a burden upon interstate commerce. Whenever a state attempts to impose such a burden in any form, with the sole exception of regulations necessary to the health and safety of the people, there is a collision between the Federal and state power, and the state regulation must yield.

Pickard v. Pullman Southern Car Co.; Norfolk & W. R. Co. v. Pennsylvania; and Crutcher v. Kentucky,—*supra*; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 695, 696, 39 L. ed. 311, 315, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Gibbons v. Ogden and Gloucester Ferry Co. v. Pennsylvania, *supra*; Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, *supra*; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494.

If one state (other than the home state) may tax the instrumentalities of interstate commerce not located within her limits, but largely located and used in all the other states of the Union, as are those of the plaintiff in error, then each state may do the same, thereby taxing all the capital stock as many times as there are states, and the aggregate action of all the states would not only burden and impede, but actually

prohibit and destroy, that feature of interstate commerce now carried on by the defendant company, and which may be controlled and regulated by Congress alone.

Brown v. Maryland, supra; *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254; *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303; *Com. v. Standard Oil Co.* 101 Pa. 119; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 573, 30 L. ed. 249, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Gloucester Ferry Co. v. Pennsylvania and Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, supra.

Mr. Fred S. Jackson argued the cause, and, with Mr. C. C. Coleman, filed a brief for defendant in error:

A question of state law alone does not present a Federal question, so as to give the Supreme Court jurisdiction over a state judgment. The judgment of the state court is final.

Nonconnah Turnp. Co. v. Tennessee, 131 U. S. clviii. Appx. and 24 L. ed. 368; *M'Bride v. Hoey*, 11 Pet. 167, 9 L. ed. 673; *Bank of West Tennessee v. Citizens' Bank*, 13 Wall. 432, 20 L. ed. 514; *Harrison v. Myer*, 92 U. S. 111, 23 L. ed. 606; *Commercial Bank v. Buckingham*, 5 How. 317, 12 L. ed. 169; *Smiley v. Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289.

In this suit the state seeks only the enforcement of its own general statutes as applied to a foreign corporation doing business within the state, and specifically limits its claim to the business done wholly within the state, and limits its right of recovery to the principle of its own statutes. This presents a case not cognizable by the Federal court, and which, under the uniform decisions of the Supreme Court of the United States, presents no question of the constitutional rights of the plaintiff in error.

Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; *New York v. Roberts*, 171 U. S. 661, 43 L. ed. 324, 19 Sup. Ct. Rep. 58; *Minot v. Philadelphia, W. & B. R. Co.* 18 Wall. 206-230, 21 L. ed. 888-896.

A state statute which imposes upon all foreign corporations seeking to transact business in the state a capitalization fee based upon the entire capital stock of each corporation subject to its provisions, as a condition precedent to granting such corporation permission to commence or continue business within the state, is wholly within the authority of the state.

State ex rel. Shawnee County v. American Book Co. 65 Kan. 847, 69 Pac. 563.

Has a foreign corporation greater rights as against the state, and greater freedom

under its laws, than one of its own creation? Must the state, without any license fee, permit a foreign corporation to transact business which is wholly within its jurisdiction, which it would deny to a corporation of its own creation without the payment of the fee? Does not the mere statement of the question compel a negative answer?

Horn Silver Min. Co. v. New York, supra; *Postal Teleg. Cable Co. v. Norfolk*, 101 Va. 125, 43 S. E. 207.

The mere fact that indirectly and incidentally the effect of the enforcement of the state law upon a subject-matter within the state's jurisdiction may cause expense or inconvenience to the person or corporation upon which such enforcement operates does not subject the law to the criticism that it takes without due process of law.

Pabst Brewing Co. v. Crenshaw, 198 U. S. 17-30, 49 L. ed. 925-931, 25 Sup. Ct. Rep. 552; *Lumberville Delaware Bridge Co. v. State Assessors*, 55 N. J. L. 529, 25 L.R.A. 134, 26 Atl. 711.

Statutes have been sustained against this objection, requiring a charge for the use of streets, poles, wires, etc.

St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; *Postal Teleg. Cable Co. v. Baltimore*, 156 U. S. 210, 39 L. ed. 399, 15 Sup. Ct. Rep. 356; *Western U. Teleg. Co. v. New Hope*, 187 U. S. 427, 47 L. ed. 244, 23 Sup. Ct. Rep. 204.

And requiring wires to be placed underground.

New York ex rel. New York Electric Lines Co. v. Squire, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880.

The questions have usually been: Does the statute in question apply only to the business of this company within the state? Does it provide for its enforcement without prohibiting or hindering the interstate business of the company? If those questions can be answered in the affirmative, the law is not unconstitutional, and has been uniformly sustained.

Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Western U. Teleg. Co. v. New York*, 3 L.R.A. 449, 2 Inters. Com. Rep. 533, 38 Fed. 552; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Sanford v. Poe*, 60 L.R.A. 641, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546.

The state has the exclusive right to determine the manner in which it shall exercise its authority over such corporations, and the Federal court will not interfere

with the state in the honest exercise of its discretion in an attempt to regulate a corporation engaged in both foreign and domestic commerce, when the regulation is an evident attempt to regulate only the domestic business of such corporation.

Western U. Teleg. Co. v. Atty. Gen. supra; *Delaware Railroad Tax*, 18 Wall. 206, 21 L. ed. 888; *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Honduras Commercial Co. v. State Assessors*, 54 N. J. L. 278, 23 Atl. 668; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181-190, 31 L. ed. 650-654, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; *Postal Teleg. Cable Co. v. Norfolk*, supra.

The Bush law is the first attempt on the part of the state to regulate foreign corporations, or to permit their entrance into the state for the transaction of business. No fees of any kind were required or received from them by the state, and any rights enjoyed by such companies were enjoyed merely as a matter of comity.

State ex rel. Coleman v. Western U. Teleg. Co. 75 Kan. 609, 90 Pac. 299; *State ex rel. Coleman v. Pullman Co.* 75 Kan. 664, 90 Pac. 319.

Mr. Justice Harlan, after making the above statement, delivered the opinion of the court:

The above extended statement would seem to be justified by the importance of this case.

The contentions of the company, to which particular attention will be directed, are, in substance, that the requirement that it pay, for the benefit of the permanent school fund of the state, a *given per cent of its authorized capital*, wherever and however employed, as a *condition* of its right to continue to do domestic business in Kansas, is a regulation which, by its necessary operation, directly burdens or embarrasses interstate commerce, and therefore is illegal under the commerce clause of the Constitution; further, that such a requirement involves the taxation not only of the company's interstate business everywhere, but equally the property employed by it beyond the limits of the state,—a thing which could not be done consistently with the due process of law enjoined by the 14th Amendment.

It will be well to inquire, at the outset,

as to the state of the law in respect of local regulations that materially burden and interfere with the freedom of commerce among the states. A review of some of the cases will throw light on the questions now before us, and enable us the better to ascertain the scope and effect of the statute.

In *McCall v. California*, 136 U. S. 104, 109, 34 L. ed. 391, 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881, a municipal ordinance of San Francisco imposing a license tax of a specified amount upon "every railroad agency" was held to be violative of the commerce clause of the Constitution *when applied to an agent in San Fran- [19] cisco of a railroad company which had its principal place of business in Chicago, and operated a continuous line between Chicago and New York. That agent, conducting his business in San Francisco city and county, solicited there passengers who proposed to travel from Chicago to New York to use the railroad he represented. The court said: "The object and effect of his soliciting agency were to swell the volume of the business of the road. It was one of the 'means' by which the company sought to increase, and doubtless did increase, its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it, therefore, was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple." At the same time, in *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958, the court held that a license tax exacted by Pennsylvania upon a railroad corporation of another state, engaged in interstate commerce, for keeping an office in Philadelphia, was a tax on such commerce, and invalid.

A leading authority on the general subject, and which has an important bearing on more than one question in the present case, is that of *Crutcher v. Kentucky*, 141 U. S. 47, 51, 57, 59, 62, 35 L. ed. 649, 651-654, 11 Sup. Ct. Rep. 851. That case involved the constitutional validity of a statute of Kentucky regulating the agencies of foreign express companies. The statute made it unlawful for the agent of a foreign express company to set up, establish, or carry on the business of transportation in Kentucky without first obtaining a license from the auditor of public accounts to carry on such business, and that officer was forbidden to issue the license until the copy of the express company's charter was filed with him, and a statement, verified by oath, showing its assets and liabilities, the

amount of its capital stock and how paid, of what its assets consisted, the amount of its losses due and unpaid, and that the company was possessed of an actual capital of at least \$150,000, either in cash or safe investments, exclusive of stock *notes. Any person carrying on any business in the state for a transportation or express company, *not incorporated in Kentucky*, without having obtained the required license, was subject to be fined not less than \$100 nor more than \$500, at the discretion of the jury. The statute specified the fee to be paid for the license, also a certain fee for filing a copy of the company's charter, and still another fee for filing an original or annual statement. The fees prescribed were on account of the company's business in Kentucky, *no discrimination being made between interstate and domestic business done there*. Without obtaining the required license, Crutcher acted as agent in Kentucky of the United States Express Company, which was organized under the laws of New York, and was engaged in both interstate and domestic commerce. For acting as such agent without the required license from the state, he was indicted, convicted, and fined \$100. The highest court of Kentucky sustained the conviction and held the statute to be constitutional. Among other things it said: "There is no discrimination made between corporations doing a like business; and the state, although the appellant's company is a foreign corporation, has the right to license the business and calling of this agent as it would that of the lawyer or merchant whose business is confined to the state alone." The judgment of the Kentucky court was reversed by this court.

Speaking by Mr. Justice Bradley, this court, among other things, said: "The law of Kentucky which is brought in question by the case requires from the agent of every express company not incorporated by the laws of Kentucky a license from the auditor of public accounts, before he can carry on any business for said company in the state. This, of course, embraces interstate business as well as business confined wholly within the state. It is a prohibition against the carrying on of such business without a compliance with the state law. . . . If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states, it would not be within the 21] *province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is en-
54 L. ed.

titled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would anyone pretend that a state legislature could prohibit a foreign corporation—an English or a French transportation company, for example—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation. *Inman S. S. Co. v. Tinker*, 94 U. S. 238, 24 L. ed. 118,"—citing *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 205, 211, 29 L. ed. 158, 162, 164, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 342, 30 L. ed. 1200, 1203, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *McCall v. California*, 136 U. S. 104, 110, 34 L. ed. 391, 393, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Norfolk & W. R. Co. v. Pennsylvania*, 130 U. S. 114, 118, 34 L. ed. 394, 396, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958. Again: "As was said by Mr. Justice Lamar, in the case last cited: 'It is well settled by numerous decisions of this court, that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits.' We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it,"—citing *Pickard v. Pullman *Southern Car Co.* 117 U. S. 34, [22 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181,

10 Sup. Ct. Rep. 881; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958. Further, in the Crutcher Case: "We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different states), does also some local business by carrying goods from one point to another within the state of Kentucky. This is, probably, quite as much for the accommodation of the people of that state as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not, they operate as such. But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection." The decisions, the court said, "are clear to the effect that neither licenses nor *indirect taxation of any kind*, nor any system of state regulation, can be imposed upon interstate any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void. And as, in our judgment, the law of Kentucky now under consideration, as applied to the case of the plaintiff in error, is open to this objection, it necessarily follows that the judgment of the court of appeals must be reversed."

The court had previously adjudged in Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 211, 29 L. ed. 158, 162, 164, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826, that a statute of Pennsylvania requiring both domestic and foreign corporations doing business in that commonwealth to pay an annual tax rated by the dividends declared, and imposed upon *the capital stock of the corporation at a named rate for every 23] dollar of *such stock*, was invalid so far as corporations engaged in interstate commerce were concerned. In that case, the court, speaking by Mr. Justice Field, said: "Nor does it make any difference whether such commerce is carried on by individuals or by corporations. Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238." Again, in the Gloucester Ferry Case: "While it is conceded that the property in a state belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a do-

mestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce." This language was quoted approvingly in Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 343, 344, 30 L. ed. 1200, 1204, 1205, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118, which held that a tax by Pennsylvania upon the gross receipts of one of *its own corporations*, derived from interstate and foreign commerce, was a regulation of interstate and foreign commerce that was inconsistent with the power of Congress under the Constitution. In Philadelphia & S. Mail S. S. Co. v. Pennsylvania, the court, referring to the Gloucester Ferry Case, said: "It is hardly necessary to add that the tax on the capital stock of the New Jersey company, in that case, was decided to be unconstitutional, because, as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business was interstate commerce."

In Leloup v. Mobile, 127 U. S. 640, 645, 32 L. ed. 311, 313, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380, the court, speaking by Mr. Justice Bradley, said: "The question is squarely presented to us, therefore, whether a state, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one state to another *and be- [24] tween the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of Congress passed July 24th, 1866 [14 Stat. at L. 221, chap. 230], and other acts incorporated in title 65 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3579). Can a state prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a state can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupa-

tion; and a tax on the occupation of doing a business is surely a tax on the business."

In the recent case of *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638, which involved the validity of a Texas statute imposing an annual tax "equal to 1 per cent of its gross receipts" on each railroad *lying wholly within that state*. The railroads there concerned lay wholly within Texas, but, this court said, they connected with other lines, and a part, and in some instances much the larger part, of their gross receipts, were derived from the carriage of passengers and freight coming from, or destined to, points without the state. The contention by the railroad company was that the tax was a burden on interstate commerce, and invalid, so far as it was based on or was measured by receipts derived from interstate transportation. That view was sustained. The court said: "Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. *Stockard v. Morgan*, 185 U. S. 27, 37, 46 L. ed. 785, 794, 22 Sup. Ct. Rep. 576; *Asbell v. Kansas*, 209 U. S. 251, 254, 256, 52 L. ed. 25] 778, 780, 781, 28 Sup. Ct. Rep. 485. *We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states. The distinction between a tax 'equal to' 1 per cent of gross receipts and a tax of 1 per cent of the same seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property, and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. On the contrary, we rather infer, from the judgment of the state court and from the argument on behalf of the state, that another tax on the property of the railroad is upon a valuation of that property, taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.' Of course, it does not matter that the plaintiffs in error are domestic corporations, or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the state."

So, in *Brennan v. Titusville*, 153 U. S. 289, 303, 38 L. ed. 719, 723, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829, which involved the validity of an ordinance imposing

a license tax on those engaged in the business of soliciting orders on behalf of manufacturers of goods, the court said: "It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a state may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the state is enabled to say that it shall not be carried on in this way, and to that extent to regulate it." Again, in *Ashley v. Ryan*, 153 U. S. 436, 440, 38 L. ed. 773, 776, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865, the court said: "Whether this charge be viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause [26 of the Constitution of the United States, or involved the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction." To the same effect is *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229.

The authorities cited show that this court has guarded with both diligence and firmness the freedom of interstate commerce against hostile state or local action, as such action has been manifested by regulations operating, in some instances, directly, in others indirectly, upon the means or instruments employed in that commerce. This has been done without violating the principle that an interstate carrier, entering a state for purposes of its business, is subject to local regulations that, in their essence and purpose, only incidentally affect interstate commerce, but are established in good faith for the protection, safety, comfort, and convenience of the people, are not in themselves in any real, just sense an obstruction to or in conflict with the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the state, and to be respected until Congress covers the subject by legislation. *Cooley v. Port Wardens*, 12 How. 299, 320, 13 L. ed. 996, 1005; *Sherlock v. Alling*, 93 U. S. 99, 104, 23 L. ed. 819, 820; *Morgan's L. & T. K. & S. S. Co. v. Board of Health*, 118 U. S. 455, 463, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 1114; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 100, 32 L. ed. 352, 354, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *New York, N.*

H. & H. R. Co. v. New York, 165 U. S. 628, 631, 632, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 297, 43 L. ed. 702, 706, 19 Sup. Ct. Rep. 465. We are aware of no decision by this court holding that a state may, by any device or in any way, whether by a license tax in the form of a "fee," or otherwise, burden the interstate business of a corporation of another state, although the state may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made 27] "dependent *in fact* on the value of its property *situated within the state*." Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 696, 39 L. ed. 311, 315, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Leloup v. Mobile, 127 U. S. 640, 649, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380. On the contrary, it is to be deduced from the adjudged cases that a corporation of one state, authorized by its charter to engage in lawful commerce among the states, may not be prevented by another state from coming into its limits for all the legitimate purposes of such commerce. It may go into the state without obtaining a license from it for the purposes of its interstate business, and without liability to taxation there *on account of such business*.

But it is said that none of the authorities cited are pertinent to the present case, because the state expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the telegraph company from entering the field of domestic business in Kansas without its consent, and without conforming to the requirements of its statute. But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute, as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction, as the adjudged cases abundantly show.

In Henderson v. New York (Henderson v. Wickham), 92 U. S. 259, 268, 23 L. ed. 543,

547, which involved the question whether a statute of New York was, in any real sense, a regulation of commerce with foreign nations, the court said that, in whatever language a statute may be framed, its purpose must be determined by its natural and *reasonable effect. In Mugler v. Kansas, [28 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273, it was said that the courts, when determining whether a statute is consistent with the fundamental law, must not deem themselves "bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." In Lyng v. Michigan, 135 U. S. 161, 166, 34 L. ed. 150, 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725, it was adjudged that a state could not lay a tax on interstate commerce "in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." In Robbins v. Taxing Dist. 120 U. S. 489, 497, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, it was attempted to support a local regulation about drummers upon the ground that no discrimination was made between domestic and foreign drummers,—that they were all taxed alike. But that device or form of taxation did not prevail, the court saying: "That does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." In Minnesota v. Barber, 136 U. S. 313, 319, 326, 34 L. ed. 455, 457, 460, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862, the particular statute there assailed as repugnant to the Constitution of the United States was not saved by the fact that it was applicable to citizens of all the states, including citizens of the state which enacted it. This court said: "There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void." It was further said in that case *—"that a statute may, upon its face, ap- [29 ply equally to the people of all the states,

and yet be a regulation of interstate commerce which a state may not establish. A burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute."

In *Brimmer v. Rebman*, 138 U. S. 78, 81, 34 L. ed. 862, 863, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213, the question arose as to the validity of a Virginia statute making it unlawful to offer for sale, within the limits of that state, "any fresh meats (beef, veal, or mutton) which shall have been slaughtered 100 miles or over from the place at which it is offered for sale until and except it has been inspected and approved" as provided in the statute. The preamble of the statute recited that unwholesome meats were being offered for sale in Virginia. Such recital was held not to conclude the question as to the conformity of the statute with the Constitution. Despite the avowal by the state that its object, by the statute, was to prevent the offering of unwholesome meats for sale in Virginia, this court adjudged it to be unconstitutional, saying: "Is the statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the Constitution? This question admits of but one answer. . . . The fees exacted under the Virginia statute for the inspection of beef, veal, and mutton, the product of animals slaughtered 100 miles or more from the place of sale, are, in reality, a tax; and 'a discriminating tax, imposed by a state, operating to the disadvantage of the products of other states when introduced into the first-mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the powers conferred by the Constitution upon the Congress of the United States.' *Walling v. Michigan*, 116 U. S. 446, 455, 29 L. ed. 691, 694, 6 Sup. Ct. Rep. 454. Nor can this statute be brought into harmony with the Constitution by the circumstances that it purports to apply alike to the citizens 30] of *all the states, including Virginia; for 'a burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the states enacting such statutes.' *Minnesota v. Barber*, 136 U. S. 313, 319, 34 L. ed. 455, 457, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Robbins v. Taxing Dist.* 120 U. S. 489, 497, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592. If the object of Virginia had been to obstruct the bringing into that state, for use as human food, of all beef, veal, and 54 L. ed.

mutton, however wholesome, from animals slaughtered in distant states, that object will be accomplished if the statute before us be enforced."

Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the telegraph company, as a charter fee, of a given per cent of *its authorized capital*, representing, as that capital clearly does, *all of its business and property, both within and outside of the state*, a condition of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the state, but a burden and tax on the company's interstate business and on its property located or used outside of the state. The express words of the statute leave no doubt as to what is the basis on which the fee specified in the state statute rests. That fee, plainly, is not based on such of the company's capital stock as represented in its local business and property in Kansas. The requirement is a given per cent of the company's authorized capital; that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that state. What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business, the state has not chosen to ascertain and declare in the statute. It strikes at the company's entire business, wherever conducted, and its property, wherever located, and, in terms, makes it a condition of the *company's tele- [31 graph right to transact purely local business in Kansas that it shall contribute, for the benefit of the state school fund, a given per cent of its whole authorized capital, representing all of its property and all its business and interests everywhere.

In *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 549, 550, 552, 31 L. ed. 793-795, 8 Sup. Ct. Rep. 961, a tax nominally upon the shares of the capital stock of the company was held to be in effect a tax only on property owned and used by the company in Massachusetts, because, and *only because*, the basis established for the ascertainment of the value of such property was *the proportion of the company's lines in the state to their entire length throughout the whole country*. Such a tax was held not to be forbidden by the Constitution, because *based* on the company's stock representing only its business and its property inside the state. In *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127, it was

held that a single tax on the receipts of a telegraph company, some of which were derived from interstate commerce and some from intrastate commerce, but capable of separation, was invalid *to the extent that the receipts were derived from interstate commerce*. The court was confronted with the same situation in *Leloup v. Mobile*, 127 U. S. 640, 647, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380, which case involved the validity of a city ordinance imposing, generally, a specified license tax "on telegraph companies." The ordinance was held invalid because the tax had reference to the entire business of the telegraph company, interstate and domestic, without any distinction being made between the different kinds of business. It was urged in that case that a portion of the telegraph company's business was wholly internal to the state, and therefore was taxable by the state. To this view the response of the court was: "But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company." So, in 32] the case now before us, the exaction, *as a condition of the privilege of continuing to do or doing local business in Kansas, that the telegraph company shall pay a given per cent of its authorized capital stock, is, for every practical purpose, a tax both on the company's local business in Kansas, and on its interstate business, or on the privilege of doing interstate business; for the statute, by its necessary operation, will accomplish precisely the result that would have been accomplished had it been made, *in express words*, a condition of doing local business, that the telegraph company should submit to taxation upon both its interstate and intrastate business and upon its interests and property everywhere, as represented by its capital stock. The exaction made by the Kansas statute is as much a tax on the interstate business of the company and on its property outside of the state as a fee or tax on the sale of an article imported only for sale, or as a tax on the occupation of an importer would be a tax on the property imported (*Brown v. Maryland*, 12 Wheat. 419, 444, 6 L. ed. 678, 687); or that a tax on the stock of the United States is a tax on the contract under which it was issued, and a tax on the power to borrow money on the credit of the United States (*Weston v. Charleston*, 2 Pet. 449, 467, 468, 7 L. ed. 481, 487, 488); or that a tax on the salary of an officer of the United States would be a tax on the means employed by the govern-

ment of the Union to execute its constitutional powers (*Dobbins v. Erie County*, 16 Pet. 435, 449, 10 L. ed. 1022, 1027); or that a tax on an ordinary bill of lading for property taken out of a state would be a tax on the property covered by that instrument (*Almy v. California*, 24 How. 169, 16 L. ed. 644); or that a tax on the amount of sales made by an auctioneer would be a tax on the goods sold (*Cook v. Pennsylvania*, 97 U. S. 566, 573, 24 L. ed. 1015, 1017). But, as already said, what part of the fee exacted by Kansas is to be attributed to intrastate business and what part to interstate business the state has not chosen to ascertain and declare. It has seen proper to exact a specified per cent of the authorized capital of the telegraph company, representing, necessarily, all its business, interstate and intrastate, and all its property in- [33 terests in and out of the state. It is important here to observe—indeed, the contrary could not be asserted—that the telegraph company lawfully entered Kansas, with the consent of both the territory and state, for the purposes of its business of every kind, long before, and was legally there when, the Bush act was passed. The state concedes its right to continue in such business in Kansas, if it will comply with the statute in question, and pay the fee demanded; and only because of such refusal it seeks the aid of the court to oust the company from the state, so far as local business is concerned, unless it shall, by paying such fee, contribute—that is the proper word—a given per cent of all its capital for the support of the schools of the state. The state knows that the telegraph company, in order to accommodate the general public and make its telegraphic system effective, must do all kinds of telegraphic business. Yet, it seeks to enforce a regulation requiring the company by paying the "fee" in question to assent to its interstate business being burdened and its property outside of Kansas being taxed in order that it may continue to conduct a business concededly beneficial to the public,—a right lawfully acquired from the United States when Kansas was a territory, and exercised consistently with the statutes of the state for many years after Kansas was admitted as a state of the Union.

But it is said to be well settled that a state, in the exercise of its reserved powers, may prescribe the terms on which a foreign corporation, whatever the nature of its business, may enter and do business within its limits.

It is true that, in many cases, the general rule has been laid down that a state may, if it chooses to do so, exclude foreign corporations from its limits, or im-

pose such terms and conditions on their doing business in the state as, in its judgment, may be consistent with the interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in ordinary business, and not directly or regularly in interstate or foreign commerce. In *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, which sustained the power of the state to exclude foreign insurance companies from its limits, or to impose conditions upon their entering the state for purposes of its business, the court said: "It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. . . . This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations. . . . The defect of the argument lies in the character of their business. *Issuing a policy of insurance is not a transaction of commerce.* . . . Such contracts are not interstate transactions, though the parties may be domiciled in different states." In *Pensacola Telegraph Co. v. Western U. Teleg. Co.* 96 U. S. 1, 12, 13, 24 L. ed. 708, 711, the case of *Paul v. Virginia* was referred to and the above extract made from its opinion. And the court, speaking by Chief Justice Waite, in the *Pensacola Case*, said: "We are aware that, in *Paul v. Virginia*, supra, this court decided that a state might exclude a corporation of another state from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' Art. 4, § 2. *That was not, however, the case of a corporation engaged in interstate commerce; and enough was said by the court to show that, if it had been, very different questions would have been presented.*"

Whatever may be the extent of the state's authority over intrastate business, was it competent for the state to require that the telegraph company,—which surely had the right to enter and remain in the state for interstate business,—as a condition of its right to continue doing domestic business in *Kansas, should pay, in the form of a fee, a specified per cent of its capital stock representing the interests, property, and operations of the company not only

in Kansas, but throughout the United States and foreign countries? Is such a regulation consistent with the power of Congress to regulate commerce among the states, or with rights growing out of such commerce, and secured by the Constitution of the United States? Can the state, in this way, relieve its own treasury from the burden of supporting its public schools, and put that burden, in whole or in part, upon the interstate business and property of foreign corporations? Can such a regulation be deemed constitutional any more than one requiring the company, as a condition of its doing intrastate business, that it should surrender its right, for instance, to invoke the protection of the Constitution when it is proposed to deprive it of its property without due process of law, or to deny it the equal protection of the laws? In *Lafayette Ins. Co. v. French*, 18 How. 404, 407, 15 L. ed. 451, 452, the court, speaking by Mr. Justice Curtis, said: "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state (*Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274). This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states and by this court, *provided they are not repugnant to the Constitution or laws of the United States.*" In *Southern P. Co. v. Denton*, 146 U. S. 202, 207, 36 L. ed. 942, 945, 13 Sup. Ct. Rep. 44, the court considered the question of the validity of a Texas statute relating to foreign corporations desiring to transact business in that state. That statute provided that the application of the corporation to do business in the state should contain a stipulation that the permit be subject to certain provisions of the statute, one of which was that the permit shall become null and void if the corporation, being sued in a state court, should remove the case into a court of the United States upon the ground of the diverse citizenship of the parties or of local prejudice against such corporation. Dealing with that point, this court, speaking [36 by Mr. Justice Gray, said: "But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the state, *to surrender a right and privilege secured to it by the Constitution and laws of the United States*, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions,"—citing *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931;

Texas Land & Mortg. Co. v. Worsham, 76 Tex. 556, 13 S. W. 384. See also to the same effect, Martin v. Baltimore & O. R. Co. (Gerling v. Baltimore & O. R. Co.) 151 U. S. 673, 684, 38 L. ed. 311, 315, 14 Sup. Ct. Rep. 533; St. Clair v. Cox, 106 U. S. 350, 356, 27 L. ed. 222, 225, 1 Sup. Ct. Rep. 354; Barrow S. S. Co. v. Kane, 170 U. S. 100, 110, 111, 42 L. ed. 964, 968, 18 Sup. Ct. Rep. 526. In the above case of Barron v. Burnside (which was cited with approval in the Denton Case), this court, speaking by Mr. Justice Blatchford, unanimously held: "As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

. . . In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States." So, in Barrow S. S. Co. v. Kane, above cited, Mr. Justice Gray, delivering the unanimous judgment of the court, said: "Statutes requiring foreign corporations, as a condition of being permitted to do business within the state, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the state, have been adjudged to be unconstitutional and void." If a domestic corporation engaged in the business of soliciting orders for goods manufactured, sold, and delivered in a state should, in addition, solicit orders for goods manufactured in and to be brought from another state for delivery, could the former state make it a condition [37] of the right to engage in local *business within its limits that the corporation pay a given per cent of all fees or commissions received by it in its business, interstate and domestic? There can be but one answer to this question, namely, that such a condition would operate as a direct burden on interstate commerce, and therefore would be unconstitutional and void. Consistently with the Constitution no court could, by any form of decree, recognize or give effect to or enforce such a condition.

We repeat that the statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in

that it makes both such commerce, as conducted by the company, and its property outside of the state, contribute to the support of the state's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a "fee" for the privilege of doing local business. To hold otherwise, is to allow form to control substance. It is easy to be seen that if every state should pass a statute similar to that enacted by Kansas, not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified, and the business of the country thrown into confusion, but each state would continue to meet its own local expenses not only by exactions that directly burdened such commerce, but by taxation upon property situated beyond its limits. We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done, or can generally be better and more economically done, by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall *not be trammelled or burdened by local [38] regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the states to regulate their strictly domestic affairs is fundamental, in our constitutional system, and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the general government, and not in hostility to rights secured by the supreme law of the land.

We need not stop to discuss at length the specific question whether the state can, by any regulation, make the property of the company, outside of Kansas, contribute directly to the support of its schools; such being the effect of the requirement that it pay into the state treasury, for the benefit of the state school fund, a given per cent of all its capital stock as a condition of its doing local business in Kansas. It is firmly established that, consistently with the due-process clause of the Constitution of the United States, a state cannot tax property located or existing permanently beyond its limits. Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 398, 47 L. ed. 513, 519, 23 Sup. Ct. Rep. 463; Union Refrigerator Transit Co. v. Kentucky, 199

U. S. 194, 209, 50 L. ed. 150, 155, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493.

It is said that the conclusions here announced are not in harmony with some cases heretofore decided by this court. This suggestion is one of serious import, and cannot be passed without consideration, although the careful examination of the cases may greatly extend this opinion. In support of the view just stated, reliance is placed particularly on *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; *Allen v. Pullman's Palace Car Co.* 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39; and *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 246, 248, 50 L. ed. 1013, 1014, 26 Sup. Ct. Rep. 619, 6 A. & E. Ann. Cas. 317.

What was the case of *Osborne v. Florida*?

A certain statute of that state made it a misdemeanor for one to act as agent in the state of an express company doing business there without the payment of a license tax, *the amount of which depended upon the number of inhabitants in the city, town, 39] or village where the *business was conducted.* *Osborne*, without obtaining such a license, and having acted as agent, in Florida, of a Georgia corporation engaged in interstate as well as intrastate business, was proceeded against criminally under the statute. He contended that the statute was invalid, in that it assumed to regulate interstate commerce. The supreme court of Florida held that the statute had no application to interstate commerce, and affected only the business done in the state that was "local" in its character. And this court, upon writ of error to the supreme court of Florida, held that the company could "conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state." As thus construed, the statute was held not to be a regulation of interstate commerce. This court, recognizing the principle announced in *Crutcher v. Kentucky*, said that "so long as the regulation as to the license or taxation *does not refer to and is not imposed upon the business of the company which is interstate*, there is no interference with that commerce by the state statute." Let it be observed that the license taxes prescribed by Florida were such as to make it clear that its statute applied, and was intended to be applied, only to domestic business within Florida, as measured by *the number of inhabitants of the city or town where the business was conducted.* It was not imposed on any basis

that had reference either to the interstate business or to the property of the company outside of the state. It imposed no burden whatever on interstate business, nor put any obstacle in the way of doing such business; whereas, the statute here involved prohibits a foreign corporation from doing any local business in Kansas unless such corporation first pays into the state's school fund a tax, or, which is the same thing, a fee, in the form of a given *per cent of all its capital, representing all of its business, property, and interests everywhere.* The Florida case is somewhat similar in principle to that of *Western U. Teleg. Co. v. Atty. Gen.* *above cited, in which it was [40 held that a state tax on the capital stock of the telegraph company was valid when measured, as it was in that case, not by its entire capital, but by the proportion of the company's lines in the state to their entire length throughout the entire country. So, in *Osborne v. Florida*, the tax was not imposed on the basis of the business of the company, interstate and intrastate, or either separately, but was made to depend alone on the number of inhabitants in the particular city or town where its agency was established. It is manifest that what has been said in the present case is in perfect harmony with the decision in the *Osborne Case*.

As to *Pullman Co. v. Adams*, 189 U. S. 420, 421, 47 L. ed. 877, 878, 23 Sup. Ct. Rep. 494, we perceive nothing in the judgment in that case that conflicts with what is herein said. That case involved the validity of a tax of a certain amount imposed by Mississippi on *each* sleeping and palace-car company carrying passengers "from one point to another *within the state*," and so many cents per mile "for each mile of railroad track over which the company runs its cars *in this state*." It was contended that this tax was an interference with commerce among the states. It is stated in the opinion that the sleeping cars of the Pullman Company, an Illinois corporation, "were carried by various railroad companies, and all of them were carried into the state from another state, or out of the state to another state, or both. But such cars in their passage also carried passengers from point to point within the state, and a specific fare was collected by the servants of the Pullman Company." It was contended by the company that the state Constitution made it a common carrier, and, in effect, compelled it to assume the burden of carrying local passengers, although its receipts from purely local business were less than the expense incurred in carrying it on. But the state supreme court held that view of the state Constitution to be fallacious. And

this court said: "If the clause of the state Constitution referred to were held to impose the obligation supposed and to be valid we assume, without discussion, that the 41] tax would be invalid. *For then it *would seem to be true that the state Constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.* On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by *Osborne v. Florida, supra*. The company cannot complain of being taxed for the privilege of doing local business which it is free to renounce. Both parties agree that the tax is a privilege tax. As the validity of the tax is thus bound up with the effect of the section of the state Constitution, we think that the Pullman Company was entitled to know how it stood under the latter, and that a judgment against it could not be justified by reasoning which leaves that point obscure. We are somewhat embarrassed in dealing with the case, because we are not quite certain whether we rightly interpret the intimations upon the subject in the judgment under review. If the Constitution of Mississippi should be read as imposing an obligation to take local passengers, the question for us might be which, if not both, the clause of the Constitution or the tax act, is invalid. But we assume that the opinion of the supreme court of Mississippi intends to meet the difficulty frankly, and when it says that the argument against the tax drawn from the above interpretation of the Constitution is fallacious, we take it as meaning that no such interpretation will be attempted in the future, and we take it so the more readily that we can see no ground for a different view. If we are right in our understanding, the judgment of the supreme court was correct for the reason sufficiently stated above." So that what was actually decided in the Adams Case was that the company was under no obligation to take local passengers, but, if it chose to do that kind of business, the privilege for doing it could be taxed by the state. The court did not hold that the state could, in any form, directly burden interstate commerce. It really held to the contrary. 42] **The Adams Case differs from the present one in this: that while the Mississippi Code imposed no other condition upon the Pullman Company doing local business in that state than that it should pay a cer-*

tain license tax on that account,—which tax, it may be observed, is not at all disproportioned to such local business, and therefore not to be regarded as a mere device to reach or burden the interstate commerce of the company,—the statute of Kansas forbids the doing of local business within its limits by a corporation of another state or foreign country, except subject to the condition that such corporation first pay to the state a given per cent of its entire capitalization representing the value of all its business, property, and interests within and without the state, thereby placing a direct burden on the privilege or franchise of transacting interstate commerce and taxing property rights beyond the jurisdiction of the state for purposes of taxation. That the Western Union Telegraph Company is engaged in both interstate and intrastate commerce is no reason, in itself, why Kansas may not, in good faith, require it to pay a license tax strictly on account of local business done by it in that state. But it is altogether a different thing for Kansas to deny it the privilege of doing such local business, beneficial to the public, except on condition that it shall first pay to the state a given per cent of all its capital stock, representing all of its property, wherever situated, and all its business in and outside of the state.

Nor is there any conflict between the views we have expressed and the decision in *Allen v. Pullman's Palace Car Co.* 191 U. S. 171, 178, 179, 48 L. ed. 134, 138, 24 Sup. Ct. Rep. 39. One of the questions in that case was as to the constitutional validity of a Tennessee statute, passed in 1887, which required every company operating sleeping cars and doing business in that state to pay, as a privilege tax, "on each car, per annum, \$500." The Pullman Car Company operated sleeping cars in Tennessee under a contract with railroad companies traversing the state. The gross receipts of the companies from lines running into the state were, annually, about \$500,000, and only about \$25,000 annually from passengers *carried locally in Ten- [43 nessee. The cars actually used on these lines during each year numbered over one hundred. The court in that case referred to *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635, which involved the validity of a Tennessee act of 1877, imposing a license tax privilege of \$50 annually, for each sleeping car or coach used on railroads in the state, and said: "It was held [in the *Pickard Case*] that the tax was a burden upon interstate commerce, and void because of the exclusive power of Congress to regulate commerce between the states. Unless the stat-

ute now under consideration can be distinguished from the one then construed, the Pickard Case is decisive of the present case. Both taxes were imposed under the power granted by the Constitution of Tennessee to lay a privilege tax. This power is held by the supreme court of the state to give a wide range of legislative discretion. Any occupation, business, employment, or the like, affecting the public, may be classed and taxed as a privilege. *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 53 L.R.A. 921, 43 S. W. 115. In the act of 1877, the running and using of sleeping cars on railroads in the state, when the cars are not owned by the railroads upon which they are run, is declared to be a privilege. Under the act of 1887, the tax is specifically imposed upon a privilege. Under the act of 1877, the tax imposed was \$50 for each car or coach used or run over the road. Under the act of 1887, each company doing business in the state is required to pay \$500 per annum for the same privilege. The distinction, except in the amount of annual tax exacted, is without substantial difference. Under the earlier act the tax is required for the privilege of running and using sleeping cars on railroads not owning the cars. In the later act it is exacted for the privilege of doing business in the state. This business consists of running sleeping cars upon railroads not owning the cars, and is precisely the privilege to be paid for under the first act, neither more nor less. *In neither act is any distinction attempted between local or through cars or carriers of passengers.* The railroads upon which the cars are run are lines traversing 44] *the state, but not confined to its limits. The cars of the Pullman Company run into and beyond the state as well as between points within the state. The act in its terms applies to cars running through the state as well as those whose operation is wholly intrastate. It applies to all alike, and requires payment for the privilege of running the cars of the company, regardless of the fact whether used in interstate traffic or in that which is wholly within the borders of the state. . . . The statute now under consideration requires payment of the sum exacted for the privilege of doing any business, when the principal thing to be done is interstate traffic. We are not at liberty to read into the statute terms not found therein or necessarily implied, with a view to limiting the tax to local business, which the legislature, in the terms of the act, impose upon the entire business of the company. We are of opinion that taxes exacted under the act of 1887 are void as an attempt by the state to impose a burden upon interstate commerce." Again, in the 54 L. ed.

same case, the court sustained the validity of a Tennessee act of 1889, which applied "strictly to business done [by sleeping-car companies] in the transportation of passengers taken up at one point in the state and transported wholly within the state to another point therein." This court, while recognizing, as former cases had done, the exclusive right of Congress to regulate interstate traffic, said that "the corresponding right of the state to tax and control the internal business of the state, although thereby foreign or interstate commerce may be indirectly affected, has been recognized with equal clearness,"—citing *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 536, 17 Sup. Ct. Rep. 214. It would seem to be too clear to admit of doubt that the principles in the *Allen Case* are substantially those herein announced. Indeed, we could not hold otherwise than we do in the present case without overruling or materially modifying the principles announced in the *Allen Case*. In the *Allen Case* the license tax there in question under the Tennessee act of 1887 was imposed generally on account of each sleeping car used on railroads traversing the state, *without any discrimination being made between *cars transport-* 45 *ing interstate passengers and those transporting local passengers.* On that ground the tax was held to be void. In the present case, the state of Kansas demands, in the form of a fee, a given per cent of all the capital of the foreign corporation, without any discrimination between the capital representing the business and property of the telegraph company outside of the state and the capital representing such of its business and property as are wholly local to the state. And it seeks the aid of the court to oust the telegraph company from continuing to do business in the state, so far as local business is concerned, because, and only because, it will not surrender its immunity from state taxation in reference to its interstate business and its property outside of Kansas.

We come now to the case of *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 246, 257, 50 L. ed. 1013, 1018, 26 Sup. Ct. Rep. 619, 6 A. & E. Ann. Cas. 317, which case, it is contended, necessarily determines the present question in favor of the state of Kansas. In the *Prewitt Case* this court sustained the constitutional validity of a Kentucky statute providing, among other things, that if a foreign insurance company should bring a suit in a Federal court against a citizen of Kentucky, or, being itself sued in a state court, should remove the suit to the Federal court, without the consent of the other party, any permit previously granted by it to do

business in Kentucky should be forthwith revoked by the state insurance commissioner, and the fact of such revocation published in some newspaper of general circulation in the state. No other question was determined. The court regarded the question as concluded in favor of the state by the decision in *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365. It said: "As a state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial." The vital difference between the *Prewitt Case* and the one now before us is that the business [46] of the *insurance company, involved in the former case, was not, as this court has often adjudged, interstate commerce, while the business of the telegraph company was primarily and mainly that of interstate commerce. A decision, such as was rendered in the *Prewitt Case*, that a state could, with or without reason, and without violating the Constitution, revoke its permit to a foreign insurance company to do business of a domestic character within its limits, cannot be cited as authority for the proposition, upon which the Kansas statute rests, that a state may prescribe such regulations as to corporations of other states engaged in both interstate and local business, as will require them, as a condition of their doing local business, that they shall contribute a given amount, out of their capital stock, representing all their business, interstate and domestic, wherever done, and all their property, wherever located, in or outside of the state, for the support of the state's schools. The *Prewitt Case* by no means recognized any uncontrollable power in a state to prohibit all foreign corporations, in whatever business engaged, from doing business within its limits. On the contrary, this court said in that very case that "a state has the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the Federal Constitution,"—citing various adjudged authorities, among them the case of *Hooper v. California*, 155 U. S. 648, 652, 653, 39 L. ed. 297, 298, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207. In the latter case the court recognized, as long settled, the general principle that the right of a foreign corporation to engage in business within the state depended solely on the will of such state. But it took especial care to say that the interstate business of

a foreign corporation was a business of an exceptional character, and was protected by the Constitution against interference by state authority. The cases referred to in support of that view are the same as those hereinbefore cited in this opinion. If it be true that the statute of Kansas, by its necessary operation, imposes a burden on the interstate business of the telegraph *company, and subjects its property and [47] business outside of that state to taxation, then the constitutional validity of the statute, in the particulars adverted to, may be here adjudged without any reference whatever to the judgment in the *Prewitt Case*, and without re-examining the grounds upon which that judgment rested. The court did not intend by its judgment in the *Prewitt Case* to recognize the right of Kentucky, by any regulation as to foreign insurance companies, to burden interstate commerce or to tax property located and used without its limits. It could not have done so without overruling numerous decisions of this court on that subject. On the contrary, as we have seen, the court in that case distinctly recognized the principle that a state could not make any prohibition whatever as to a corporation doing business within its limits that would be in violation of the Federal Constitution. In respect of the point actually decided in it, we leave the *Prewitt Case* and the objections urged against the doctrine it announces wholly on one side, and go no further now than is indicated in this opinion.

It results that a decree of ouster, such as the state asks, could not be granted without recognizing the validity of and the giving effect to the unconstitutional requirement that the telegraph company, as a condition of its being allowed to do intrastate business in Kansas, should pay into the state school fund a given per cent of its authorized capital in the form of a fee, based, as in effect it is, on all its property, business, and interests everywhere, including both its interstate and intrastate business and property. Such a decree is asked on the ground that the company has refused to pay such fee. The state court ought to have refused the affirmative relief asked, and dismissed the petition upon the ground that the condition sought to be enforced by a decree of ouster was in violation of the commerce and due-process clauses of the Constitution and of the company's rights under that instrument. The right of the telegraph company to continue the transaction of local business in Kansas could not be made to *depend upon its [48] submission to a condition prescribed by that state, which was hostile both to the letter and spirit of the Constitution. The compa-

ny was not bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the state, any more than it would have been bound to surrender any other right secured by the national Constitution.

There are other aspects of the case involving constitutional questions that might be considered, and which, it is contended, would lead to the same conclusion as is herein indicated. But it is unnecessary to pass on any of the grounds urged by the telegraph company in its defense, other than those made the basis of the decision now rendered. In order to dispose of this case we need not now go further than to hold, as we do, that, for the reasons stated, the state was not entitled to the aid of the court in this case; that the affirmative relief asked by it could not have been granted without practically compelling the telegraph company, as a condition of its doing local business in Kansas, that it should surrender rights belonging to it under the Constitution of the United States, and secured by that instrument against hostile state action; that any such condition was unconstitutional and void; and that the right of the telegraph company to continue doing business in Kansas is not, and cannot be, affected by that condition.

Mr. Justice **Moody** heard the argument in this case, participated in its decision, and approves the opinion of the court.

The judgment of the Supreme Court of Kansas is reversed and the cause remanded for such proceedings as may be consistent with this opinion.

Reversed.

Mr. Justice **White**, concurring:

It is shown that the telegraph company, many years ago, went into the state of Kansas, constructed its lines, established [49] *its offices, etc., and has since been engaged in business, both interstate and local. It is not disputed that there was no law in the state forbidding the company from doing as it did. From this it results that the corporation went into the state, constructed its plant, and carried on its business, on the implied invitation, or, at least, with the tacit consent, of the state. No one questions that the tax which is here in dispute, imposed by the law of Kansas upon the corporation, is repugnant to the Constitution of the United States because wanting in due process, and that it is therefore confiscatory in character. The tax being thus conceded to be inherently vicious, there is, of course, no attempt to sustain its validity on its intrinsic merits. The sole contention is that,

although the tax is void, the telegraph company may not invoke the protection of the Constitution of the United States, because it is in a position where it is not entitled to avail itself of the fundamental safeguards which it was the purpose of the Constitution to secure to all. The reasoning by which it is thus sought to sustain the right of the state to exert a power prohibited by the Constitution of the United States, and to outlaw the corporation by depriving it of the protection afforded by that instrument, is this: The state, it is insisted, has the right to prevent a foreign corporation from coming into its jurisdiction and engaging there in local business, and this power, in the nature of things, must include the right to affix such conditions to the privilege of coming in as the state chooses to impose. Under these circumstances, the argument proceeds, it becomes immaterial to consider the character of the condition annexed by the state to the enjoyment of the right to come in, since, although such conditions be repugnant to the Constitution of the United States, and destructive of the most obvious and sacred rights, as the condition only becomes operative provided the corporation elects to come in, therefore the condition is not obligatory, but is voluntarily assented to by the corporation, and hence may not be by it questioned. But even if, for the sake of the argument only, *the general correctness of the proposi- [50] tion be conceded, it has no application to the case here presented. Such is the case, since this cause is concerned not with the power of the state to prevent a corporation from coming in for the purpose of doing local business, and to attach conditions to the privilege of so coming in, but involves the right of the state to confiscate the property of the corporation already within the state, and which has been there for years, devoted to the doing of local business, as the result of the implied invitation or tacit consent of the state, arising from its failure to forbid or to regulate the coming in. In other words, this case involves determining, not how far a state may arbitrarily exclude, but to what extent, after allowing a corporation to come in and acquire property, a state may take its property within the state without compensation, upon the theory that the corporation is not in the state, and has no property right therein which is not subject to confiscation. The difference between the premise upon which the proposition contended for rests and the situation here presented seems to me self-evident. I say this because my mind fails to perceive how the doctrine of election or voluntary assumption of an unconstitutional burden can have any possible application to a case

like this. Let me illustrate. The telegraph company has expended in the state large sums of money, adequate for the purpose of enabling it to do both local and interstate business. The investment is there, and its magnitude, it is fair to assume, is, in part, a resultant of the requirements of the local business. The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired; that is, for both interstate and local business. The state law takes the property, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden, upon the condition that such burden be discharged or the local business be abandoned. What possible election can there be? The property is in the state. It has been invested therein for the very purpose of doing local as 51] *well as other business. If the unconstitutional burden be not assumed, local business must cease, and hence the property established for the purpose of doing the local business becomes worthless and is in effect confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place.

Nor, I submit, is there force in the suggestion that, under the facts here disclosed, the company cannot be heard to complain, because, as it was in the state without express authority, it must be assumed to have gone into the state and made its investment subject to the exertion by the state of its authority. I concede the proposition to be sound in so far as it includes the right of the state to exert its lawful powers. That is to say, I concede that the corporation, in going in and investing its property within the state, did so subject to the right of the state to exert, as to the property thus in the state, all lawful powers which might be called into play as to property so situated, of the character of that under consideration. But I cannot assent to the correctness of the contention in so far as it asserts that the state may suffer a corporation to come into its borders, invest in property therein, and then, after having allowed, by acquiescence or implied invitation, such a situation to arise, the state may treat the corporation as if it had never come in and its property within the state as if it were wholly out of the state, and despoil the corporation of its rights and property upon such false assumption.

It is to be observed that the view taken by me does not deprive the state of power to exert its authority over the corporation and its property in the amplest way, subject to constitutional limitations. It simply prevents the state from driving out the corporation which is in the state by im-

posing upon it arbitrary and unconstitutional conditions, when upon no possible theory could the right to exact them exist, except upon the assumption that the corporation is not in the state, and that the illegal exactions are the price of the privilege of allowing it to come in.

*Resting, as I do, my concurrence in [52 the decree in this case upon the grounds just previously stated, it becomes unnecessary for me to say anything concerning the wider ground upon which the opinion of the court proceeds, but I do not wish to be understood as dissenting in any respect from the fundamental principle which the opinion of the court embodies and applies.

Mr. Justice Holmes, dissenting:

I think that the judgment of the supreme court of Kansas was right, and it will not take me long to give my reasons. I assume that a state cannot tax a corporation on commerce carried on by it with another state, or on property outside the jurisdiction of the taxing state, and I assume further that, for that reason, a tax on or measured by the value of the total stock of a corporation like the Western Union Telegraph Company is void. But I also assume that it is not intended to deny or overrule what has been regarded as unquestionable since *Bank of Augusta v. Earle*, 13 Pet. 539, 10 L. ed. 284, that, as to foreign corporations seeking to do business wholly within a state, that state is the master, and may prohibit or tax such business at will. *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 246, 249, 50 L. ed. 1013, 1014, 26 Sup. Ct. Rep. 619, 6 A. & E. Ann. Cas. 317; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357. I make the same assumption as to what has been decided twice, at least, since I have sat on this bench, that the right to prohibit, regulate, or tax foreign corporations in respect of business done wholly within a state is not taken away by the fact that they also are engaged there in commerce among the states. *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; *Allen v. Pullman's Palace Car Co.* 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39.

If it should be said that the corporation had a right to enter the state for commerce with other states, and, being there, had the same right to use its property as others, I reply that this begs the question, if the premises be granted. If the corporation has the right to enter for one purpose, and the state has *a right to exclude its entry [53 for another, the two rights can coexist. To say that the disappearance of the latter is an incident of the ownership of property there

is to declare that what is allowed only for a limited purpose must have general results. I think it more logical and more true to the scheme of the Union to recognize that what comes in only for a special purpose can claim constitutional protection only in its use for that purpose, and for nothing else. That, at all events, has been decided in the cases to which I have referred.

Now what has Kansas done? She has not undertaken to tax the Western Union. She has not attempted to impose an absolute liability for a single dollar. She simply has said to the company that, if it wants to do local business, it must pay a certain sum of money, just as Mississippi said to the Pullman Company that, if it wanted to carry on local traffic, it must pay a certain sum. It does not matter if the sum is extravagant. Even in the law the whole generally includes its parts. If the state may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way. I hardly can suppose that the provision is made any the worse by giving a bad reason for it or by calling it by a bad name. I quite agree that we must look through form to substance. The whole matter is left in the Western Union's hands. If the license fee is more than the local business will bear, it can stop that business and avoid the fee. Whether economically wise or not, I am far from thinking that the charge is inherently vicious or bad. If the imposition were absolute, or if the attempt were to oust the corporation from the state if it did not pay, the arguments that prevail would be apposite. But the state seeks only to oust the corporation from that part of its business that the corporation has no right to do unless the state gives leave.

Of course, the suggestion on the other side is that this is an attempt by indirection to break the taboo on the telegraph company's business with other states. The local and the interstate business may be necessary each to the other to make the whole pay. Or the telegraph company might 54] carry on the *local business at a loss, for the sake of popularity or other indirect sources of gain. In the last case the fee would come out of earnings that the state has no right to touch. But these considerations do not reach their aim. To deny the right of Kansas to do as it chooses with the local business is to require the local business to help to sustain that between the states. If the latter does not pay alone, that is no reason for cutting down powers that up to this time the states always have possessed. If the telegraph company chooses 54 L. ed.

to pay the fee out of its other earnings, that is its affair. It is master of the situation and can stop if it sees fit. Exactly this argument was pressed in *Pullman Co. v. Adams*, 189 U. S. 420, 421, 47 L. ed. 877, 878, 23 Sup. Ct. Rep. 494, and was rejected without dissent. See *Ashley v. Ryan*, 153 U. S. 436, 444, 38 L. ed. 773, 777, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865.

What I have said shows, I think, the fallacy involved in talking about unconstitutional conditions. Of course, if the condition was the making of a contract contrary to the policy of the Constitution of the United States, the contract would be void. That was all that was decided in *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44. But it does not follow that, if keeping the contract was made a condition of staying in the state, the condition would be void. I confess my inability to understand how a condition can be unconstitutional when attached to a matter over which a state has absolute arbitrary power. This court was equally unable to understand it in *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 315, 36 L. ed. 164, 168, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403. In that case it was said: "Having the absolute power of excluding the foreign corporation, the state may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital."

The consequence is the measure of the condition. When the only consequence of a breach is a result that the state may bring about directly in the first place, the condition cannot be unconstitutional. If, after this decision, the state of Kansas, *without [55 giving any reason, sees fit simply to prohibit the Western Union Telegraph Company from doing any more local business there, or from doing local business until it has paid \$20,000, I shall be curious to see upon what ground that legislation will be assailed. I am aware that the battle has raged with varying fortunes over this matter of unconstitutional conditions, but it appears to me ground for regret that the court so soon should abandon its latest decision (*Security Mnt. L. Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 A. & E. Ann. Cas. 317).

Finally, in the absence of contract, the power of the state is not affected by the fact that the corporation concerned already

is in the state, or even has been there for some time. *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; *National Council v. State Council*, 203 U. S. 151, 163, 51 L. ed. 132, 137, 27 Sup. Ct. Rep. 46. Whatever the corporation may do or acquire there is infected with the original weakness of dependence upon the will of the state. This is a general principle, illustrated by many cases. Thus, a water company cannot take away the power of a city to establish rates by making contracts with its customers. *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 438, 47 L. ed. 887, 891, 23 Sup. Ct. Rep. 531. Private individuals cannot cut down the police power by their arrangements together. *Manigault v. Springs*, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127. A city cannot limit the power of the legislature over property by making a lease. *Browne v. Turner*, 176 Mass. 9, 15, 56 N. E. 969. Or, to pass at once to the most recent and most conspicuous example, the power of Congress to regulate commerce among the states cannot be affected by the acquisition of property or growth of values dependent upon the continuance of its assent. *United States ex rel. Atty. Gen. v. Delaware & H. Co.* 213 U. S. 366, 405, 406, 53 L. ed. 836, 847, 848, 29 Sup. Ct. Rep. 527. In that case an enormous amount of property had been built up under direct encouragement from the states in which it was situated, and was saved from destruction only by the restricted meaning given to the act of Congress. The unrestricted power of Congress was affirmed in strong terms. See also *Union Bridge Co. v. United States*, 204 U. S. 364, 394, 51 L. ed. 523, 536, 27 Sup. Ct. Rep. 367. In *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403, the corporation showed by its answer that it had employed part of its capital in manufacturing in New York. It had got into the state and was at work there, yet it was held liable to pay a percentage of its entire capital, although the greater part was outside the state. But furthermore, it is a short answer to this part of the argument that, in the present case, according to decisions relied upon by the majority, the state could not have prevented the entry of the corporation, because it entered for the purpose of commerce with other states.

The CHIEF JUSTICE and Mr. Justice McKenna concur in this dissent.

The late Mr. Justice Peckham took part in the consideration of the case and agreed with the minority.

THE PULLMAN COMPANY, Plff. in Err.
v.
STATE OF KANSAS EX REL. C. C. COLEMAN, Attorney General.

(See S. C. Reporter's ed. 56-77.)

Foreign corporations — state exclusion from doing local business — interstate commerce.

A foreign sleeping-car company cannot be restrained from doing local business in the state because of its refusal to pay the "charter fee" of a given per cent of its entire capital stock, imposed by Kan. Gen. Stat. 1901, p. 280, for the benefit of the permanent school fund, as a condition of doing such business, since such requirement amounts to a burden or tax on the company's interstate business and on its property located and used outside the state.

[For other cases, see *Corporations*, XII. b, 2; *Commerce*, 273-287, 368-375; *Constitutional Law*, 536-540, in *Digest Sup. Ct.* 1908.]

[No. 5.]

Argued March 17, 18, 1909. Decided January 31, 1910.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment restraining a foreign sleeping-car company from doing local business in the state because of its refusal to pay the "charter fee" of a given per cent of its entire capital stock for the benefit of the permanent school fund of the state. Reversed and remanded for further proceedings.

See same case below, 75 Kan. 664, 90 Pac. 319.

The facts are stated in the opinion.

Mr. Frank B. Kellogg argued the cause, and, with Mr. Charles Blood Smith, filed a brief for plaintiff in error:

This case comes within those decisions of

NOTE.—State licenses or taxes as affecting interstate commerce—see notes to *Rothermel v. Meyerle*, 9 L.R.A. 366; *American Fertilizing Co. v. Board of Agriculture*, 11 L.R.A. 179; *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Brown v. Maryland*, 6 L. ed. U. S. 678; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 217; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041; *Postal Teleg. Cable Co. v. Adams*, 39 L. ed. U. S. 311; and *Pittsburg & S. Coal Co. v. Bates*, 39 L. ed. U. S. 538.

On exclusion, regulation, and taxation of foreign corporations—see note to *McCauna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13.

On corporate taxation and the commerce clause—see note to *Sandford v. Poe*, 60 L.R.A. 641.

On the taxation of corporate capital stock generally—see note to *State Board v. People*, 58 L.R.A. 513.

this court which hold that the states may not, as a condition of continuance to do a business in the state, impose a tax upon the entire capital.

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 209, 29 L. ed. 164, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

The Pullman Company cannot refuse to do a local business in the state of Kansas, and withdraw from the state.

Allen v. Pullman's Palace Car Co. 191 U. S. 183, 48 L. ed. 140, 24 Sup. Ct. Rep. 39; Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635.

If the corporation is obliged by law to act as a common carrier, and treat all alike, even a tax upon its local business, the payment of which is made a condition of the continuance of the corporation to do business in the state, would be unconstitutional, because it would practically compel the corporation to withdraw from its interstate business, and, within the decisions of this court, that would clearly be a burden upon interstate commerce.

Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277.

When it comes to the question of whether a tax is a burden upon interstate commerce, this court judges for itself the scope and extent of such statute.

Galveston, H. & S. A. R. Co. v. Texas, supra; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 462, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 1114; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 473, 474, 24 L. ed. 527, 531; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Yick Wo v. Hopkins, 118 U. S. 356, 366, 30 L. ed. 220, 225, 6 Sup. Ct. Rep. 1064.

An erroneous view of the Kansas statute led the supreme court of Kansas into the error of holding that their construction was justified by the decisions of this court in Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 54 L. ed.

23 Sup. Ct. Rep. 494, instead of within the principles of Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. ed. 164; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, supra; Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Galveston, H. & S. A. R. Co. v. Texas, supra, as to a tax upon the stock of a corporation being a burden upon interstate commerce, and within the principles laid down in M'Culloch v. Maryland, 4 Wheat. 429, 4 L. ed. 607; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360, as to burdens which may be laid on instrumentalities of interstate commerce, and as to taxation of property beyond the jurisdiction of the state. The supreme court of Kansas held that the state statute did not burden interstate commerce. That court could not have decided the case adversely to the plaintiff in error without so deciding that Federal question, and this court, therefore, has jurisdiction to inquire whether the supreme court of Kansas erred in that holding.

Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 622, 42 L. ed. 878, 881, 18 Sup. Ct. Rep. 488; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; Metropolitan Nat. Bank v. Claggett, 141 U. S. 520, 35 L. ed. 841, 12 Sup. Ct. Rep. 60.

All that the state court did hold was that the tax imposed a condition upon corporations continuing to do business "wholly within the state." This decision was contrary to its previous holding in the case of State ex rel. Shawnee County Attorney v. American Book Co. 65 Kan. 847, 69 Pac. 563, and opposed to the view of this court in the Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

Messrs. Charles Blood Smith, Francis B. Daniels, and Gustavus S. Fernald also filed a brief for plaintiff in error:

The state cannot exact from the Pullman Company, as a condition precedent to its doing business in the state, a tax or license fee based upon the entire capital stock of

the company, when more than 99 per cent of its capital stock is in use elsewhere than in the state of Kansas, and is largely employed in interstate commerce elsewhere than in Kansas.

Judson, Taxn. § 169; Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; Lafayette Ins. Co. v. French, 18 How. 404, 407, 15 L. ed. 451, 452; St. Clair v. Cox, 106 U. S. 350, 356, 37 L. ed. 222, 225, 1 Sup. Ct. Rep. 354; Barron v. Burnside, 121 U. S. 186, 200, 30 L. ed. 915, 919, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 696, 39 L. ed. 311, 315, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Colorado v. Pullman Co. (1905, C. C. D. Colo.).

The court will look to the substance rather than to forms,—to what an enforcement of the law would really do, rather than to what the law itself may say it would do.

Ashley v. Ryan, *supra*; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Postal Teleg. Cable Co. v. Taylor, 192 U. S. 64, 73, 48 L. ed. 342, 346, 24 Sup. Ct. Rep. 208; Postal Teleg. Cable Co. v. Adams, *supra*; Home Ins. Co. v. New York, 134 U. S. 594–598, 33 L. ed. 1025–1029, 10 Sup. Ct. Rep. 593.

The protection from state interference with interstate commerce, secured by the Constitution, ceases to be of force if the state may do indirectly that which it may not do directly.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Home Ins. Co. v. New York, 134 U. S. 598, 33 L. ed. 1029, 10 Sup. Ct. Rep. 593; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23.

This court has plainly pointed out the distinction between corporations engaged in interstate commerce, and having a quasi public character, and corporations organized to conduct strictly private business.

New York v. Roberts, 171 U. S. 658, 661, 664, 43 L. ed. 323, 324, 326, 19 Sup. Ct. Rep. 58.

It is held not to be a violation of the commerce clause of the Constitution for a state to tax, as property, the instrumentalities of interstate commerce having a fixed situs within her limits, or an average quantity, as in Pullman v. Pennsylvania, *supra*, but to entitle a state to tax such instrumentalities there must be attached to them all the conditions necessary to render property subject to taxation, as location and jurisdiction of the taxing power.

St. Louis v. Wiggins Ferry Co. 11 Wall. 423, 20 L. ed. 192; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Fargo v. Hart; Union Refrigerator Transit Co. v. Kentucky; and Gloucester Ferry Co. v. Pennsylvania,—*supra*.

Any burden laid on such instrumentalities, except under the rule as laid down by this court, is an interference with and a burden upon interstate commerce. Whenever a state attempts to impose such a burden in any form, with the sole exception of regulations necessary to the health and safety of the people, there is a collision between Federal and state power, and the state regulation must yield.

Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; Norfolk & W. R. Co. v. Pennsylvania, *supra*; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Postal Teleg. Cable Co. v. Adams; Gibbons v. Ogden; and Gloucester Ferry Co. v. Pennsylvania,—*supra*; Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, *supra*.

The instrumentalities of commerce are a part of the commerce.

Gibbons v. Ogden, *supra*.

Vehicles are essential to transportation, and cars are essential to some forms of transportation; applied to such forms of interstate transportation, cars are essentials of commerce.

Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, *supra*.

If one state (other than the home state) may tax the instrumentalities of interstate commerce not located within her limits, but largely located and used in all the other states of the Union, as are those of the plaintiff in error, then each state may

do the same, thereby taxing all the capital stock as many times as there are states; and the aggregate action of all the states would not only burden and impede, but actually prohibit and destroy, that feature of interstate commerce now carried on by the defendant company, and which may be controlled and regulated by Congress alone.

Brown v. Maryland, supra; *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254; *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303; *Com. v. Standard Oil Co.* 101 Pa. 119; *Wabash St. L. & P. R. Co. v. Illinois*, 118 U. S. 573, 30 L. ed. 249, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Gloucester Ferry Co. v. Pennsylvania and Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, supra.

The Kansas statute should be construed as requiring a levy of the tax only upon the capital stock employed in this state.

Com. v. Standard Oil Co.; *Colorado v. Pullman Co.*; *Ashley v. Ryan*; and *Union Refrigerator Transit Co. v. Kentucky*,—supra; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360.

The construction placed upon the act of the legislature by the decision of the supreme court of Kansas renders the act unconstitutional and void, because, as so construed, it impairs the obligation of contracts. It deprives the defendant of its property without due process of law, and denies to the defendant the equal protection of the laws, in violation of the impairment clause and of the 14th Amendment and of the commerce clause of the Constitution of the United States, and of the acts of Congress passed in pursuance thereof.

Lapsley v. Brashears, 4 Litt. (Ky.) 53; *Louisiana v. Jumel*, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Green v. Bidle*, 8 Wheat. 1, 5 L. ed. 547; *Von Hoffman v. Quiney*, 4 Wall. 535, 18 L. ed. 403; *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143; *McCraeken v. Hayward*, 2 How. 608, 11 L. ed. 397; *Den ex dem. Berdan v. Van Riper*, 16 N. J. L. 11; *Woodruff v. State*, 3 Ark. 285; *Commercial Bank v. State*, 12 Miss. 439; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Bedford v. Eastern Bldg. & L. Asso.* 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597; *Security Sav. & L. Asso. v. Elbert*, 153 Ind. 198, 54 N. E. 753; *Seaboard Air Line R. Co. v. Railroad Commission*, 155 Fed. 792; *Chicago, R. I. & P. R. Co. v. Ludwig*, 156 Fed. 152; *American Smelting & Ref. Co. v. Colorado*, 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198, 9 A. & E. Ann. Cas. 978.

54 L. ed.

Mr. Fred S. Jackson argued the cause, and, with Mr. C. C. Coleman, filed a brief for defendant in error:

The construction of the state statutes is a question for the state courts alone.

M'Bride v. Hoccy, 11 Pet. 167, 9 L. ed. 673; *Bank of West Tennessee v. Citizens' Bank*, 13 Wall. 432, 20 L. ed. 514; *Harrison v. Myer*, 92 U. S. 111, 23 L. ed. 606; *Commercial Bank v. Buckingham*, 5 How. 317, 12 L. ed. 169; *Noneannah Turnp. Co. v. Tennessee*, 131 U. S. elviii. Appx. and 24 L. ed. 368; *Smiley v. Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289.

The granting of rights and privileges which constitute the franchises of the corporation are matters resting entirely within the control of the legislature, and may be accompanied by any such conditions as the legislature may think suitable to the public interest and policy.

Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; *New York v. Roberts*, 171 U. S. 661, 43 L. ed. 324, 19 Sup. Ct. Rep. 58; *Minot v. Philadelphia, W. & B. R. Co.* 18 Wall. 206, 21 L. ed. 888.

Has a foreign corporation greater rights as against the state, and greater freedom under its laws, than one of its own creation? Must the state, without any license fee, permit a foreign corporation to transact business which is wholly within its jurisdiction, which it would deny to a corporation of its own creation without the payment of the fee? Does not the mere statement of the question compel a negative answer?

Horn Silver Min. Co. v. New York, supra; *Postal Teleg. Cable Co. v. Norfolk*, 101 Va. 125, 43 S. E. 207.

The mere fact that indirectly and incidentally the effect of the enforcement of the state law upon a subject-matter within the state's jurisdiction may cause expense or inconvenience to the person or corporation upon which such enforcement operates does not subject the law to the criticism that it takes without due process of law. Statutes have been sustained against this objection, requiring a charge for the use of streets, poles, wires, etc.

St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; *Postal Teleg. Cable Co. v. Baltimore*, 156 U. S. 210, 39 L. ed. 399, 15 Sup. Ct. Rep. 356; *Western U. Teleg. Co. v. New Hope*, 187 U. S. 427, 47 L. ed. 244, 23 Sup. Ct. Rep. 204.

And requiring wires to be placed underground.

New York ex rel. New York Electric Lines Co. v. Squire, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880.

Any effect which is merely indirect and incidental is not within the constitutional prohibition.

Pabst Brewing Co. v. Crenshaw, 198 U. S. 17-30, 49 L. ed. 925-931, 25 Sup. Ct. Rep. 552; *Lumberville Delaware Bridge Co. v. State Assessors*, 55 N. J. L. 529, 25 L.R.A. 134, 26 Atl. 711.

The only serious questions are: Does the statute in question apply only to the business of this company within the state? Does it provide for its enforcement without prohibiting or hindering the interstate business of the company? If those questions can be answered in the affirmative, the law is not unconstitutional, and has been uniformly sustained.

Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Western U. Teleg. Co. v. New York*, 3 L.R.A. 449, 2 Inters. Com. Rep. 533, 38 Fed. 552; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Sanford v. Poe*, 60 L.R.A. 641, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546.

The state has the exclusive right to determine the manner in which it shall exercise its authority over such corporations, and the Federal court will not interfere with the state in the honest exercise of its discretion in an attempt to regulate a corporation engaged in both foreign and domestic commerce, when the regulation is an evident attempt to regulate only the domestic business of such corporation.

Western U. Teleg. Co. v. Atty. Gen. and Minot v. Philadelphia, W. & B. R. Co., supra; *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Honduras Commercial Co. v. State Assessors*, 54 N. J. L. 278; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181-190, 31 L. ed. 650-654, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; *Postal Teleg. Cable Co. v. Norfolk*, supra; *State ex rel. Coleman v. Western U. Teleg. Co.* 75 Kan. 609.

58] *Mr. Justice Harlan delivered the opinion of the court:

This is a proceeding in quo warranto, instituted by the state in the supreme court of Kansas against the Pullman Company,

a corporation of Illinois, in which the state, by its petition, prays that the defendant be required to show by what authority it exercises within Kansas the corporate right and power of charging compensation for the use of reserved seats in its cars by day and sleeping berths during the night, and of serving meals in its dining cars within the state of Kansas, such services, it is alleged, being rendered to and said fees being collected from passengers transferring upon railroads from places within the state to other places within the state; and that it be adjudged that the defendant has no authority of law for the performance of such corporate acts, powers, franchises, and business in the state of Kansas, and be ousted of and from the exercise within the state of the said corporate rights and franchises, and of receiving compensation therefor.

On the petition of the company the case was removed to the circuit court of the United States, but that court remanded it to the state court, where the defendant filed an answer resisting the relief asked on various grounds, one of which was that such relief could not be granted consistently with the power of Congress to regulate commerce among the several states, or with rights belonging to the defendant under the Constitution of the United States. A demurrer to the answer was sustained, and a decree rendered by which it was adjudged that the Pullman Company be ousted, prohibited, restrained, and enjoined from transacting, as a corporation, any business of a domestic or intrastate character within the state of Kansas. The decree declared that it should in nowise affect or restrict the interstate business of the company, nor affect any of its contracts, obligations, or corporate duties with or to the government of the United States.

The business of the Pullman Company under its charter, *was that of furnishing [59] sleeping, parlor, and tourist cars on railroads, the company reserving to itself the right to charge a certain price for the use of reserved seats in such cars during the daytime and sleeping berths during the night. The company's business extended throughout the United States, where any trunk line railroad was operated. It is not necessary to go into detail as to the mode in which that business was conducted, further than to say that the business was and is principally that of interstate commerce.

This case arises under the statute of Kansas which was examined in *Western U. Teleg. Co. v. Kansas*, recently decided, [216 U. S. 1, ante, 355, 30 Sup. Ct. Rep. 190] *Laws of Kansas, Special Session, 1898*, p. 30; *Kan. Gen. Stat. 1901*, title, "Corporations," p. 280; *Id. 1905*, same title, p. 284. The

only provisions of that statute which need be recalled for the purposes of this opinion are these: "Each corporation which has received authority from the [state] charter board to organize shall, before filing its charter with the secretary of state, as provided by law, pay to the state treasurer of Kansas, *for the benefit of the permanent school fund*, a charter fee of $1/10$ of 1 per cent of its authorized capital, upon the first \$100,000 of its capital stock, or any part thereof; and upon the next \$400,000, or any part thereof, $1/20$ of 1 per cent; and for each million or major part thereof over and above the sum of \$500,000, \$200. . . . In addition to the charter fee herein provided, the secretary of state shall collect a fee of \$2.50 for filing and recording each charter containing not to exceed ten folios, and an additional fee of 25 cents for each folio in excess of ten contained in any charter. The fee for filing and recording a charter shall also entitle the corporation to a certified copy of its charter. All the provisions of this act, including the payment of the fees herein provided, shall apply to foreign corporations seeking to do business in this state, except that, in lieu of their charter, 60] they shall file with the *secretary of state a certified copy of their charter, executed by the proper officer of the state, territory, or foreign country under whose laws they are incorporated; and any corporation applying for a renewal of its charter shall comply with all the provisions of this act in like manner, and to the same extent, as is herein provided for the chartering and organizing of new corporations." "Any corporation organized under the laws of another state, territory, or foreign country, and authorized to do business in this state, shall be subject to the same provisions, judicial control, restrictions, and penalties, except as herein provided, as corporations organized under the laws of this state." Id. §§ 1264, 1267.

Proceeding under the statute of Kansas, the Pullman Company made written application to the charter board for permission to engage in business in that state. The application was granted, and the board made the following order: "The board having under consideration the application of the Pullman Company, a foreign corporation organized under the laws of the state of Illinois, for leave to transact the business of a sleeping car company in the state of Kansas; and it appearing that said foreign corporation has, in due form of law, filed with the secretary of state a certified copy of its charter, executed by the proper officers of the state of its domicil, and the written consent, irrevocable, of said corporation that actions may be commenced

against it in the proper court of any county in this state in which the cause of action may arise, accompanied by a duly certified copy of the resolution of the board of directors of said corporation, authorizing the proper officers to execute the same, it is, upon motion, thereupon ordered that said application be granted, and that said applicant be authorized and empowered to transact the business of operating sleeping cars, dining cars, tourist cars, and other cars within the state of Kansas, and receiving money for such services, and transacting within the state its business of a sleeping car and transportation company, provided, that this order shall not take effect and no *certificate of such authority shall issue [61 or be delivered to said company until such applicant shall have paid to the state treasurer of Kansas, *for the benefit of the permanent school fund*, the sum of \$14,800, being the charter fees provided by law, necessary to be paid by the corporation with a capital of \$74,000,000, seeking to transact business within this state. It is further understood, ordered, and provided that nothing herein contained shall apply to nor be construed as restricting in anywise the transaction, by said applicant, of its interstate business; but that this grant of authority and requirement as to payment relate only to the business transacted wholly within the state of Kansas."

We have seen from the provisions of the statute, as set forth in *Western U. Teleg. Co. v. Kansas*, that it is made a condition of the right of a foreign corporation seeking to do local business in Kansas, that it should apply to the state charter board for permission to do so. It is also prescribed as a condition of the right of a foreign corporation to do intra-state business in Kansas that it shall pay not only an application fee of \$25, but a charter fee "of $1/10$ of 1 per cent of its authorized capital upon the first \$100,000 of its capital stock or any part thereof; and upon the next \$400,000, or any part thereof, $1/20$ of 1 per cent; and for each million or major part thereof over and above the sum of \$500,000, \$200."

The Pullman Company is admittedly engaged, as it has been continuously for many years, in commerce among all the states of the Union, as well as in intrastate business in Kansas. The charter board, we have seen, gave it permission to engage in intrastate business in Kansas on condition that it should pay to the state treasurer *for the benefit of the permanent school fund of the state*, as a charter fee, the sum of \$14,800, which is the prescribed statutory per cent of the company's authorized capital, representing all of its property and interests everywhere, in and out of the state, and all

62] its *business, both interstate and intrastate. It does not appear how much of the single "fee" demanded by the state is to be referred to the interstate business of the company, nor how much to its property outside of the state, nor what part has reference to its intrastate business, or to its property within the state.

The Pullman Company refused to pay the fee so demanded, upon the general ground, among others, that the state could not, consistently with the Constitution of the United States or with the company's rights under the Constitution, make it a condition of its doing intrastate business in Kansas, that the company should pay, in the form of a fee, a specified per cent of all its authorized capital; that such a fee necessarily operated as a burden on the company's interstate business as well as a tax on its property interests outside of the state, and was hostile to its constitutional right of exemption from local taxation in reference to its property beyond the jurisdiction of the state.

For the reasons, and under the limitations, expressed in the opinion delivered in *Western U. Teleg. Co. v. Kansas*, and without expressing any opinion upon questions raised by the pleadings, but not covered by this opinion, we hold, 1. That the Pullman Company was not bound to obtain the permission of the state to transact interstate business within its limits, but could go into the state, for the purposes of that business, without liability to taxation there with respect to such business, although subject to reasonable local regulations for the safety, comfort, and convenience of the people which did not, in a real, substantial sense, burden or regulate its interstate business, nor subject its property interests outside of the state to taxation in Kansas. 2. That the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the state a specified per cent of its authorized capital, was a violation of the Constitution of the United States, in that such 63] a single fee, based *as it was on all the property interests, and business of the company, within and out of the state, was, in effect, a tax both on the interstate business of that company, and on its property outside of Kansas, and compelled the company, in order that it might do local business in Kansas in connection with its interstate business, to waive its constitutional exemption from state taxation on its interstate business and on its property outside of the state, and contribute from its capital to the support of the public schools of Kansas; that the state could no more exact such a waiver than it could prescribe as a condition of the company's right to do local

business in Kansas that it agree to waive the constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law. 3. That a decree ousting and prohibiting the company from doing intrastate business in Kansas was improperly granted, the aid of the court should have been refused and the bill dismissed, because a decree such as the state asked would, in effect, have recognized the validity of a condition which the state could not constitutionally prescribe under the guise of a fee for permission to do intrastate business.

Mr. Justice Moody heard the argument of this case, participated in its decision, and approves this opinion.

On the authority of *Western U. Teleg. Co. v. Kansas*, and for the reasons and with the reservations therein set forth in the opinion in that case, the decree must be reversed and the cause remanded for such further proceedings as may be consistent with this opinion.

It is so ordered.

Mr. Justice White, concurring:

It is not disputed that the Pullman Company, many years ago, entered Kansas, and has since therein operated its cars for the purposes of interstate as well as local business. Although the cars, in passing in and out of the state, may not have been constantly the same, it was long ago settled (*Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876) that a proportionate number of the cars so used are to be considered as having a definite situs in the state, and therefore as property permanently therein, subject to the power of the state to tax. Taking this rule into consideration, in my opinion the case is controlled by the reasons given for my concurrence in the *Western Union Case*. That is to say, as a due proportion of the cars of the Pullman Company used in the state of Kansas were there permanently, I am not able to conclude that the company or its property were not permanently in the state, and, hence, that such property can be taken by the state without due process of law, as a condition of the right to bring the property into the state and there carry on local business. To so hold without overruling *Pullman's Palace Car Co. v. Pennsylvania* and the many cases which have followed it would be to place the court in the position of saying, on the one hand, for the purpose of upholding the state's lawful power of taxation, that the property of the company was permanently in the state, and, on the other, of deciding, for the purpose

of enabling the state to impose an unconstitutional tax, that the company was outside of the state and had no property permanently employed in carrying on business therein. True it is that my concurrence in the *Western Union Case* was placed upon the ground that the company was in the state, and consequently was not subject to be dealt with upon the fictitious assumption that such was not the fact. However, it was also said that I did not dissent from the fundamental application which the court made of the commerce clause of the Constitution. As the reasons for this statement differed somewhat from those expressed by the court in its opinion, it to me seems, in view of the importance of the subject, that it is my duty now to state as briefly as possible my reasons for thinking that the tax in question is repugnant to the commerce clause of the Constitution, even under the assumption that the corporation 65] and its property *were out of the state, and that the tax is a condition affixed to the privilege of coming in to do a local business, and may therefore be escaped by not doing such business.

The conflict of opinion as to the decisive effect of certain prior decisions of the court exacts that the principles which this case involves should be first definitely brought into view in order that the appositeness of the cases referred to may be determined in the light of the true doctrine by which the case should be controlled. I therefore at once summarily state certain dominant propositions which are to my mind not subject to be controverted, because, whatever may be the differences of opinion as to some of them, considered originally, they are all so conclusively established by the previous decisions of this court as to be now beyond dispute.

1. A state may not exert its concededly lawful powers in such a manner as to impose a direct burden on interstate commerce. This is so elementary as to require no reference to the multitude of authorities by which it is sustained.

2. Even though a power exerted by a state, when inherently considered, may not, in and of itself, abstractly impose a direct burden on interstate commerce, nevertheless, such exertion of authority will be a direct burden on such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on. *I. M. Darnell & Son Co. v. Memphis*, 208 U. S. 113, 52 L. ed. 413, 28 Sup. Ct. Rep. 247; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365, and authorities there cited.

3. Subject to constitutional limitations, the states have the power to regulate the doing of local business within their borders. As a result of this power, and of the authority which government may exert over corporations, the states have the right to control the coming within their borders of foreign corporations. In cases where this power is absolute, the states may affix to the privilege such conditions as are deemed proper, or, without giving a reason, may arbitrarily forbid such corporation from coming in. When, therefore, *in a case [66 where the absolute power to exclude obtains, a condition is affixed to the right to come into a state, and a foreign corporation avails of such right, it may not assail the constitutionality of the condition because, by accepting the privilege, it has voluntarily consented to be bound by the condition. In other words, in such case the absolute power of the state is the determining factor, and the validity of the condition is immaterial. This doctrine finds, in the decided cases, no terser and clearer statement than that expressed in the opinion in *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403. In that case, a manufacturing company, organized under the laws of Utah, was sought to be made liable for a tax on the franchise of carrying on, in the state of New York, a manufacturing business. It contested liability on the ground that the tax was repugnant to the Constitution of the United States. The court, in deciding that the constitutionality of the burden was an irrelevant consideration because of the absolute power of the state to impose it as a condition on the right of the corporation to come into the state and do a manufacturing, and therefore local, business, said, speaking of the power of the state (p. 315):

"Having the absolute power of excluding the foreign corporation, the state may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the state may require for the grant of its privileges. It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation."

And in a passage of the opinion previous to the one just quoted, concerning the right of a state, where its power to exclude was

absolute, to impose such condition as it pleased, it was observed (p. 314):

67] **"This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest."*

In addition, the following cases either directly, expressly, or by fair implication must be taken as sustaining the right of the state, where it has the absolute power to exclude, to affix whatever condition it deems proper to the right of a foreign corporation to come in, and the consequent inability of such corporation, after accepting the privilege, to assail the constitutionality of the condition: *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 693, 38 L. ed. 872, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; *Allen v. Pullman's Palace Car Co.* 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39; *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 A. & E. Ann. Cas. 317; *National Council v. State Council*, 203 U. S. 151, 51 L. ed. 132, 27 Sup. Ct. Rep. 46.

4. The absolute power of the state, as stated in the preceding proposition, does not include the right to exclude a foreign corporation from doing in a state interstate commerce business, since the regulation of such business is vested by the Constitution in Congress, and the states are impotent, as stated in the first and second propositions, to directly burden the right to do such business, or to discriminate against those doing it. *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851. And, indeed, by necessary implication, the want of power in the states to exclude corporations as well as individuals from carrying on within their borders interstate commerce results, by implication, from the decisions in the cases previously cited under proposition 3. This is aptly illustrated by the *Horn Silver Mining Case*, where, after stating, in the clearest way, the absolute power of the state, generally speaking, to exclude a foreign corporation, it was declared (pp. 314, 315):

"Only two exceptions or qualifications have been attached to it, in all the numerous adjudications in which the subject has been considered since the judgment of this court was announced more than half a century ago in *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274. One of these qualifications is that the state cannot exclude

from its limits a corporation engaged in interstate or foreign commerce, established by the decision in *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 12, 24 L. ed. 708, 711. The other limitation on the power of the state is where the corporation is in the employ of the general government,—an obvious exception, first stated, we think, by the late Mr. Justice Bradley in *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. 9, 14. As that learned justice said: 'If Congress should employ a corporation of shipbuilders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any state of the Union.' And this court, in citing this passage, added, 'without the permission and against the prohibition of the state.' *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 186, 31 L. ed. 650, 652, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737."

Let me, then, test the question for decision by the light of these principles.

As it is obvious that the Pullman Company, in so far as it was engaged in interstate commerce within the state of Kansas, was independent of the will of the state, it follows that the state had no absolute power to exclude the corporation, and therefore no authority to impose an unconstitutional burden as the price for the privilege of doing local in conjunction with the interstate commerce business. The power to exclude in such a case being only relative, affords no warrant for the exertion by the state of an absolute prohibition. That is to say, the exerted power could not, in the nature of things, be wider than the authority in virtue of which alone it could be called into play. Moreover, to me it seems that where the right to do an interstate commerce business exists, without regard to the assent of the state, a state law which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business would be a direct burden upon interstate commerce, and in conflict with the principles stated in proposition 1. This follows, since the imposition on a corporation which has the right to do interstate commerce *business within the [69 state of an unconstitutional burden for the privilege of doing local business is, in my opinion, the exact equivalent of placing a direct burden on its interstate commerce business. It is not by me doubted that, as a practical question, the arbitrary prohibition against doing a local business, imposed on one engaged in, and having the right to engage in, interstate commerce, is to burden that business. But passing, for argument's sake, the considerations just stated, if a state, in express terms, enacted that all foreign

corporations which availed of the right granted them by the Constitution of the United States to carry on interstate commerce within the state without the previous consent of the state, should, as a penalty for not obtaining that consent, be deprived of all right to transact local business, it would not, I assume, be contended that such an enactment was not a discrimination against the corporations to which it applied because of their possession of a right conferred upon them by the Constitution of the United States. And yet such must be the direct and immediate result of applying an absolute act of exclusion to corporations who are not subject to such absolute exercise of power, because of the right bestowed upon them by the Constitution of the United States to carry on within a state an interstate commerce business. Nor is it an answer to say that, as a state may exclude a foreign corporation from doing local business, the exertion of its lawful power may not be prevented because a bad reason is given or an illegal condition imposed, since the power exerted is the test, and not the reason which has been given for exerting the power. But the proposition in effect assumes the question at issue, since, however controlling it may be conceded to be, when applied to a case where the absolute power to exclude exists, it can have no application to a case where the power of the state is relative, because it may not extend to prohibiting the doing of an interstate commerce business. In such a case the limitation upon the power operates not only to forbid the exclusion, as the result of the [70] press enactment *of an unconstitutional condition, but also, in the nature of things, prohibits the absolute exclusion, although the reason for the attempted exertion of such a power be not given. In other words, where the power to exclude is absolute, no inquiry as to the reasons for its exertion need be resorted to in order to determine its constitutionality. But, where the power is only relative, because it may not be exerted under particular conditions and circumstances, the violation of the Constitution cannot be accomplished by a failure to express the reason for the exclusion, and thus absolute power be exerted where such power does not exist. The controlling influence of the Constitution may not be destroyed by doing indirectly that which it prohibits from being done directly.

It is to be observed that the conclusions just expressed take away from the states no lawful power. It leaves to the states the right to exert absolute authority where such power is possessed, and simply requires that where, as a result of the Constitution of the United States, the power is not abso-

lute, but is merely relative, not only the right of regulation, but likewise the right to exclude, must be exerted conformably to the requirements of the Constitution of the United States; that is, in such a manner as not, either directly, by the expression of a condition, or indirectly, by its nonexpression, to deprive of rights secured by that instrument.

The principal cases relied upon to establish that the prior decisions support the right of the states to impose the unconstitutional tax here in question are reviewed in the opinion of the court, and I might well rest content with that review. But, in addition, it to me seems that none of the cases relied upon are apposite here, for two obvious reasons,—because they either involved the exercise of state power concerning subjects over which the authority of the state was absolute, or considered state burdens which were upheld as being in effect neither direct burdens upon interstate commerce nor discriminatory against such commerce.

A very summary reference to the cases will be made for *the purpose of indicating [71 why this is said. *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, involved the validity of a state statute which prescribed certain conditions for the doing of the business of insurance within a state by a foreign insurance company, and it was held that such business was not commerce, and therefore was within the absolute regulating power of the states. *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403, as previously shown, involved no question of interstate commerce, but the right of a foreign corporation to carry on in a state a manufacturing business without compliance with the laws of the state. And although the ruling of the court, as heretofore stated, was, in express terms, placed upon the absolute power of the state over the subject, the court was careful to point out that such power did not embrace the right to exclude a foreign corporation from doing an interstate commerce business in the state, or extend to excluding a corporation chartered by the United States for governmental purposes. *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 693, 38 L. ed. 872, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094, involved a tax concerning which the court said (p. 699): "The express terms of the ordinance restricts the tax to 'business done exclusively within the city of Charleston, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents.'" It is certain that the burden was sustained

on its inherent merit as a purely lawful tax on a subject within the state's authority, and not as an unconstitutional tax on interstate commerce, which, although void, was to be enforced because it was a mere condition for the privilege of doing local business, which privilege had been accepted. This is certain, since the court said (p. 695): "That this license is not a condition upon which the right to do business depends, but is a tax, is shown by the case of *Home Ins. Co. v. Augusta*, 93 U. S. 116, 122, 23 L. ed. 825, 826." How the ruling thus made is applicable here my mind does not perceive. The distinction between this case and that is but the difference which exists [72] between "the exertion of a lawful power and the attempt to violate the Constitution by doing that which it forbids to be done. The gulf which separates the case referred to from this, it may be, can be made plainer by observing that this case involves no issue as to the right of a state to lawfully tax the local business of corporations, whether domestic or foreign. That right is fully conceded. The only right here challenged is the authority of a state to impose an unconstitutional tax, and validate the tax by making the payment of the unlawful tax a condition of the right to do a local business. And this upon the false assumption that absolute power to exclude exists; that is, to impose an unlawful tax and sustain it by another unlawful assumption of power,—a process of reasoning which, to my mind, must rest on the proposition that, in deciding questions of constitutional power, it is to be held that two wrongs make a right. *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 297, was a case involving only the right of a state to absolutely control the doing of insurance business within the state, and the doctrine of *Paul v. Virginia* was reiterated. The court, however, was sedulous to declare that, as that particular subject was not commerce, the authority of the state was absolute, and not relative; but it expressly pointed out the limitation upon the absolute power which would obtain where a right arose in favor of a corporation under the Constitution of the United States to engage within the state in interstate commerce. In *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518, the oil company had accepted a permit from the state of Texas to engage for the period therein stated in local as well as interstate commerce within the state, upon the conditions therein set forth. No question was raised as to what would have been the rights of the company had it gone into the state for the purpose of transacting therein a purely interstate commerce business without the

consent of the state. Indeed, the decision proceeded upon the theory that no such question was involved in the case, since it was assumed in the opinion that, under the circumstances of the case, the power *of [73 the state was absolute, and not relative. *Paul v. Virginia* and cases of that character were cited. *Hooper v. California* was referred to and the exception as to interstate commerce business which that case enunciated was pointed out. It was declared that the case could have been rested upon the *Hooper Case* without saying anything further,—a conclusion wholly incompatible with any other conception than that the right recognized was based upon the absolute power of the state, and did not come within the exception based upon the right to do an interstate commerce business, even by a foreign corporation, which the *Hooper Case* had announced and which the case of *Horn Silver Min. Company* had, in effect, treated as being as well established as the principle of absolute power. It is true that in *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494 and *Allen v. Pullman's Palace Car Co.* 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39, the taxes which were assailed as invalid were treated as conditions imposed for the privilege of carrying on local business, and which were therefore considered to be optional, as the right to escape payment would result upon discontinuing the doing of the local business. But the taxes in question in those cases were not levied upon interstate commerce, either directly or indirectly, but only upon the business done within the state, and therefore substantially involved no question of the absolute right of the state to impose an unconstitutional condition where the power of the state was not absolute, but only relative. No reference was made in the opinion to the distinction stated in the previous cases between the absolute power to exclude, generally considered, and the relative character of that power where the foreign corporation possessed the power to do an interstate commerce business, irrespective of the consent of the state. *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 A. & E. Ann. Cas. 317, involved the right of the state to deal with the business of insurance,—a matter purely of state concern, involving interstate commerce in none of its aspects; and the case of *National Council v. State Council*, 203 U. S. 151, 51 L. ed. 132, 27 Sup. Ct. Rep. 46, also involved the right of a *state to control the doing within [74 the state of a business purely local in character, as distinct from an interstate commerce business.

Moreover, none of the cases referred to

prevent me, in this case, from acting upon my independent convictions, even if it be conceded that expressions may be found in the opinions in some of the cases, which, when separated from their context, and apart from the subject-matter of the controversies which the cases presented, would tend to conflict with the views I have expressed. This is said because certain is it that in none of the cases is the slightest reference made to the distinction between the absolute and relative power which this case involves, and the direct burden which must result to interstate commerce from the attempt to exert absolute power, where, as the result of the interstate commerce clause of the Constitution, relative power alone obtains. When first after the duty came to me of taking part in the work of the court, the question arose of the right of a state, in cases where it had absolute authority, to impose an unconstitutional condition as a prerequisite to the right to do local business, my individual convictions were suppressed and my opinion yielded because of the conception that it was my duty to enforce in such a case the previous rulings of the court, however much, as an original question, I would have held a contrary view. But because my convictions were thus yielded in such a case affords no reason why I now should assent to extending the doctrine of the previous cases to conditions to which, in my opinion, they do not apply. And certainly this should not be done when the result of such extension of the previous cases would be to destroy the efficiency of the commerce clause of the Constitution, to restrict the powers of Congress conferred by that clause, and ultimately, by the doctrine to result from the unwarranted extension of the cases, to destroy the substantial powers of both Congress and the states, and establish a system from which it would come to pass that, instead of living under a constitutional government, we would live under 75] *a government of unconstitutional exactions, sanctioned by means of the exertion of arbitrary and absolute power, although the right to exert such power did not exist.

Mr. Justice Holmes, dissenting:

As this case has received some further discussion beyond that in *Western U. Teleg. Co. v. Kansas* [216 U. S. 1, ante, 355, 30 Sup. Ct. Rep. 190], I will contribute my mite. I do not care to add to what I said the other day as to the supposed accession of rights to a corporation because it already has property in the state. Argument from *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, is excluded by 54 L. ed.

New York ex rel. New York C. & H. R. R. Co. v. Miller, 202 U. S. 584, 50 L. ed. 1155, 26 Sup. Ct. Rep. 714, which shows that the question whether there is any necessary parallelism between liability to taxation elsewhere and immunity at home still is an open question (p. 598), and points out that in the earlier case the same cars were continuously receiving the protection of Pennsylvania (p. 597). In the present case it is alleged that the cars are taxed in other states as well as in Kansas, and that the property represented by the capital of the company has no situs in Kansas. If I thought it material I should say that, on the declaration, the cars were taxable at the Pullman Company's domicile more certainly than anywhere else. But I think it immaterial, for the reasons that I gave last week; and, furthermore, the argument drawn from the presence in the state of cars that can be and are rolled out of it at will cannot, I should think, be meant to be pressed.

I will add a few words on the broader proposition put forward, that the Constitution forbids this charge, whether the corporation was established previously in the state or not. I do not see how or why the right of a state to exclude a corporation from internal traffic is complicated or affected in any way by the fact that the corporation has a right to come in for another purpose. It is said that in such a case *the power of the state is only relative, [76 and in the sense that it is confined to the local business, I agree. But, in the sense that it is not absolute over that local business, the statement seems to me merely to beg the question that is to be discussed. I do not understand why the power is less absolute over that because it does not extend to something else. So, again, the proposition that a state may not subject all corporations that enter the state for commerce with other states to such conditions as it sees fit to impose upon local business, no matter how offensive the terms, seems to me a proposition not to be assumed, but to be proved; or again, that the arbitrary prohibition of local business is a burden on commerce among the states. I am quite unable to believe that an otherwise lawful exclusion from doing business within a state becomes an unlawful or unconstitutional burden on commerce among states because, if it were let in, it would help to pay the bills. Such an exclusion is not a burden on the foreign commerce at all; it simply is the denial of a collateral benefit. If foreign commerce does not pay its way by itself, I see no right to demand an entrance for domestic business to help it out.

The distinction that I believe exists is sanctioned by many cases earlier than those

referred to in my former dissent. That the local business of telegraph and railroad companies may be taxed by the states has been held over and over again, with full acceptance of the doctrine that *quoad hoc*, "the power to tax involves the power to destroy" (*McCulloch v. Maryland*, 4 Wheat. 316, 431, 4 L. ed. 579, 607),—essentially the doctrine on which the power of the states to tax interstate commerce was denied (*State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 146). Thus, in *Western U. Teleg. Co. v. Alabama Bd. of Assessment* (*Western U. Teleg. Co. v. Seay*) 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161, it was held that the telegraph company could be taxed upon all messages carried and delivered wholly within the state, and the principle was stated by Mr. Justice Miller to be that this "class are elements of internal commerce solely within the limits and jurisdiction of the state, and therefore subject to its taxing power." This was by unanimous court, and followed the intimations and decisions of earlier cases. The above passage was cited and followed in *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094, when a license fee or tax was exacted in respect of local business, and the previous decisions were cited and commented upon by Mr. Justice Shiras. One of the arguments repudiated was that the tax was a burden upon commerce among the states. I do not see how the reasoning that denies the power to tax one kind of commerce and asserts it with regard to the other can be reconciled with the denial of the power of the state to exclude the latter altogether, or to tax it for whatever sum it likes. The right to tax "in its nature acknowledges no limits." *Weston v. Charleston*, 2 Pct. 449, 466, 7 L. ed. 481, 487; *New York ex rel. Bank of Commerce v. Tax Comrs.* 2 Black, 620, 17 L. ed. 451.

I think that the tax in question, for I am perfectly willing to call it a tax, was lawful under all the decisions of this court until last week. From other points of view, if I were at liberty to take them, I should agree that it deserved the reprobation it receives from the majority. But I have not heard, and have not been able to frame, any reason that I honestly can say seems to me to justify the judgment of the court in point of law.

The CHIEF JUSTICE concurs in this dissent.

Mr. Justice McKenna also dissents.

*CINCINNATI, NEW ORLEANS, & [78 TEXAS PACIFIC RAILWAY COMPANY, Plff. in Err.,

v.

J. SLADE and E. M. Pless, Composing the Firm of Pless & Slade.

(See S. C. Reporter's ed. 78-84.)

Error to state court—Federal question—decision on non-Federal ground.

1. The decision of a state court sustaining its jurisdiction of a suit against a foreign railway corporation, commenced by attaching a box car belonging to that company, does not involve a ruling upon the company's contention that the levy upon such car was invalid, as burdening interstate commerce, where the court did not pass upon the question whether the levy of the attachment was regular, or whether the property seized was subject to levy, but held, construing the state statutes relating to attachments and the decisions of the highest court of that state, that it was unnecessary to decide those questions, because they had been waived by the conduct of the railway company in giving a replevy bond and answering without protestation. [For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

Error to state court—Federal question—how raised.

2. The appellate jurisdiction of the Federal Supreme Court over a state court cannot be based upon the supposed denial of a Federal right which was not urged in the trial court, or called to the attention of or decided by the state appellate court.

[For other cases, see Appeal and Error, 1249-1318, in Digest Sup. Ct. 1908.]

[No. 79.]

Argued January 14, 1910. Decided January 31, 1910.

IN ERROR to the Court of Appeals of the State of Georgia to review a judgment which affirmed a judgment of the City Court of Cordele, in that state, in favor of plaintiffs in a suit against a foreign railway cor-

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

poration, commenced by attaching a box car belonging to that company. Dismissed for want of jurisdiction.

See same case below, 3 Ga. App. 400, 60 S. E. 8.

Statement by Mr. Justice White:

The Cincinnati, New Orleans, & Texas Pacific Railway Company—hereafter referred to as the railway company—is a corporation organized under the laws of Ohio, and operates lines of railroad in several states other than Georgia.

On May 14, 1907, Pless & Slade, a partnership, asserting a claim against the railway company, resulting from the alleged negligent carriage of a car load of horses and mules, received at a point in Kentucky, for through carriage to Pless & Slade, at Cordele, Georgia, procured an attachment to be issued from the city court of Cordele, under which a box car belonging to the company was seized. The railway company gave "a replevy bond, or a bond to release the attachment . . . and on the filing of such bond the attachment became dissolved." The railway company, specially entered its appearance, *moved to quash, first, upon the ground that it was a foreign corporation, and had no agent, office, or place of business, and transacted no business, in the state of Georgia, and was not susceptible of being therein sued; and, second, because the box car came into the state under a contract of interstate shipment, and could not be attached in Georgia without imposing a direct burden upon interstate commerce, in violation of the laws of the United States regulating that subject. On July 26, 1907, the plaintiffs demurred to the motion to quash, and filed an answer to the same, and on the same day filed their declaration in attachment. On August 3, 1907, the railway company, appearing only for that purpose, filed a formal plea to the jurisdiction of the court. In this plea, with great elaboration, the grounds previously asserted in the motion to quash were reiterated. The plaintiffs demurred to this plea, and also answered the same. Both demurrers, the one to the motion to quash and the other to the plea to the jurisdiction, were heard together. The demurrers were sustained, and exceptions were only reserved. Thereupon the railway company both demurred to and answered the declaration in attachment. The demurrer challenged the sufficiency of the declaration to show jurisdiction in the court, because it was not averred that the railway company was transacting business or had an office, agent, or place of business in the county where the suit was brought or in the state of Georgia; that it was not charged that the acts of neg-

ligence for which recovery was sought had been committed in the state of Georgia; and because, on the contrary, the contract relied upon in the declaration was stated therein to have been made in Kentucky. The answer, after reserving the benefit of the demurrer, traversed the declaration on the merits, and, as a special defense, again set up that the railway company had no line of road in the state, or agent therein, and transacted no business in Georgia, and therefore was not subject to be therein sued. Concerning the box car which had been attached, it was specially set up that, in order to save breaking bulk and reloading *at [80] connecting points, the railway company had an agreement with connecting carriers by which its cars, when loaded on its line with freight for points in Georgia, should not be unloaded at the terminus of the company's road, but should be transferred to the connecting carrier for delivery in Georgia, such carrier coming under an obligation to return the cars with all possible despatch. It was alleged that the car in question was delivered under these circumstances, and was hence not subject to attachment in Georgia.

The demurrer was overruled. The court also sustained a demurrer filed on behalf of the plaintiffs to the special defenses set up by the railway company in its answer, to which we have previously adverted. To these rulings of the court exceptions were noted by the railway company and made part of the record. The case went to trial upon the merits, and at the close of the evidence the court directed a verdict for the plaintiffs. The case was taken to the court of appeals of Georgia, where the judgment was affirmed. 3 Ga. App. 400, 60 S. E. 8. This writ of error to the court of appeals was allowed by the chief judge upon the ground that the court of appeals was the highest court of the state in which a decision in the suit could be had, and upon the averments made in the petition for the allowance of a writ of error, that grounds of Federal cognizance were presented by the record.

Mr. D. A. R. Crum argued the cause, and, with Mr. J. Gordon Jones, filed a brief for plaintiff in error.

Mr. Joseph T. Hill argued the cause and filed a brief for defendants in error.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

In the trial on the merits it was shown that a shipment of live stock had been made from a point in Kentucky under a *con- [81] tract with the railway company for delivery at Cordele, Georgia, the contract contemplat-

ing the movement of the shipment over the line of the railway company, and the transfer by it of the car to connecting carriers for delivery at the point of destination. It was this contract of shipment out of which it was alleged the claim arose which was the basis of the attachment. The railway company offered in evidence the written contract, and then rested its defense. This contract of shipment contained various provisions limiting the common-law liability of the railway company. Thereupon the record recites as follows:

"Mr. Hill offers in evidence for plaintiff § 196 of the Constitution of the state of Kentucky, as follows:

"Transportation of freight and passengers by railroad, steamboat, or other carrier, shall be so regulated by general law as to prevent unjust discrimination. No common carrier shall be permitted to contract for relief from its common-law liability."

"Mr. Jones [for railway company] objects that the regulation as provided for in this section should accompany it, and unless it does it is irrelevant and inadmissible; that it is merely a paragraph of the Constitution of the state giving the legislature and laws. He further objects to it on the ground that this suit is brought under the Georgia laws, and is not a suit on a Kentucky contract.

"Objection overruled.

"Plaintiff announces closed.

"Mr. Hill moves the court to direct a verdict for plaintiff for the amount sued for.

"Mr. Jones [for railway company] insists that the contract offered is a legal contract, and forms an issue for the jury to pass upon."

Concerning the questions of jurisdiction raised by the pleadings, the court of appeals, to which the case was taken, held as follows: 1st. That by the requirements of § 1475 of the Georgia Civil Code, and by the 82] application of the law of the *state as expounded in repeated decisions of the supreme court, "the giving of the replevy bond was a general appearance by the defendant, dissolving the attachment, and converting it from an action *in rem* into an action *in personam*." 2d. That, under the law of the state, "the filing of a general demurrer or an answer, not under protestation, and without expressly reserving the special appearance, waives the special appearance." Applying these general propositions, it was decided that "the defendant having, by filing a replevy bond, a demurrer, and an answer, submitted itself personally to the jurisdiction of the court, with the right to make only such defenses as it could have made if it had been personally served with process, and the surety on the replevy bond making no complaint against the judgment, it be-

comes immaterial whether the levy of the attachment was regular or not, or whether the property seized was subject to levy; and these questions are therefore not for decision. *King v. Randall*, 95 Ga. 449, 22 S. E. 683. The defendant had the right to replevy, irrespective of whether the property was subject or not subject to the levy. *Swift v. Tatner*, 89 Ga. 660, 673, 32 Am. St. Rep. 101, 15 S. E. 842." In affirming the judgment on the merits, the contract of shipment out of which the controversy arose was treated as a Kentucky contract. Certain limitations therein were held to be void under the laws of that state, and other provisions which were held not to be repugnant to those laws were decided not to exempt the railway company from liability.

The assignments of error are eleven in number, but when the reiterations which they contain are put out of view, it is apparent on their face that, in their broadest aspect, they embrace only two questions of a Federal nature: First, that the trial court did not acquire jurisdiction over the railway company, as the levy upon the box car was a direct burden upon, and, at all events, was repugnant to the legislation of Congress on the subject of, interstate commerce; and, second, that a right under the same legislation to the benefit of the laws of the United States in construing the contract of shipment upon *which the cause of action arose [83 was denied by the decision of the state court. But, as we have previously shown, on the face of the record it is apparent that the court of appeals did not pass upon the question whether the levy of the attachment was regular, or whether the property seized was subject to levy. It held, construing the statutes of Georgia relating to attachments and the decisions of the highest court of the state, that it was unnecessary to decide those questions, because they had been waived by the conduct of the railway company in giving a replevy bond and answering, etc., without protestation. It follows that no Federal question is presented as to the issue concerning jurisdiction, since the ruling below was based exclusively upon a non-Federal ground broad enough to sustain it without considering or referring to the alleged Federal question. It is besides to be observed that the plaintiff in error in argument does not question the correctness of the deductions drawn by the court below from the prior decisions of the supreme court of the state of Georgia. Indeed, there is nothing in the record showing that any question was raised below as to the repugnancy to the Constitution of the United States of the statute of Georgia concerning the giving of a bond to release attached property, as construed by the supreme court

of Georgia. See, in this connection, the cases of *York v. Texas*, 137 U. S. 15, 20, 34 L. ed. 604, 605, 11 Sup. Ct. Rep. 9; *Kauffman v. Wootters*, 138 U. S. 285, 34 L. ed. 962, 11 Sup. Ct. Rep. 298; and *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 205, 37 L. ed. 699, 703, 13 Sup. Ct. Rep. 859.

The second proposition is that, as the court below construed the contract of shipment upon which the cause of action depended by the law of Kentucky, where it was made, instead of by the laws of the United States regulating interstate commerce, thereby a Federal right was denied. But this contention is at once disposed of by saying that the assertion of Federal right upon which it rests finds no support in the record, as it does not appear to have been urged below, or called to the attention of, or decided by, the appellate court. On the contrary, as we have previously shown, the contention made at the trial by the railway company was not that the contract of 84]*shipment was to be governed by the laws of the United States, but that it should be treated as a Georgia, and not as a Kentucky, contract.

From these considerations it results that the record presents no Federal question, and the writ of error is therefore dismissed for want of jurisdiction.

Dismissed.

LYDA B. CONLEY, Appt.,

v.

RICHARD A. BALLINGER,† Secretary of the Interior, and Horace B. Durant, Thomas G. Walker, and William A. Simpson, Commissioners.

(See S. C. Reporter's ed. 84-91.)

Indians — tribal lands — Federal control.

1. The United States retained the same exclusive power over land used for an Indian burying ground, which was excepted in the Wyandotte treaty of January 31, 1855 (10 Stat. at L. 1159), art. 2, from the cession of the lands of the tribe for subdivision in severalty to the members, that it would have had if the tribe had continued in existence after that treaty.

[For other cases, see *Indians*, V., in Digest Sup. Ct. 1908.]

Indians — tribal lands — reservation in cession.

2. Tribal rights only were retained by the

†Substituted January 14, 1910, as party appellee in place of James A. Garfield, upon suggestion of the latter's resignation and appointment of his successor.

NOTE.—On Federal control of Indians,—see note to *Worcester v. Georgia*, 8 L. ed. U. S. 484.

54 L. ed.

Wyandotte Indians in and over their cemetery, under the Wyandotte treaty of January 31, 1855, art. 2, by which they ceded their land to the United States for subdivision in severalty to the members of the tribe, excepting the portion then inclosed and used as a public burying ground, which was permanently to be reserved and appropriated for that purpose.

[For other cases, see *Indians*, V., in Digest Sup. Ct. 1908.]

Indians — individual rights — public burying ground.

3. An individual descendant of Wyandotte Indians has no right, as against the United States, to the continued use as a cemetery of the parcel of land excepted in the Wyandotte treaty of January 31, 1855, art. 2, ceding the lands of the tribe to the United States for subdivision in severalty to the members, except the portion then inclosed and used as a public burying ground, which was permanently to be reserved and appropriated for that purpose.

[For other cases, see *Indians*, VIII., in Digest Sup. Ct. 1908.]

Costs — in circuit court — on dismissal.

4. No costs should be imposed upon the dismissal for want of jurisdiction of a bill in equity to enjoin the Secretary of the Interior and commissioners appointed by him from selling or disturbing an Indian cemetery.

[For other cases, see *Costs and Fees*, II. c, in Digest Sup. Ct. 1908.]

[No. 77.]

Argued and submitted January 14, 1910.
Decided January 31, 1910.

APPEAL from the Circuit Court of the United States for the District of Kansas to review a decree, dismissing, for want of jurisdiction, a bill in equity to enjoin the Secretary of the Interior and commissioners appointed by him from selling or disturbing an Indian cemetery. Reversed and remanded for the dismissal of the bill without costs.

The facts are stated in the opinion.

Miss Lyda B. Conley, *in propria persona*, argued the cause and filed a brief for appellant:

If a court holds that it has no jurisdiction whatever of a cause, it cannot give judgment for costs.

2 Bates, Fed. Eq. Proc. p. 873, ¶ 845; *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89; *Inglee v. Coolidge*, 2 Wheat. 363, 4 L. ed. 261; *Hornthall v. The Collector* (*Hornthall v. Keary*) 9 Wall. 560, 566, 19 L. ed. 560, 562; *Blacklock v. Small*, 127 U. S. 96, 32 L. ed. 70, 8 Sup. Ct. Rep. 1096; *Nashville v. Cooper*, 6 Wall. 247, 250, 18 L. ed. 851, 852.

The circuit court of the United States has jurisdiction to enjoin the acts of individuals who, claiming authority under color

of an unconstitutional act of Congress, invade personal or property rights, to the injury of the plaintiff, without due process of law.

Cooley, Const. Lim. 7th ed. p. 28; May, United States Sup. Ct. Pr. p. 102; Tindal v. Wesley, 167 U. S. 213, 42 L. ed. 140, 17 Sup. Ct. Rep. 770; Cooley, Torts, 2d ed. p. 830; Black, Const. Law, p. 131; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Hagood v. Southern, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 468, 2 Sup. Ct. Rep. 91; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623; Poindexter v. Greenhow, 114 U. S. 270, 273, 297, 29 L. ed. 185, 186, 195, 5 Sup. Ct. Rep. 903, 962; Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Cooley, Const. Law, pp. 136, 345; Sutherland, Notes on Const. pp. 78, 644; Andrews, Am. Law, p. 126, note; Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209; Board of Education v. Blodgett, 155 Ill. 441, 31 L.R.A. 70, 46 Am. St. Rep. 348, 40 N. E. 1025; Eaton v. Boston, C. & M. R. Co. 51 N. H. 504, 12 Am. Rep. 151; Ordronaux, Constitutional Legislation, p. 254; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 277, 15 L. ed. 374; Lowe v. Kansas, 163 U. S. 85, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; Lasere v. Rochereau, 17 Wall. 438, 21 L. ed. 695; Orchard v. Alexander, 157 U. S. 373, 39 L. ed. 738, 15 Sup. Ct. Rep. 635; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Works, Courts & Their Jurisdiction, p. 206; 1 Desty, Fed. Proc. 9th ed. p. 42; Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323; Ex parte Ah Fook, 49 Cal. 402; People ex rel. Witherbee v. Essex County, 70 N. Y. 229; Black, Const. Law, pp. 417, 420; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; Union Trust Co. v. Stearns, 119 Fed. 794; Brown, Jurisdiction of Courts, 2d ed. p. 8.

Rights of persons and property, not political rights, are subjects of judicial power, and the judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated power, or be an assumption of power beyond the grants in the Constitution.

Ableman v. Booth, 21 How. 506, 520, 16 L. ed. 169, 175; Fifth Nat. Bank v. Long, 7 Biss. 503, Fed. Cas. No. 4,780; Union Trust Co. v. Stearns, 119 Fed. 793; Field,

Fed. Courts, p. 113, ¶ 122; Osborn v. Bank of United States, supra; Poindexter v. Greenhow, 114 U. S. 291, 29 L. ed. 193, 5 Sup. Ct. Rep. 903, 962; Smyth v. Ames, 169 U. S. 518, 42 L. ed. 839, 18 Sup. Ct. Rep. 418; Webster, Citizenship, p. 47; Blair v. Silver Peak Mines, 93 Fed. 335; Sutherland, Notes on Const. pp. 484, 569, 570, 610; United States v. Cruikshank, 92 U. S. 542, 549, 23 L. ed. 588, 590; Story, Const. chap. 9, pp. 85, 86; Cooley, Const. Law, pp. 31, 163, 269, 367; Ordronaux, Constitutional Legislation, p. 478; Rison v. Farr, 24 Ark. 163, 87 Am. Dec. 52; Wells, Jurisdiction of Courts, pp. 3, 6; Potter's Dwarrr. Stat. pp. 65, 351, note 7; Chirac v. Chirac, 2 Wheat. 277, 4 L. ed. 238; Cooley, Const. Lim. 7th ed. p. 131; Cunningham v. Macon & B. R. Co. 109 U. S. 446, 451, 27 L. ed. 992, 994, 3 Sup. Ct. Rep. 292, 609; Reichart v. Felps, 6 Wall. 166, 18 L. ed. 849; Wilson v. Wall, 6 Wall. 83, 18 L. ed. 727; Brown, Jurisdiction of Courts, 2d ed. pp. 6, 86; Black, Const. Law, p. 50, §§ 21, 22; Dartmouth College v. Woodward, 4 Wheat. 519, 4 L. ed. 630; 2 Butler, Treaty Making Power of United States, p. 145; Society for Propagation of the Gospel v. New Haven, 8 Wheat. 464, 5 L. ed. 662; Swasey v. North Carolina R. Co. 1 Hughes, 19, Fed. Cas. No. 13,679; Charles River Bridge v. Warren Bridge, 11 Pet. 572, 9 L. ed. 834; McComb v. Board of Liquidation, 2 Woods, 54, Fed. Cas. No. 8,707, 92 U. S. 531, 23 L. ed. 623; Preston v. Walsh, 10 Fed. 325; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Gray v. Davis, 1 Woods, 425, Fed. Cas. No. 7,515; Woolsey v. Dodge, 6 McLean, 145, Fed. Cas. No. 18,032, 18 How. 331, 15 L. ed. 401; United States v. Peters, 5 Cranch, 115, 3 L. ed. 53.

Solicitor General Bowers and Mr. Barton Corneau submitted the cause for appellees:

The lower court was without jurisdiction, because the suit is, in reality, against the United States.

Naganab v. Hitchcock, 202 U. S. 473, 50 L. ed. 1113, 26 Sup. Ct. Rep. 667; Louisiana v. Garfield, 211 U. S. 70, 53 L. ed. 92, 29 Sup. Ct. Rep. 31.

The United States had full power to administer the tribal lands of the Indians during the tribal existence.

Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity to enjoin the Secretary of the Interior and commissioners appointed by him from selling or disturbing an Indian cemetery. The bill was demurred

to on the grounds, among others, that the matter in dispute was not alleged to exceed the value of \$2,000, and that the suit was a suit against the United States. The bill was dismissed for want of jurisdiction, and an appeal was taken to this court.

The substance of the bill is as follows: The plaintiff is a citizen of the state of Kansas and of the United States, and a descendant of Wyandotte Indians dealt with in the treaty of January 31, 1855. 10 Stat. at L. 1159. By article 1 of that treaty the tribe of the Wyandottes was to be dissolved on the ratification of the treaty, and the members made citizens of the United States, with exemption for a limited time of such as should apply for it. By article 2, the Wyandotte Nation ceded their land to the United States for subdivision in severalty to the members, "except as follows, *viz.*: The portion now inclosed and used as a public burying ground shall be permanently reserved and appropriated for that purpose;" etc. The plaintiff's parents and sister are buried in this ground, and she alleges that she "has seisin, and a legal estate and vested 89] *rights in and to" the same, and that although the land is worth \$75,000, there is no standard by which to estimate the value of her rights. (It is set forth further that, by a treaty of February 23, 1867, with the Senecas and others, art. 13, 15 Stat. at L. 513, 516, a portion of the Wyandottes were allowed to begin anew a tribal existence; but the bearing of this treaty upon the case does not appear.) The defendants are intending and threatening to remove the remains of persons buried as above to another designated place and to sell the burying ground; the proceeds, after certain deductions, to be paid to parties to the treaty of 1855, or their representatives, in accordance with the act of Congress of June 21, 1906, chap. 3504. 34 Stat. at L. 325, 348. This act is alleged to violate the constitutional rights of the plaintiff and to be void.

The record shows that the court left it open to the plaintiff to amend so as to avoid any technical objection that could be avoided by amendment, and as she conducted her own case, we go as far as we can in leaving such considerations on one side. For every reason we have examined the facts with anxiety to give full weight to any argument by which the plaintiff's pious wishes might be carried out. But if it is obvious that the bill could not be amended so as to state a case within the jurisdiction of the court, the judgment must be affirmed or the appeal dismissed, as the defect of jurisdiction turns out to be peculiar to courts of the United States as such, or one common to all courts.

The allegation of the plaintiff's interest plainly does not mean that she has taken

possession of the whole burying ground, and has acquired a seisin of the whole by wrong. As it does not mean that, it must mean simply a statement of the rights that the plaintiff conceives to have been conferred by the treaty of 1855 upon those whom she represents. The argument that vested rights were conferred upon individuals by that treaty, stated as strongly as we can state it, would be that, as the tribe was to be dissolved by the treaty, it cannot have been the beneficiary of the agreement for the permanent *appropriation of the land in question [90 as a public burying ground, and that the language used imported a serious undertaking, and that to give it force as such the United States must be taken to have declared a trust. If a trust was declared, the benefit by it must have been limited to the members of the disintegrated tribe and their representatives, whether as individuals or as a limited public, and thus it might be possible to work out a right of property in the plaintiff, as a first step towards maintaining her bill.

But we do not pursue the attempt to state the argument on that side, because we are of opinion that it is plainly impossible for the plaintiff to prevail. There is no question as to the complete legislative power of the United States over the land of the Wyandottes while it remained in their occupation before their quitclaim to the United States. *Lone Wolf v. Hitchcock*, 187 U. S. 553, 565, 47 L. ed. 299, 306, 23 Sup. Ct. Rep. 216. When they made that grant they excepted this parcel. Therefore it remained, as the whole of the land had been before, in the ownership of the United States, subject to the recognized use of the Wyandottes. But the right of the Wyandottes was in them only as a tribe or nation. The right excepted was a right of the tribe. The United States maintained and protected the Indian use or occupation against others, but was bound itself only by honor, not by law. This mode of statement sounds technical, perhaps, but the principles concerned are not so. The government cannot be supposed to have abandoned merely for a moment and for a secondary matter its general attitude toward the Indians as wards over whom and whose property it retained unusual powers, so long as they remained set apart from the body of the people. The very treaty of 1867, cited in the bill, providing for the resumption of the tribal mode of life by the Wyandottes, shows that the United States assumed still to possess such unusual powers. It seems to us that the reasonable interpretation of the language as to the burying ground is not that the United States declares itself subject to a trust which no court could enforce

against it, if against anyone (see *Naganab v. 91*] *Hitchcock*, 202 *U. S. 473, 50 L. ed. 1113, 26 Sup. Ct. Rep. 667; *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568), while, on the other hand, it stripped itself of any protecting power that otherwise it might have retained. It seems to us more reasonable to suppose that the words, "shall be permanently reserved and appropriated for that purpose," like the rest of the treaty, were addressed only to the tribe, and rested for their fulfilment on the good faith of the United States,—a good faith that would not be broken by a change believed by Congress to be for the welfare of the Indians.

We are driven to the conclusion that even if the suit is not to be regarded as a suit against the United States, within the authority of the cases cited (202 U. S. 60 and 473), the United States retained the same power that it would have had if the Wyandotte tribe had continued in existence after the treaty of 1855; that the only rights in and over the cemetery were tribal rights; and that the plaintiff cannot establish a legal or equitable title of the value of \$2,000, or indeed any right to have the cemetery remain undisturbed by the United States.

We are of opinion that, in view of the circumstances, it is just that the bill should be dismissed without costs. Act of March 3, 1875, chap. 137, § 5, 18 Stat. at L. 472, U. S. Comp. Stat. 1901, p. 511.

Decree reversed. Bill dismissed without costs.

92] *HENRY C. KING, Plff. in Err.,
v.

STATE OF WEST VIRGINIA and Spruce
Coal & Lumber Company. (No. 445.)

HENRY C. KING, Plff. in Err.,
v.

STATE OF WEST VIRGINIA, Egbert
Mills, Egbert Mills, Trustee, et al. (No.
446.)

HENRY C. KING, Plff. in Err.,
v.

STATE OF WEST VIRGINIA, U. B. Bus-
kirk, Trustee, et al. (No. 447.)

(See S. C. Reporter's ed. 92-101.)

**Error to state court — Federal question
— settled by prior decisions.**

1. The contention that U. S. Const., 14th Amendment, is violated by the provisions of W. Va. Const., art. 13, and Code, chap. 105, for the forfeiture to the state of lands not listed by the owner for taxation for five successive years, with liberty to the owner to intervene and redeem, having been decided adversely in a prior decision of the

Federal Supreme Court, affords no basis for a writ of error from that court to a state court.

[For other cases, see Appeal and Error, 1110-1137, in Digest Sup. Ct. 1908.]

**Error to state court — Federal question
— decision on facts.**

2. A decision by a state court that certain tracts of land were not within the boundaries of a land grant rests upon a question of fact, which cannot serve as the basis of a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 1595-1600, in Digest Sup. Ct. 1908.]

**Error to state court — Federal question
— local procedure.**

3. The construction and effect of a prior decree of a state court, and how far it bound the state, and whether or not it bound parties subsequently coming in, are matters of state procedure, the rulings upon which cannot present any question which will sustain a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 1601-1644, in Digest Sup. Ct. 1908.]

**Error to state court — Federal question
— statutory construction.**

4. The misconstruction of a state statute by a state court cannot present a question which will sustain a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 1584-1594, in Digest Sup. Ct. 1908.]

**Error to state court — Federal question
— statutory construction — partial in-
validity.**

5. The decision of a state court that a void provision of a state statute is separable from its valid provisions does not present a Federal question which will sustain a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 1584-1594, in Digest Sup. Ct. 1908.]

[Nos. 445, 446, 447.]

Argued December 14, 15, 16, 1909. Decided
January 31, 1910.

NOTE.—On due process of law in revenue proceedings—see note to *Read v. Dingess*, 9 C. C. A. 398.

On necessity of color of merit in Federal question to sustain writ of error to state court—see note to *Offield v. New York, N. H. & H. R. Co.* 51 L. ed. U. S. 231.

On review of questions of fact on writ of error to a state court—see note to *Smiley v. Kansas*, 49 L. ed. U. S. 546.

On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

THREE WRITS OF ERROR to the Supreme Court of Appeals of the State of West Virginia to review decrees which affirmed decrees of the Circuit Court of Marion County, in that state, forfeiting to the state certain lands not listed by the owner for taxation for five successive years. Dismissed for want of jurisdiction.

See same case below, No. 445, 64 W. Va. 545, 63 S. E. 495; No. 446, 64 W. Va. 546, 63 S. E. 468; No. 447, 64 W. Va. 610, 63 S. E. 495.

The facts are stated in the opinion.

Messrs. **Hannis Taylor** and **Maynard F. Stiles** argued the cause, and, with Mr. John G. Carlisle, filed a brief for plaintiff in error:

Where a state court decides a case against a claim under Federal law, and also puts its decision in part upon other grounds, the latter ground must be a valid, pertinent matter of claim or defense, arising on the record, and not one imported into the case *dehors* the record, or one that itself is not sound and sufficient.

Johnson v. Risk, 137 U. S. 307, 34 L. ed. 686, 11 Sup. Ct. Rep. 111; *Terre Haute & I. R. Co. v. Indiana*, 194 U. S. 579, 589, 48 L. ed. 1124, 1129, 24 Sup. Ct. Rep. 767; *Atty. Gen. ex rel. Kies v. Lowrey*, 199 U. S. 233-239, 50 L. ed. 167-170, 26 Sup. Ct. Rep. 27; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 580, 50 L. ed. 596, 604, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *West Chicago Street R. Co. v. Illinois*, 201 U. S. 506, 519, 520, 50 L. ed. 845, 850, 851, 26 Sup. Ct. Rep. 518.

When a decision by a state court of a Federal question appears to have been the foundation of the judgment, this court has jurisdiction.

Wedding v. Meyler, 192 U. S. 573, 48 L. ed. 570, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322.

The right to resort to the Federal courts is a Federal right, and conspiracy or contrivance to defeat it ought not to be tolerated by a Federal court.

Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 97.

Messrs. John G. Carlisle and Maynard F. Stiles filed a separate brief for plaintiff in error in Nos. 445 and 446:

It is not always necessary that a Federal question be distinctly shown on the record to have been specifically raised or decided; it is enough if it was involved in the case.

Eureka Lake & Y. Canal Co. v. Superior Ct. 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. Rep. 429; *Kankauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 269, 35 L. ed. 1009, 12 Sup. Ct. Rep. 173; 54 L. ed.

McQuade v. Trenton, 172 U. S. 639, 43 L. ed. 582, 19 Sup. Ct. Rep. 292.

Where the record suggests many points which cannot be considered upon the motion to dismiss, the court will refuse the motion, but allow it to be brought up on argument on the merits.

Day v. Washburn, 23 How. 309, 16 L. ed. 551.

Where the motion cannot be determined without looking into the merits, it will be continued to the hearing.

Hecker v. Fowler, 1 Black, 95, 17 L. ed. 45; *Semple v. Hagar*, 4 Wall. 431, 18 L. ed. 402; *Lynch v. De Bernal*, 131 U. S. xciv. Appx. and 19 L. ed. 395.

Messrs. **John F. Dillon** and **C. W. Campbell** argued the cause, and, with Messrs. Harry Hubbard, Edward C. Lyon, Malcolm Jackson, John A. Sheppard, and Wells Goodykoontz, filed a brief for defendants in error:

The adjudication by the West Virginia courts in these present cases as to what was the meaning and effect of the Wyoming decree involves the decision of no Federal question unless the plaintiff in error can show that he has a "contract," and that some subsequent law, that is, act of the legislature, impaired such contract.

San Francisco v. Itsell, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241.

No question of fact can be reviewed on these writs of error.

Behn v. Campbell, 205 U. S. 403, 51 L. ed. 857, 27 Sup. Ct. Rep. 502.

No question of state law or general law can be reviewed on these writs of error; but only Federal questions, if any exist.

Patterson v. Colorado, 205 U. S. 454, 461, 51 L. ed. 879, 880, 27 Sup. Ct. Rep. 556, 10 A. & E. Ann. Cas. 689.

Mr. William G. Conley filed a separate brief for defendant in error the state of West Virginia.

Messrs. John F. Dillon, Harry Hubbard, Edward C. Lyon, C. W. Campbell, Malcolm Jackson, and John A. Sheppard filed a separate brief for defendants in error in No. 446:

The question whether a person was a party to a former judgment or decree, and the whole question, and all that is involved therein, as to whether a former decree or judgment is a matter *res judicata* or constitutes an estoppel so as to be a bar in subsequent litigation is a question of general law, arising frequently in courts of general jurisdiction, and is not a Federal question arising under the Constitution of the United States or act of Congress or treaty.

Chouteau v. Gibson, 111 U. S. 201, 28 L. ed. 401, 4 Sup. Ct. Rep. 340; San Francisco v. Itsell, 133 U. S. 65, 66, 33 L. ed. 570, 571, 10 Sup. Ct. Rep. 241.

These writs of error can bring up only questions of law, and not questions of fact.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220.

Mr. James F. Brown also filed a brief for defendants in error in No. 446.

Mr. Frank Cox also argued the cause, and, with Messrs. James F. Brown and William R. Lilly, filed a brief for defendants in error in No. 447:

The Supreme Court of the United States is confined, on a writ of error from the state court, to an examination of the right, title, claim, or exemption set up by the party as depending upon the construction of the law or treaty of the United States under which it is set up, and to questions of law as distinguished from questions of fact.

Matthews v. Zane, 7 Wheat. 164, 5 L. ed. 425; Corry v. Campbell, 154 U. S. 629, Appx. and 24 L. ed. 926, 14 Sup. Ct. Rep. 1183; Stanley v. Schwalby, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754; United States Trust Co. v. New Mexico, 183 U. S. 535, 46 L. ed. 315, 22 Sup. Ct. Rep. 172; 11 Cyc. Law & Proc. p. 940; Taylor, Jurisdiction, p. 434.

The decision of the supreme court as to the weight given the judgment is not a Federal question.

Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; Bonner v. Gorman, 213 U. S. 86, 53 L. ed. 709, 29 Sup. Ct. Rep. 483; Phoenix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 184, 40 L. ed. 660, 664, 16 Sup. Ct. Rep. 471; Northern P. R. Co. v. Ellis, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724.

On error to a state court, when the facts are found by the court below, this court is concluded by such finding.

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.

Mr. Justice Holmes delivered the opinion of the court:

These writs of error are taken in a suit by the state of West Virginia, brought in May, 1894, for the sale of so much of a tract of 500,000 acres of land granted to Robert Morris in 1795 as is within the state and liable to be sold for the benefit of the school fund. See 64 W. Va. 545, 63 S. E. 495; id. 546, 584, 63 S. E. 468; id. 610, 63 S. E. 495. The Constitution of the state provides as follows: "It shall be the duty of every owner of land to have it entered on the

land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing 1,000 acres or more, shall not have been charged on such books with state tax on said land, then, by operation hereof, the land shall be forfeited and the title thereto vest in the state." Art. 13, § 6. By chapter 105 of the Code of the state, as amended by the act of February 23, 1893, chap. 24, a suit like the present is to be brought by the state for the sale of land so forfeited, and the former owner is to receive the surplus proceeds if he files a petition and proves title, or, if he prefers, may redeem. Further details are stated in King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925, where the validity of the system *created by the Con- [94] stitution and statute referred to was considered and maintained in a suit concerning this same tract. See also King v. Panther Lumber Co. 171 U. S. 437, 43 L. ed. 227, 18 Sup. Ct. Rep. 573; Swann v. West Virginia, 188 U. S. 739, 47 L. ed. 677, 23 Sup. Ct. Rep. 848.

These provisions being in the interest of actual settlement in the country, the Constitution also provides that all titles of the state to forfeited lands, etc., not redeemed or redeemable, shall be vested in any person, other than the one in default, his heirs or devisees, for so much thereof as he shall have held for ten years under color of title, having paid taxes on the same for any five of the ten years, with ulterior provisions if there be no such person. The statute further provides for bringing in parties interested, and enacts that land already sold under the statute, on which taxes since have been regularly paid, or land transferred by the Constitution, shall be dismissed from the suit, and thus exempts it both from sale in that suit and from the redemption incident to the proceedings for a sale. § 6. The redemption allowed is only from the title still remaining in the state, and does not affect titles under previous sales or the Constitution; the petitioner acquires no other title than that which was vested in him immediately before forfeiture. § 17. By § 20, the bar of the final decree is limited in accord with these provisions of § 17.

After the bill in this case had been filed and several times amended, the plaintiff in error, King, answered, in June, 1896, setting up title to the 500,000 acres, charging that the statute which attempts to work out a forfeiture of land etc., is contrary to the 14th Amendment of the Constitution, but asking "if it would be adjudged that said tract of land is forfeited to the state

of West Virginia by reason of the nonassessment thereof," etc., that a decree be made allowing him to redeem. The answer also set out a very long list of claims to parcels of the tract, and charged that the persons making them should be made parties defendant to the bill. There were parties intervening at this stage, but they do not seem to need notice. The case was sent to a commissioner, who found, "among other things, that about 10,000 acres of the land were not subject to junior claims and that the taxes and interest were \$2,195.65. On his report coming in, King paid \$3,090.08 for taxes and costs, and thereupon, on September 30, 1897, a decree was entered declaring that King "has the right, superior to all others, to redeem said land so far as the record in this case shows," and that the portion of the land lying in West Virginia, "so far as the title thereto is in said state," which portion is adjudged to be bounded as set forth in the decree, "is hereby, by the said Henry C. King, fully redeemed; and all forfeitures of said land, and taxes and interest heretofore charged or chargeable thereon, are hereby released and discharged." "But it is provided that this redemption shall not affect the rights any person not party to this suit may have, if any, under the provisions of § 3, article 13, of the Constitution of the state of West Virginia, such rights and claims not being in any manner adjudged or determined hereby." In fact, whatever it said, the decree could not grant a redemption affecting anybody's right but that of the state. The rights of purchasers at court sales and transferees under the Constitution are protected by § 17 of the act of 1893, as pointed out by the supreme court of appeals. 64 W. Va. 590, 599, 63 S. E. 468.

The state appealed in October, 1898, to the supreme court of appeals, and on February 7, 1900, the decree "in so far as it allows the appellee, Henry C. King, to redeem the land described in this decree by reason of the payment of the sum of \$3,090.08, costs, taxes, and interest as fixed by the circuit court, and in so far as it ascertains such costs, taxes, and interest," was reversed and in all other respects affirmed. The cause was ordered to be remanded with directions to permit King to amend his petition so as to carefully describe and accurately locate the portion of said land he desired to redeem. 47 W. Va. 437, 35 S. E. 30. A little later in the same year (1900) the state submitted a fifth amended bill, making the persons mentioned in King's answer as having [96] interest in the tract parties, and asked the directions of the court, King now, contrary to his answer above stated, protesting, on the ground of the above-

mentioned decree. The bill was ordered to be filed, and in March, 1901, King filed an amended answer and petition, stating that he had not been able in the time allowed to define all the land, but that he did there give a careful description of certain portions upon which he desired to pay such future sum as was properly chargeable thereon. Schedules were set forth and the prayer was to be permitted to pay the sum properly chargeable upon the land above described and to be described in a supplemental petition.

In many instances the land claimed by the newly joined parties was dismissed without controversy from the suit, as subject neither to sale nor to redemption under the Constitution and laws. In others, the land claimed was within the boundaries established by the above-mentioned decree of September 30, 1897, but was alleged to be outside the true lines of the Morris grant, the correctness of the decree being denied. And again, claims inconsistent with King's right to redeem, that were not admitted by him, were set up on the footing of purchases from the state. On July 5, 1901, the case was referred to a commissioner to report, among other things, the quantity, description, and location of the portions of the Morris grant and other land concerned, to which the title then remained in the state, and which was subject to sale. On July 14, King answered the answers of some of the new parties, claiming portions of the land. In September, he applied for a prohibition against the proceeding in the county court, which was denied on the ground that the court had jurisdiction, and that, if it made a mistake, it would be only error to be corrected in the usual way. King v. Doolittle, 51 W. Va. 91, 41 S. E. 145. The commissioner proceeded to take evidence, King being represented at the hearing, and this lasted until April 6, 1903, when the report was filed. On December 6, 1905, the court made a decree establishing very different boundaries from those fixed by the decree of September 30, 1897, and cutting down the Morris grant to about 97,000 or, as the [97] plaintiff in error says 90,000 acres. Meantime the state made a sixth, seventh, and eighth amendment to its bill, bringing in new defendants, but these seem to need no further mention.

Motions had been made by Egbert Mills to dismiss a tract of 112 acres from the suit, and by the Spruce Coal & Lumber Company to dismiss a tract of 7,000 acres, and by others, on the ground that, as has been stated by the statute under which the suit was instituted, whenever it should appear to the court that any part of the land in question had been sold by the state in former

similar proceedings, etc., or was held under § 3 of article 13 of the state Constitution, the bill should be dismissed as to such part.

On February 23, 1905, the act of 1893 was amended so as to allow defendant claimants to file deeds or certified copies of deeds made under an order of court in previous proceedings for the sale of school land, or patents from Virginia or West Virginia, purporting to convey any part of the land in suit; and it was enacted that if the state or some other claimant did not, within thirty days, allege and prove by a proper certificate that such part again had become forfeited since the date of the conveyance, the court should have no jurisdiction to sell such part or to permit redemption of it, but should enter an order dismissing the suit as to such part. (It was left an open question in 64 W. Va. 594, 63 S. E. 468, whether this did not enlarge King's rights, in case of a second forfeiture.) It was enacted also that if it should appear that any part of the land had been held for ten years under color or claim of title, and that taxes had been paid for five of the ten years, or if it should appear that the land had been held under color of title and taxes paid for five years since 1865, the suit should be dismissed as to such part. The court further was authorized to dismiss the suit in whole or in part if satisfied by report of the commissioner of school lands and inquiry that the whole or part of the lands was not liable to sale. Previous sales of school lands were validated so far as to pass the title of the state. After 98] *this amendment new motions were filed on June 1, 1905, and subsequently, with copies of patents and deeds, if not previously filed. King objected on the ground that if § 3 of article 13 of the Constitution was construed to apply to land forfeited after the Constitution was adopted, it was contrary to the Constitution of the United States, and that § 6 of chapter 105 was also, if construed not to permit King to redeem all the land described in his petition. Time was allowed until the first day of the next October term for the state or any other claimant to show any defenses to these motions, and no defense appearing, on December 7, 1905, the day after the new boundary decree, and on later days, the motions were granted and the suit dismissed as to the tracts of land concerned.

The dismissals were on two grounds: That the tracts concerned were outside the Morris grant as bounded by the new decree, and that they were held under grants from the state, etc., and therefore were within chap. 105, § 6, of the Code, as amended and article 13, § 3, of the Constitution. On December 3, 1907, King appealed to the supreme court of appeals, but on December 22,

1908, the decrees were affirmed. It was held that the above-mentioned tracts claimed by Egbert Mills (No. 446 in this court) and the Spruce Coal & Lumber Company (No. 445 in this court) were outside the Morris grant. 64 W. Va. 545, 63 S. E. 495. The new boundary was upheld in 64 W. Va. 546, 63 S. E. 468. In that case it was decided that the defendants made parties after the first boundary decree of September 30, 1897, were not bound by it as partially affirmed, even if they had instigated and contributed to the appeal. pp. 559, et seq. See Rumford Chemical Works v. Hygienic Chemical Co. 215 U. S. 156, ante, 137, 30 Sup. Ct. Rep. 45. Finally, in 64 W. Va. 610, 63 S. E. 495, the court sustained a dismissal of land claimed by Buskirk (No. 447 in this court) on the ground that it had been sold as school land pending the present proceedings, and so the right to redeem was gone; and moreover, the sale was validated by the amendment of 1905 to the act of 1893, as above set forth. In 64 W. Va. at 564, 63 S. E. 468, is a separate opinion *discussing the amendment of 1905, and [92] deciding that it merely made legitimate rules of evidence, and changed no rights.

To complete the history of the case, even if not material, it may be added that petitions for rehearing were presented and disallowed, but that on January 21, 1909, it was decreed that the boundary decree of December 6, 1905, should be "so modified and limited in effect as not to affect or impair any right vested in any person by the decree entered herein by the circuit court of Wyoming county on the 30th day of September, 1897, as modified and partially affirmed by a decree entered by this court on the 7th day of February, 1900, and to the like extent the decree made and entered herein on the 22d day of December, 1903, by this court, in so far as the same affirms said decree of December 6th, 1905, is hereby so modified and limited." The decrees as to the defendants in error were not modified, but still stand. Perhaps the meaning of this last decree is as contended for by some of the defendants in error, that, as between the state and King on one side, and the defendants brought in after September 30, 1897, on the other, the new boundaries shall prevail; but that, as between those who were parties before September 30, 1897, the old boundaries still are to be taken as correct; so that if, within the latter bounds, there is land to which the state alone has title, King still may redeem. The court has indicated a tendency to believe that the old decree still bound the state (King v. Mason, 60 W. Va. 607, 56 S. E. 377), while it clearly holds that it does not bind parties afterwards introduced (64 W. Va. 546, 561, 63 S. E. 468).

At all events, we are of opinion that this modification does not affect the cases before this court.

The present writs of error are for the purpose of reversing the decrees as to boundary and dismissal that have been mentioned. The defendants in error move to dismiss, and we are of opinion that the motion should be granted. The only serious question in the case, if we assume that King saved it, is whether the West Virginia Constitution and statute are consistent with the 14th Amendment. But 100] that question *was answered in *King v. Mullins*, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925. The construction of the state Constitution by the state court as not confined in its operation to title vested and remaining in the state when the Constitution went into effect (which, of course, is final) is the only natural construction and was to be expected; then, as now, it was obvious that the right to redeem under the statute would not exist in case part of the land had been sold to a junior purchaser, so that in that case there would not be a "revestiture commensurate with the divestiture," as it is argued that there should be; and to say the least, it is not surprising that it is held that the right may be lost by transfer pending the proceedings. The whole discussion upon this point is little more than an attempt, in respectful form, to reargue by unreal distinctions what was decided in the former case. The question is not open and we shall discuss it no more. It hardly is necessary to add that, on a writ of error, we do not deal with the facts (*Behn v. Campbell*, 205 U. S. 403, 407, 51 L. ed. 857, 858, 27 Sup. Ct. Rep. 502), and therefore the decision that most of the tracts in question are not within the boundaries of the Morris grant disposes of King's rights here.

But an attempt is made to maintain that King got vested rights under the first boundary decree September 30, 1897, and his payment of the sum fixed in that decree, coupled with the partial affirmance of the same. But the construction and effect of that decree, how far it bound the state, and whether or not it bound parties subsequently coming in, were matters of state procedure alone. The cases remained within the jurisdiction of the state court, and if, by local practice, the lower or higher court had power to change an earlier decree in the cause by direct order, or indirectly, by construction, which latter we by no means intimate was done, it is a matter that can-

not be complained of here. See *Patterson v. Colorado*, 205 U. S. 454, 460, 51 L. ed. 879, 880, 27 Sup. Ct. Rep. 556, 10 A. & E. Ann. Cas. 689. It is said that the decree established the law of the case, but that phrase expresses only the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. *Remington v. Central P. R. Co.* 198 *U. S. 95, [101 99, 100, 49 L. ed. 959, 963, 25 Sup. Ct. Rep. 577. See *Great Western Teleg. Co. v. Burnham*, 162 U. S. 339, 343, 40 L. ed. 991, 993, 16 Sup. Ct. Rep. 850. In some states it is true that a stricter rule is applied (*Northern P. R. Co. v. Ellis*, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724), but there is nothing in the Constitution of the United States to require it, or to prevent a state from allowing past action to be modified while a case remains in court. See *San Francisco v. Itsell*, 133 U. S. 65, 33 L. ed. 570, 10 Sup. Ct. Rep. 241. The highest court of the state is the final judge of the powers conferred by the state laws in that regard. It was said by the supreme court of appeals in this case that "the decree adds nothing to King's rights." 64 W. Va. 599, 63 S. E. 468.

In view of what we have said, it hardly is necessary to consider the amendment of the Code, chap. 105, and the act of 1893 by the act of 1905. It is argued that the state court misconstrued the statute, but we have nothing to do with that. Judge Brannon clearly shows (64 W. Va. 584, 591, et seq., 63 S. E. 468) that the amendment does not even change the burden of proof as to the validity or invalidity of other sales or conveyances set up. *Id.* 594. The limitation of thirty days to overcome the effect of filing a deed or patent from the state is thought to be merely directory, and it is pointed out that in fact King was allowed five months, and that he did nothing. The limitation is held to be reasonable, and, even if void, to be separable from the rest of the act,—another point on which the state's decision is final. Giving prima facie effect to the document cannot be questioned seriously. *Marx v. Hanthorn*, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508. The other provisions of the act are shown to take no right from King that he had under the previous law, and are held to be consistent with the state Constitution. In our opinion there was no question raised in these cases that properly could be brought before this court for review.

Writs of error dismissed.

102] *BYRON F. BABBITT, Trustee in Bankruptcy of the Estate of Randolph-Macon Coal Company, Appt.,

v.

HOWARD DUTCHER, Secretary of Randolph-Macon Coal Company, and James T. Gardiner, President of Randolph-Macon Coal Company.

(See S. C. Reporter's ed. 102-115.)

Bankruptcy — what passes to trustee — books and papers.

1. The corporate records and stock books passed on an adjudication in bankruptcy against the corporation to the trustee, by virtue of the provisions of the bankruptcy act of July 1, 1898 (30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3451), § 70, vesting in such trustee the title of the bankrupt to all documents relating to his property, and § 1, subd. 13, providing that the word "documents" shall include any book, deed, or instrument in writing.

Bankruptcy — summary jurisdiction — compelling production of documents.

2. A court of bankruptcy has power upon a petition and rule to show cause, there being no adverse holding, to compel delivery to the trustee of the records and stock books of the corporate bankrupt.

[Jurisdiction of Bankruptcy Courts, see Bankruptcy, II., in Digest Sup. Ct. 1908.]

Bankruptcy — jurisdiction — ancillary proceedings in another district.

3. A Federal district court has jurisdiction to entertain proceedings instituted by a trustee in bankruptcy, duly appointed in a bankruptcy proceeding pending in another district, to compel the officers of the bankrupt to deliver to such trustee the documents in their possession relating to the business of the bankrupt, since the general jurisdiction conferred on bankruptcy courts by the bankruptcy act of July 1, 1898, § 2, is not cut down, so far as summary jurisdiction is concerned, by the provisions of §§ 23a and b, § 60, subd. b, or § 67, subd. c, which affect only those cases where there is a claim of adverse title based upon a transfer antedating the bankruptcy.

[Jurisdiction of Bankruptcy Courts, see Bankruptcy, II., in Digest Sup. Ct. 1908.]

[No. 39.]

Argued November 29, 1909. Decided February 21, 1910.

A PPEAL from the District Court of the United States for the Southern District of New York to review an order denying a motion by a trustee in bankruptcy appointed in a proceeding pending in another district, to compel the officers of the bankrupt to deliver to the trustee the cor-

NOTE.—As to persons against whom production and inspection of books or writings may be had—see note to *Cassatt v. Mitchell Coal & Coke Co.* 81 C. C. A. 96.

porate records and stock books of the bankrupt. Reversed and remanded for further proceedings.

Statement by Mr. Chief Justice Fuller:

The Randolph-Macon Coal Company was a Missouri corporation, and was duly adjudicated a bankrupt March 26, 1907, in proceedings instituted in the district court of the United States, in and for the eastern division of the eastern judicial district of Missouri. Byron F. Babbitt was duly appointed trustee in bankruptcy for the corporation May 10, 1907, and duly qualified by giving bond on that day.

He thereafter made demand upon the president of the company for the delivery to him of the corporate records and stock books of the bankrupt company, which were kept in the office maintained by the company in New York city. This request was refused by letter of the president of the company, dated September 24, 1907, in which he says that he is advised "that such records and stock books are not documents relating to the property of the bankrupt, and therefore you, as trustee in bankruptcy, are not entitled to their possession."

Thereupon the trustee made application to the district court in and for the southern district of New York, by petition, *for [103 an order directing James T. Gardiner, the president, and Howard Dutcher, the secretary, of the company, or either of them, to deliver to him the stock-certificate book, the corporation minute book, and the stock register of said company, together with all other records and documents belonging to said company, in their possession or under their control. Gardiner and Dutcher were within the jurisdiction of the district court for the southern district of New York, and the books and papers referred to were within their custody there, and the trustee alleged that the stock-certificate book, the corporation minute book, and the stock register book were necessary to the trustee in his administration and settlement of the affairs of the company.

Thereafter a hearing was had on the petition, the order to show cause, and return thereto, and the district judge (Holt, J.) indorsed on the petition: "I am obliged to deny this motion on the authority of *Re Von Hartz*, 74 C. C. A. 58, 142 Fed. 726," and ordered that the motion be denied on the ground that the court was without jurisdiction to entertain the proceeding or to grant the relief prayed for, and the district judge also certified that the order denying the motion and refusing to grant the relief was based solely on the ground that the court was without jurisdiction "to entertain

proceedings instituted by a trustee in bankruptcy duly appointed in a bankruptcy proceeding pending in another district, to compel the officers of the bankrupt to deliver to such trustee the documents in their possession relating to the business of the bankrupt."

This appeal was then allowed and duly prosecuted.

Mr. William B. Hornblower argued the cause, and, with Mr. Morgan M. Mann, filed a brief for appellant:

The title to all books and papers relating to the business of the bankrupt was vested in the trustee in bankruptcy upon his appointment and qualification as of the date of the adjudication.

Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; Re Hess, 134 Fed. 109.

It was proper to resort to summary proceedings in a court of bankruptcy rather than to an action of replevin in a state court.

Mueller v. Nugent, *supra*.

The district court of the United States in and for the southern district of New York had jurisdiction to entertain this proceeding and to grant the relief prayed for.

Lathrop v. Drake, 91 U. S. 516, 23 L. ed. 414; Sherman v. Bingham, 3 Cliff. 552, Fed. Cas. No. 12,762; Goodall v. Tuttle, 3 Biss. 219, Fed. Cas. No. 5,533; M'Gehee v. Hentz, Fed. Cas. No. 8,794; Re Tift, Fed. Cas. No. 14,034; Payson v. Dietz, 2 Dill. 504, Fed. Cas. No. 10,861; Re Benedict, 140 Fed. 55; Re Peiser, 115 Fed. 199; Re Sutter Bros. 131 Fed. 654; Re John L. Nelson & Bro. Co. 149 Fed. 590; Loveland, Bankr. 3d ed. § 21; Re Dunseath & Son Co. 168 Fed. 973.

Mr. Henry W. Taft argued the cause and filed a brief for appellees:

A district court has no ancillary jurisdiction on the application of a trustee in bankruptcy appointed by another district court, to compel by summary order the delivery to him of property of the bankrupt.

Re Von Hartz, 74 C. C. A. 58, 142 Fed. 726; Hull v. Burr, 83 C. C. A. 61, 153 Fed. 945; Re Williams, 120 Fed. 38; Re Williams, 123 Fed. 321; Ross-Meeham Foundry Co. v. Southern Car & Foundry Co. 124 Fed. 403; Re Tybo Min. & Reduction Co. 132 Fed. 697; Re Benedict, 140 Fed. 55.

Changes have been made in the act of 1898 which clearly indicate an intention on the part of Congress to limit the jurisdiction of courts of bankruptcy, both when acting in matters, narrowly speaking, of bankruptcy administration, and also when acting as courts of adjudication.

54 L. ed.

Even if this application had been made to the district court which originally adjudicated the Randolph-Macon Coal Company a bankrupt, it would not have had power, in a summary proceeding, to direct the delivery of the books in question to the trustee.

The title of the trustee to these books is disputed by Messrs. Gardiner and Dutcher. Under the cases, therefore, his remedy to establish his title or right to possession lies in a plenary action.

Jaquith v. Rowley, 188 U. S. 620, 47 L. ed. 620, 23 Sup. Ct. Rep. 369.

Mr. Chief Justice Fuller delivered the opinion of the court:

Subdivision 1 of § 70 of the bankruptcy act of 1898 (30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3451) provides that the trustee of the estate of a bankrupt shall be vested by operation of law, as of the date of the adjudication, with the title of the bankrupt (a 1) to all "documents relating to his property," and subdivision 13 of § 1 of the act provides that "'documents' shall include any book, deed, or instrument in writing."

Appellees, as officers of the bankrupt company, asserted no adverse claim, but denied that the corporate records and stock books were "documents relating to the property of the bankrupt," and asserted that therefore the trustee in bankruptcy was not entitled to their possession.

We have no doubt that the books and records in question passed, on adjudication, to the trustee, and belong in the custody of the bankruptcy court, and, there being no adverse holding, that the bankruptcy court had power, upon a petition and rule to show cause, to compel their delivery to the trustee. Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; Louisville Trust Co. v. Cominger, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293; First Nat. Bank v. Chicago Title & T. Co. 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693; Whitney v. Wenman, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778.

This brings us to the real question in the case, and upon which the decision was rendered; namely, whether the district court of the United States in and for the southern district of New York had jurisdiction to entertain this particular proceeding and grant the relief prayed for.

In *Ex parte Martin*, Fed. Cas. No. 9,149, decided in 1842, Mr. Justice Story, sitting on circuit, held that the equity jurisdiction of the district courts, under the bankruptcy act of 1841 (5 Stat. at L. 440, chap. 9),

was not confined to cases originally arising and pending in the particular court where the relief was sought, and where a creditor living in Massachusetts commenced suits in several states other than Pennsylvania, where proceedings were pending against the bankrupt for an adjudication, that an injunction would issue against the Massachusetts creditor, enjoining him from proceeding in the suits. Mr. Justice Story said:

"The language of the 6th section of the act is: 'That the district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under the act,' the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity. The act then goes on to enumerate certain specific cases and controversies, to what the jurisdiction extends (which I deem merely affirmative, and not restrictive, of the preceding clause); and then it extends the jurisdiction 'to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.' Now, this language is exceedingly broad and general; and it is not in terms, or by fair implication, necessarily confined to cases of bankruptcy originally instituted and pending in the particular district court where the relief is sought. On the contrary, it is not unnatural to presume that, as cases originally instituted and pending in one district may apply to reach persons and property situate in other districts, and require auxiliary proceedings therein to perfect and accomplish the objects of the act, the intention of Congress was that the district courts in every district should be [107] mutually *auxiliary to each other for such purposes and proceedings. The language of the act is sufficiently comprehensive to cover such cases; and I can perceive no solid ground of objection to such an interpretation of it."

Section 1 of the bankruptcy act of 1867 (14 Stat. at L. 517, chap. 176), and § 2 of the bankruptcy act of 1898, are substantially identical as to the jurisdiction of the district courts sitting as courts of bankruptcy, as will appear from the following comparison:

Section 1 of the Bankruptcy Act of 1867.

That the several district courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby

Section 2 of the Bankruptcy Act of 1898.

That the courts of bankruptcy as herein before defined, viz., the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian

territory and the district of Alaska, are hereby made courts of bankruptcy, and are hereby invested, with- in their respective territorial limits, as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers, and during their respec-

And the jurisdiction hereby conferred shall extend.

To the collection of all the assets of the bankrupt and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

five terms, as they are now or may be hereafter held, to

(7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act;

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

In *Sherman v. Bingham*, 3 Cliff. 552, Fed. Cas. No. 12,762, Mr. Justice Clifford, sitting on circuit, and construing the act of 1867, reversed the judgment of the district court, which held that an assignee in bankruptcy of a person declared a bankrupt in one district court could not maintain an action to recover moneys paid the defendants, residents of another district, in the district court of such district. And Mr. Justice Clifford said:

"District courts have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and the argument is, that inasmuch as the jurisdiction must be exercised in the district for which the district judge is appointed, the district court, sitting as a court of bankruptcy, cannot exercise jurisdiction in any case except in the district *where the bankruptcy [109] proceedings are pending; but § 1 of the bankrupt act contains no such limitation, nor does it contain any words which, properly considered, justify any such conclusion.

"General superintendence and jurisdiction of all cases and questions under the act are conferred upon the several circuit courts, except where special provision is otherwise made by the first clause of § 2 of the act; but the subsequent language of the same clause makes it clear that the jurisdiction

conferred by that clause can only be exercised within and for the district 'where the proceedings in bankruptcy shall be pending.' No such limitation, however, is found in the clause of § 1, conferring jurisdiction upon the district courts as courts of bankruptcy. Judges of the district courts must sit undoubtedly in the districts for which they are respectively appointed, and no doubt is entertained that the process of the court in proceedings in bankruptcy cases is restricted to the territorial limits of the district; but the language of § 1 of the bankrupt act describing the jurisdiction of the district courts, sitting as courts of bankruptcy, is, that they shall have original jurisdiction in their respective districts, 'in all matters and proceedings in bankruptcy,' showing unquestionably that they can only sit and exercise jurisdiction in their own districts; but the limitation that the proceedings in bankruptcy must in all cases be pending in that district is not found in that clause of § 1 of the act. On the contrary, the same section provides that the jurisdiction conferred, that is, the jurisdiction of the several district courts, shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy act, and also to the collection of all the assets of the bankrupt, to the ascertainment and liquidation of the liens, and other specific claims thereon, to the adjustment of the various priorities and conflicting interests of all parties, and to the marshaling and disposition of all the different funds and assets, so as to secure the 110] rights of all *parties, and the due distribution of the assets among all the creditors, and to all acts, matters, and things to be done under and in virtue of the bankruptcy."

In *Lathrop v. Drake*, 91 U. S. 516, 23 L. ed. 414, the question of the ancillary jurisdiction of the district court under the act of 1867 was considered, and the decision in *Sherman v. Bingham* approved. Mr. Justice Bradley, delivering the opinion, said:

"Their jurisdiction is confined to their respective districts, it is true; but it extends to all matters and proceedings in bankruptcy without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. Each court, within its own district, may exercise the powers conferred; but those powers extend to all matters of bankruptcy, without limitation. There are, it is true, limitations elsewhere in the act; but they affect only the matters to which they relate. Thus, by § 11, the petition in bankruptcy, and, by consequence, 54 L. ed.

the proceedings thereon, must be addressed to the judge of the judicial district in which the debtor has resided, or carried on business, for the six months next preceding; and the district court of that district, being entitled to and having acquired jurisdiction of the particular case, necessarily has such jurisdiction exclusive of all other district courts, so far as the proceedings in bankruptcy are concerned. But the exclusion of other district courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of or connected with that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary *result of the general [111] jurisdiction conferred upon them, and is in harmony with the scope and design of the act. The state courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the states, in which it is possible that embarrassments might arise. The question has been quite fully and satisfactorily discussed by a member of this court in the first circuit, in the case of *Sherman v. Bingham*, 3 Cliff. 552, 7 Nat. Bankr. Reg. 490, Fed. Cas. No. 12,762; and we concur in the opinion there expressed, that the several district courts have jurisdiction of suits brought by assignees appointed by other district courts in cases in bankruptcy."

The same question was considered in *Goodall v. Tuttle*, 3 Biss. 219, Fed. Cas. No. 5,533, which arose under the act of 1867, and the same conclusion reached, as also in *McGehee v. Hentz*, Fed. Cas. No. 8,794, and *Re Tift*, Fed. Cas. No. 14,034. On the authority of these decisions it must be and is conceded that, under the bankruptcy acts of 1841 and 1867, ancillary jurisdiction, both in summary proceedings and in plenary suits, existed in all district courts within their respective districts; and the question really is whether the provisions of the act

of 1898 are to the contrary, or, as appellee's counsel puts it, show an intention on the part of Congress to restrict such jurisdiction so as to cut off the inferences drawn from the language of the earlier acts.

But neither the act of 1867, nor the act of 1898, expressly confers or expressly negatives ancillary jurisdiction in courts other than the court of adjudication. The provisions as to summary jurisdiction in the two acts are substantially identical, and it appears to us should receive the same construction. **Re Benedict*, 140 Fed. 55; *Re Peiser*, 115 Fed. 199; *Re Sutter Bros.* 131 Fed. 654; *Re John L. Nelson & Bros. Co.* 149 Fed. 590.

It is, however, urged that the act of 1898 contains restrictive provisions as to the jurisdiction of both the circuit and district courts which weaken the force of the reasoning of the decisions based upon the general language of the earlier statutes. Subdivision 7 of § 2 of the act of 1898 confers power to "cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided." And it is said that the following provisions of § 23 should be regarded as coming within the exception and operating to restrict the jurisdiction:

"a. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees, as such, and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted, and such controversies had been between the bankrupts and such adverse claimants." [30 Stat. at L. 552, chap. 541, U. S. Comp. Stat. 1901, p. 3431.]

"b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section 60, subdivision b, and section sixty-seven, subdivision c." [Act of 1898, as amended by act Feb. 5, 1903, 32 Stat. at L. 798, chap. 487, U. S. Comp. Stat. Supp. 1909, p. 1312.]

Section 60, subdivision b, refers to preferences given within four months before the filing of the petition in bankruptcy, and provides that they may be recovered by the trustee, and further: "And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court

which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

*Section 67, subdivision e, provides [113 that conveyances in fraud of creditors shall be null and void, and that it shall be the duty of the trustee to sue to recover the property conveyed, and that, "for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." [32 Stat. at L. 800, chap. 487, U. S. Comp. Stat. Supp. 1909, pp. 1315, 1316.]

But the general jurisdiction was not restricted by these provisions, though they operated to mitigate the rigor of the rule laid down in the *Bardes* Case.

There are two classes of cases arising under the act of 1898, and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy.

In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated.

In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily, and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation.

The former class falls within the ruling in the case of *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000, and in the case of *Jaquith v. Rowley*, 188 U. S. 620, 47 L. ed. 620, 23 Sup. Ct. Rep. 369, which hold that such a suit can be brought only in a court which would have had jurisdiction of a suit by the bankrupt against the adverse claimant, except where the defendant consents to be sued elsewhere.

In the latter class of cases a plenary suit is not necessary, but the case falls within the rule laid down in *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557, and *Mueller v. Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269, *which held that the bankruptcy court [114 could act summarily. The question was not discussed as to whether a court other than the court of adjudication could exercise this summary jurisdiction.

The precise question before us on the present appeal is whether, in a case in which the original court of bankruptcy could act summarily, another court of bankruptcy, sitting in another district, can do so in aid of the court of original jurisdiction.

Judge Holt, after expressing an opinion upholding ancillary jurisdiction, felt compelled to decide otherwise in this case, on the authority of *Re Von Hartz*, 74 C. C. A. 58, 142 Fed. 726, decided by the United States circuit court of appeals for the second circuit. It appears from the statement of the case in the opinion of the court in the matter of *Von Hartz* that the proceeding was a summary application, in which the appellant had been directed to turn over to the trustee in bankruptcy a policy of life insurance upon the life of the bankrupt, which "had theretofore been assigned by *Von Hartz* to appellant." It was not stated in the opinion whether the assignment was prior or subsequent to the proceedings in bankruptcy. If prior thereto, then neither the court where the bankruptcy proceedings were pending nor any other court could grant a summary order disposing of the title of the adverse claimant claiming title to the policy by assignment. That could only be determined in a plenary suit, and would fall within the rule in the *Bardes* and *Jaquith* Cases. But if the assignment was subsequent to the bankruptcy proceedings, then it would be a nullity, and would be disregarded by the bankruptcy court, and possession could be given to the trustee by a summary order, as in the *Bryan* and *Mueller* Cases.

There is no decision of this court adverse to the ancillary jurisdiction of the district courts, as asked to be exercised in this case.

Upon the whole, we are of opinion that the District Court for the Southern District of New York had jurisdiction of the [115] *petition below and to grant the relief therein prayed for, and therefore we reverse the order of that court denying the petition, and remand the cause for further proceedings in conformity with law.

ABRAM I. ELKUS, Petitioner.

(IN THE MATTER OF THE MADSON STEELE COMPANY, Bankrupt.)

(See S. C. Reporter's ed. 115-117.)

Bankruptcy — jurisdiction — ancillary proceedings in another district.

1. A Federal district court has jurisdiction to grant an order for the examination of witnesses who are residents of the district, on the application of a trustee in
54 L. ed.

bankruptcy, appointed in proceedings in bankruptcy pending in another district.

[Jurisdiction of Bankruptcy Courts, see Bankruptcy, II., in Digest Sup. Ct. 1908.]

Bankruptcy — jurisdiction — ancillary proceedings in another district.

2. The respective district courts of the United States sitting in bankruptcy have ancillary jurisdiction to make orders and issue process in aid of proceedings pending and being administered in the district court of another district.

[Jurisdiction of Bankruptcy Courts, see Bankruptcy, II., in Digest Sup. Ct. 1908.]

[No. 238.]

Argued November 29, 1909. Decided February 21, 1910.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting questions as to whether the Federal district courts have ancillary jurisdiction in aid of the court of original jurisdiction in a bankruptcy proceeding. Answered in the affirmative.

The facts are stated in the opinion.

Mr. Abram I. Elkus, *in propria persona*, argued the cause, and, with Messrs. Carlisle J. Gleason and James, Schell, & Elkus, filed a brief for petitioner:

A district court of the United States has the power to exercise ancillary or auxiliary jurisdiction in aid of other district courts in which bankruptcy proceedings are pending.

Markson v. Heaney, 1 Dill. 497, Fed. Cas. No. 9,098; *Re Richardson*, 2 Ben. 517, Fed. Cas. No. 11,774; *Sherman v. Bingham*, 3 Cliff, 552, Fed. Cas. No. 12,762; *Ex parte Martin*, Fed. Cas. No. 9,149; *Lathrop v. Drake*, 91 U. S. 516, 517, 23 L. ed. 414, 415; *Re Wood*, 210 U. S. 246, 52 L. ed. 1046, 28 Sup. Ct. Rep. 621.

Mr. Chief Justice Fuller delivered the opinion of the court:

The certificate, with the accompanying statement of facts, is as follows:

"On the 28th day of February, 1908, a petition in involuntary *bankruptcy was [116] filed in the United States district court for the northern district of Illinois, against the *Madson Steele Company*, and in due course the said corporation was adjudicated a bankrupt, and Frank M. McKey was appointed its trustee in bankruptcy.

"Application was made to the United States district court for the southern district of New York for an authorization to examine, pursuant to the provision of § 21a of the national bankruptcy act, the officers of a New York corporation which it was alleged had, within four months prior to the filing of the petition in bank-

ruptey, received a payment under circumstances which would permit of recovery by the trustee in bankruptcy as a voidable preference. These officers were residents of the southern district of New York.

"The application in the southern district of New York was made on behalf of the trustee of the bankrupt's estate, which was being administered in the northern district of Illinois, and the order proposed for signature required the examination of witnesses within the jurisdiction of the district court for the southern district of New York, and the production of books and vouchers which contained transactions between the bankrupt corporation and the New York corporation.

"The United States district court for the southern district of New York refused to direct the appearance and examination of the said witnesses, on the ground that it had no jurisdiction to grant an order for examination in a proceeding which was not pending within its own district, and from the order denying the right to examine, the petition to review was taken to this court.

"The questions submitted are:

"I. Did the United States district court for the southern district of New York have jurisdiction to grant an order for the examination of witnesses who were residents of that district, when the bankrupt proceedings in which the examination was desired were being administered in the northern district of Illinois?

117] "II. Have the respective district courts of the United States, sitting in bankruptcy ancillary jurisdiction to make orders and issue process in aid of proceedings pending and being administered in the district court of another district?"

On the authority of *Babbitt v. Dutcher*, just decided [216 U. S. 102, ante, 402, 30 Sup. Ct. Rep. 372], we answer both questions in the affirmative, and it will be so certified.

WILLIAM WOODSIDE, Plff. in Err.,
v.

H. S. BECKHAM,† Administrator, etc.,
et al.

(Sec S. C. Reporter's ed. 117-121.)

Federal courts — jurisdiction — assignment to aggregate jurisdictional amount.

Claims or demands assigned for collection only, the assignors remaining the abso-

†Substituted as a party defendant in error December 9, 1909, on suggestion of the death of Albert Vasey, one of the defendants in error herein.

408

lute owners, and paying *pro rata* the expenses of collection, including costs and attorneys' fees, cannot be added to the amount of the assignee's own claim to create an amount in dispute in excess of \$2,000, for the express purpose of enabling suit to be brought in a Federal circuit court.
[For other cases, see Courts, 908-911, in Digest Sup. Ct. 1908.]

[No. 56.]

Argued December 9, 1909. Decided February 21, 1910.

IN ERROR to the Circuit Court of the United States for the Northern District of Iowa to review a judgment dismissing, for want of the jurisdictional amount in controversy, an action founded on the failure of the directors of a corporation to file an annual report. Affirmed.

See same case below, 142 Fed. 617.

The facts are stated in the opinion.

Mr. John R. Smith argued the cause, and, with Mr. Hartley B. Woods, filed a brief for plaintiff in error:

The judgments obtained in the district and county courts of Colorado, courts of record, on valid service on the defendant corporation, for \$2,724.45, without interest or costs, and \$162.36, before the commencement of this suit, and being each debts and obligations for which the directors were liable by reason of their default, were independent debts and a liability upon which this action would lie, and conferred jurisdiction on the court so far as the amount in controversy was concerned.

Huntington v. Attrill, 146 U. S. 657-684, 36 L. ed. 1123-1134, 13 Sup. Ct. Rep. 196; *Feidler v. Bartleson*, 88 C. C. A. 194, 161 Fed. 35; *Tabor v. Commercial Nat. Bank*, 10 C. C. A. 429, 27 U. S. App. 111, 62 Fed. 388; *Frost v. St. Paul Bkg. & Invest. Co.* 57 Minn. 325, 59 N. W. 308; *Montgomery v. Whitehead*, 40 Colo. 322, 11 L.R.A.(N.S.) 230, 90 Pac. 509.

By the laws of Colorado, where these debts were contracted, the assignments made, and these judgments obtained, an assignment for collection, under the circumstances shown in this case, is an assignment in good faith, carrying all the right and title to the assignee, and he becomes and is the owner of the claim, and the real party in interest in any suit to enforce it.

Bassett v. Inman, 7 Colo. 270, 3 Pac. 383; *Weleh v. Mayer*, 4 Colo. App. 440, 36 Pac.

NOTE.—On the jurisdiction of Federal courts as affected by the amount in dispute—see notes to *Rich v. Bray*, 2 L.R.A. 225; *Auer v. Lombard*, 19 C. C. A. 75; and *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.

216 U. S.

613; *Walsh v. Allen*, 6 Colo. App. 303, 40 Pac. 473; *Marks v. Anderson*, 1 Colo. App. 1, 27 Pac. 168; *Robinson Reduction Co. v. Johnson*, 10 Colo. App. 139, 50 Pac. 215.

If a party is the honest owner of a claim which he is entitled to enforce in the Federal courts, his right should not be defeated by proof that the claim was at one time composed of several separate and distinct items of less than \$500 each.

Stanley v. Albany County, 15 Fed. 484.

The validity of the assignment is governed by the law of the state where the liability arose and which is the domicile of the assignor and assignee, and the Federal courts will recognize and follow the law of such foreign state.

Davis v. Mills, 99 Fed. 39.

The rule is the same in Iowa, where the suit on these judgments and assigned claims was brought.

Wardner, B. & G. Co. v. Jack, 82 Iowa, 435, 48 N. W. 729; *Whittaker v. Johnson County*, 10 Iowa, 161; *Gere v. Council Bluffs Ins. Co.* 67 Iowa, 272, 23 N. W. 137, 25 N. W. 159.

By the judgments of record, personal service having been made on defendant, all questions as to the right of the plaintiff to sue upon the claims assigned to him, his title to them, and the character in which he held them, were, as against the defendant the Neptune Mining Company, and all persons in privity with it, foreclosed, barred, and determined, and the constitutional provision requiring the giving of full faith and credit to the judgment of the state court required that the plaintiff recovering the judgment should be held to be, as against the defendant, the absolute owner of the claims merged in the judgment.

Fauntleroy v. Lum, 210 U. S. 230-237, 52 L. ed. 1039-1042, 28 Sup. Ct. Rep. 641; *Huntington v. Attrill*, supra; *United States v. California & O. Land Co.* 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141-147, 30 L. ed. 614-617, 7 Sup. Ct. Rep. 472.

The assignment of claims against a corporation, held by different persons, to one plaintiff for collection and for the purpose of suit in the Federal court after judgment obtained, where all the assignors were citizens of Colorado and the defendants were citizens of Iowa, was a lawful and proper proceeding, and has been upheld even where no one of the assigned claims amounted to \$2,000.

Bowden v. Burnham, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 752; *Chase v. Sheldon Roller-Mills Co.* 56 Fed. 625; *Bushnell v.* 54 L. ed.

Kennedy, 9 Wall. 387, 19 L. ed. 736; *Holmes v. Goldsmith*, 147 U. S. 150, 37 L. ed. 118, 13 Sup. Ct. Rep. 288; *Bergman v. Inman*, 91 Fed. 293; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 455, 94 Fed. 739; *Brigham-Hopkins Co. v. Gross*, 107 Fed. 769.

With a judgment in his favor for more than \$2,000, it was right and proper that the other creditors of the corporation, citizens of Colorado, should assign their claims to Woodside for collections only, such assignment passing to him under the laws of Colorado, the place of the assignment, full title to the demand in suit, constituting him the real party in interest, and being a full protection to the defendant against a second demand.

Huff v. Bidwell, 81 C. C. A. 43, 151 Fed. 563.

Mr. J. W. Jamison argued the cause, and, with Messrs. R. J. Williamson and J. N. Hughes, filed a brief for defendants in error:

Plaintiff in error was attempting to prosecute an action in the Federal court for \$162.36 by adding to his claim for the purpose of conferring jurisdiction upon the court an amount equal to \$2,000, individual claims of numerous other men and firms in the state of Colorado. This cannot be done.

Williams v. Nottawa, 104 U. S. 209, 26 L. ed. 719; *Bernards Twp. v. Stebbins*, 109 U. S. 341, 27 L. ed. 956, 3 Sup. Ct. Rep. 252; *Lake County v. Dudley*, 173 U. S. 243, 43 L. ed. 684, 19 Sup. Ct. Rep. 398; *Waite v. Santa Cruz*, 184 U. S. 302-325, 46 L. ed. 552-567, 22 Sup. Ct. Rep. 327.

Mr. Chief Justice Fuller delivered the opinion of the court:

This was an action to recover of defendants, as directors of the Neptune Mining Company, a Colorado corporation, the sum of \$5,500 as the aggregate amount of claims or demands of the plaintiff and of thirty other persons, firms, or corporations against the mining company, which had been assigned to the plaintiff.

The liability was asserted to arise under the requirement of the act of April 6, 1901, of Colorado, which required annual reports to be filed by all corporations with the secretary of state for Colorado within sixty days after the 1st day of January in each year as to matters designated in the statute, and which provided: "If any such corporation shall fail, refuse, or omit to file the annual report aforesaid, and to pay the fee prescribed therefor within the time above prescribed, all the officers and directors of said corporation shall be jointly and severally and individually liable for all debts of such corporation, joint stock company, or

association that shall be contracted during the year next preceding the time when such reports should by this section have been made and filed, and until such report shall be made and filed." And it was averred that no annual report was filed by or for said corporation, the Neptune Mining Company, within sixty days from and after January 1, 1903.

The complaint set out the various items of indebtedness incurred by the mining company, which, it was alleged, had been 119] *assigned to William Woodside for collection only, with the agreement that each of the several assignors should remain the absolute owner of his or their claims, and should contribute his proportion of the expenses of collection of the same, including costs and attorneys' fees, and it was agreed that the said several assignors have ever since been and now are the exclusive owners of their several claims, and that said William Woodside has no interest whatever in any of the claims so assigned.

The case coming on for trial, a jury was duly waived and the cause submitted to the court.

The court found that the plaintiff was not the owner of, or the real party in interest in, any of the claims against the mining company that had been assigned to him; that the amount of his own claim against the company was only \$162.36; and that the amount of none of the separate claims of the others assigned to him exceeded \$650, while some were less than \$100; that the claims other than his own were assigned to plaintiff for the purpose of collection only; that he paid no consideration therefor, and that said assigned claims or demands in fact remained the property of the different assignors thereof, who were paying *pro rata* the expenses of prosecuting the action; that if plaintiff recovered upon the claims from defendants, the amount of such recovery above the plaintiff's individual claim would be for the benefit of the several assignors thereof, and would be distributed to them in proportion to the amount of the claim of each; that the several claims other than that of the plaintiff were assigned to him by the different owners thereof, to be added to the amount of plaintiff's claim, to create an amount in excess of \$2,000, for the express purpose of enabling the plaintiff to sue thereon in the circuit court.

It also appeared that in 1903 plaintiff recovered judgment in the district court of Custer county, Colorado, against the Neptune Mining Company for the amount of his own claim, to wit, \$162.36, and a part of 120] the other claims so assigned to *him, the judgment being for the sum of \$2,724.46, 410

and the items on which suit was brought being set forth in the present complaint.

The circuit court, in its opinion, quoted the evidence of the plaintiff as to his interest in or right to the assigned claims, upon which he sued in the action, as follows:

After stating that his own claim against the Neptune Mining Company was \$162.36, he said:

"The assignments of the accounts to me, and of the judgment, aside from my personal account, were made to me for the sole purpose of beginning suit in my name, and to thus save expenses. I have no interest in any of said claims or judgments except my individual claim. The actual ownership of the said judgments and the proceeds thereof, and the accounts and the proceeds thereof, belong to the several assignors, and I am to account to them and to pay them such proceeds in case I collect them."

And the circuit court held that, as none of the claims or demands so assigned were of sufficient amount to authorize an action thereon in a court of the United States, it was clear that this action could not be maintained in the circuit court, and it was accordingly dismissed without prejudice, for want of jurisdiction, and at the plaintiff's costs. 142 Fed. 617.

Thereupon the court certified that the order of dismissal was based solely on the ground that the cause did not involve a controversy within the jurisdiction of the court, for the reasons stated in the opinion filed in the case, which opinion was, by the terms of the certificate, made a part of the record and directed to be certified and sent up as such.

The circuit court cited many cases decided in this court to sustain the proposition that where a plaintiff is not in fact the owner of the claims sued upon, and none of the claims assigned is sufficient in amount to confer jurisdiction upon the Federal court, it has no jurisdiction, and will dismiss the case for that reason.

*Thus, in *Bernards Twp. v. Steb* [121 bins, 109 U. S. 341, 355, 27 L. ed. 956, 961, 3 Sup. Ct. Rep. 252, 262, it was said:

"The decision in *Williams v. Nottawa*, 104 U. S. 209, 26 L. ed. 719, establishes that the circuit court of the United States cannot, since the act of 1875 [18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508], entertain a suit upon municipal bonds payable to bearer, the real owners of which have transferred them to the plaintiffs of record for the sole purpose of suing thereon in the courts of the United States for the benefit of such owners, who could not have sued there in their own names, either by reason of their being citizens of the same state

as the defendant, or by reason of the insufficient value of their claims."

And so in *Waite v. Santa Cruz*, 184 U. S. 302, 328, 46 L. ed. 552, 568, 22 Sup. Ct. Rep. 327, 337, this court quoted § 5 of the act of March 3, 1875, and said:

"We adjudge that, as the plaintiff does not own the bonds or coupons in suit, but holds them for collection only, the circuit court was without jurisdiction to render judgment upon any claim or claims, whether bonds or coupons, held by a single person, firm, or corporation against the city, and which, considered apart from the claim or claims of other owners, could not have been sued on by the real owner by reason of the insufficiency of the amount of such claim or claims."

And see *Crawford v. Neal*, 144 U. S. 593, 36 L. ed. 556, 12 Sup. Ct. Rep. 759, and cases cited.

That rule is decisive in this case, and the judgment of the Circuit Court is affirmed.

122] *ATLANTIC COAST LINE RAILROAD COMPANY, Plff. in Err.,
v.

B. MAZURSKY. (No. 58.)

SOUTHERN EXPRESS COMPANY, Plff. in Err.,
v.

E. E. McTEER. (No. 59.)

ATLANTIC COAST LINE RAILROAD COMPANY, Plff. in Err.,
v.

R. KEITH CHARLES. (No. 60.)

ATLANTIC COAST LINE RAILROAD COMPANY, Plff. in Err.,
v.

A. VON LEHE. (No. 61.)

ATLANTIC COAST LINE RAILROAD COMPANY, Plff. in Err.,
v.

A. VON LEHE. (No. 62.)

(See S. C. Reporter's ed. 122-134.)

Commerce — state regulation — carrier's liability.

Penalizing the failure of a common carrier to adjust and pay within a specified time claims for loss or damage, as is done by South Carolina act of February 23, 1903, § 2, does not unlawfully interfere with interstate commerce, even as applied to shipments from without the state, where the statute is construed by the state courts as affecting only the liability of carriers do-
54 L. ed.

ing business in the state, for property lost or damaged while in their possession.

[For other cases, see *Commerce*, 327-332, in *Digest Sup. Ct.* 1908.]

[Nos. 58, 59, 60, 61, 62.]

Argued December 9, 1909. Decided February 21, 1910.

FIVE WRITS OF ERROR to the Supreme Court of the State of South Carolina to review judgments affirming judgments below, penalizing the failure of common carriers to adjust and pay within a specified time claims for loss or damage. Affirmed.

See same case below, No. 58 (S. C.) 58 S. E. 931; No. 59 (S. C.) 58 S. E. 930; No. 60, 78 S. C. 36, 125 Am. St. Rep. 762, 58 S. E. 927; No. 61, 78 S. C. 167, 59 S. E. 1135; No. 62, 78 S. C. 168, 59 S. E. 1135.

Statement by Mr. Chief Justice Fuller:

By the act of the general assembly of the state of South Carolina, entitled, "An Act to Regulate the Manner in which Common Carriers Doing Business in This State Shall Adjust Freight Charges and Claims for Loss of or Damage to Freight," approved February 23, 1903 (No. 50, Acts of S. C. 1903, p. 81), it was enacted:

"Section 1. Be it enacted by the general assembly of the state of South Carolina,

NOTE.—On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* 13 L.R.A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; and *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158.

State statutes imposing penalty on carrier for failure to settle claims as interference with interstate commerce.

The South Carolina statute involved in the principal case has been sustained by the state supreme court, when applied to shipments from without the state, in a number of decisions in addition to those under review in this case. *Porter v. Charleston & S. R. Co.* 63 S. C. 169, 90 Am. St. Rep. 670, 41 S. E. 108; *Cooper v. Seaboard Air Line R. Co.* 78 S. C. 81, 58 S. E. 930; *Coffey v. Atlantic Coast Line R. Co.* 79 S. C. 150, 60 S. E. 447; *De Lorme v. Atlantic Coast Line Co.* 79 S. C. 370, 60 S. E. 440; *Winslow Bros. & Co. v. Atlantic Coast Line R. Co.* 79 S. C. 344, 60 S. E. 709.

A similar statute in North Carolina, penalizing the failure of a common carrier to settle a claim for goods lost or damaged while in its possession, has also been upheld as not unlawfully interfering with interstate commerce, though applied to shipments from without the state. *Morris-Scarboro-Moffitt Co. v. Southern Exp. Co.* 146 N. C. 167, 15 L.R.A. (N.S.) 983, 59 S. E. 667; *Raleigh Iron Works v. Southern R. Co.* 148 N. C. 469, 62 S. E. 595.

That from and after the passage of this act, all common carriers doing business in this state shall settle their freight charges according to the rate stipulated in the bill of lading: Provided, The rate therein stipulated be in conformity with the classifications and rates made and filed with the Interstate Commerce Commission, in case of shipments from without this state, and with those of the railroad commissioners of this state; by which classifications and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carrier to inform any consignee or consignees of the correct amount due for freight, according to such classifications and rates; and upon payment or tender of the amount due on any shipment, or on any part of any shipment, which has arrived at its destination, according to such classifications or rates, such common carrier shall deliver the freight in question to the consignee or consignees, and any failure or refusal to comply with the provisions hereof shall subject each such carrier so failing or refusing to a penalty of \$50 for each such failure or refusal, to be recovered by any consignee or consignees aggrieved by suit in any court of competent jurisdiction.

"Sec. 2. That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this state, and within ninety days, in case of shipments from without this state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: Provided, That no such claim shall be filed until after the arrival of the shipment or of some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor [124] *until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of \$50 for each and every such failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction: Provided, That unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: Provided, further, That no common carrier shall be liable under this act for property which never

came into its possession, if it complies with the provisions of § 1710, vol. 1, of the Code of Laws of South Carolina, 1902."

Section 1710, volume 1, of the Code of Laws of South Carolina, 1902, is as follows:

"When under contract for shipment of freight or express over two or more common carriers, the responsibility of each or any of them shall cease upon delivery to the connecting line 'in good order;' and if such freight or express has been lost, damaged, or destroyed, it shall be the duty of the initial, delivering, or terminal road, upon notice of such loss, damage, or destruction being given to it by the shippers, consignee, or their assigns, to adjust such loss or damage with the owners of said goods within forty days, and upon failure to discharge such duty within forty days after such notice, or to trace such freight or express, and inform the said party so notifying when, where, and by which carrier the said freight or express was lost, damaged, or destroyed, within said forty days, then said carrier shall be liable for all such loss, damage, or destruction in the same manner and to the same extent as if such loss, damage, or destruction occurred on its lines: Provided, That if such initial, terminal, or delivering road can prove that, by the exercise of due diligence, it has been unable to trace the line upon which such loss, damage, or destruction occurred, [it] shall thereupon be excused from liability under this section."

The above-entitled cases were brought to test the validity of *the provisions of [125 § 2 of the act of February, 1903, when applied to claims for loss or damage to interstate freight.

In each case the objection that that section was unconstitutional and invalid was seasonably made. In each case the objection was overruled and judgment given in favor of the respective claimants, plaintiffs, for the value of the undelivered freight, with the full penalty of \$50 added.

The opinion of the supreme court of South Carolina, construing and applying the provisions of the state statute, appears in the printed transcript of the record in case No. 60 (Charles v. Atlantic Coast Line R. Co. 78 S. C. 36, 125 Am. St. Rep. 762, 58 S. E. 927). In each of the other cases the principles assumed to have been settled in and by that opinion were made the basis of the judgment of the state supreme court.

The cases were submitted to this court December 9, 1909, as one case, and argued as such on one side only. On the 20th of December, this court entered an order that notice of the pendency of these cases should

be given to the attorney general of South Carolina, and leave was given to him to file a brief as *amicus curiæ* on or before the 3d day of January, if he should be so advised. The attorney general filed a brief accordingly January 3, 1910; Townsend was with him on the brief.

Mr. **Frederic D. McKenney** argued the cause, and, with Messrs. P. A. Willecox, F. L. Willecox, and Henry E. Davis, filed a brief for plaintiffs in error:

The provisions of the state law in question, when applied to interstate commerce shipments, *i. e.*, to shipments from without the state, constitute a direct and unreasonable burden upon such commerce and amount to a regulation thereof; and with respect to such commerce the provisions of such statute are unconstitutional, null, and void.

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 209, 38 L. ed. 962, 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *McNeill v. Southern R. Co.* 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; *Central Stock Yards Co. v. Louisville & N. R. Co.* 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Central R. Co. v. Murphey*, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 A. & E. Ann. Cas. 514; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

While the states may legitimately exercise their police power with respect to matters of interstate commerce, provided such commerce is not unnecessarily burdened thereby, as, for instance, by regulating the speed of trains, including interstate trains, within city limits (*Erb v. Morasch*, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819), or prohibiting the running of freight trains on Sunday (*Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086), or by promoting the safety and comfort of passengers, employees, and persons crossing railroad tracks (*Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132), or by establishing a rule of evidence or ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line (*Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335), nevertheless it has been said that what a state may have enacted in such connection, although it may have relation

to the public morals, the public health, the public safety, or the public convenience, and even though the subject-matter may not be within the exclusive power of Congress, a test, if not the final test, as to the validity of such legislation, is that of reasonableness. While this test of reasonableness may be lacking in definiteness, it can be illustrated and deduced, in a measure, at least, from decided cases, wherein it has been determined what, in that particular case, was reasonable or otherwise.

The presumption that a state statute was enacted in good faith for the accomplishment of any of the purposes for which the reserved powers of the state could be exercised may, and ordinarily should, be indulged; but nevertheless the validity of such a statute must always be tested by its natural and reasonable effect.

Henderson v. New York, 92 U. S. 259, 23 L. ed. 543.

Such presumption cannot control the final determination of the question whether the statute is or is not repugnant to the Constitution of the United States.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

As construed by the supreme court of South Carolina, this statute was designed to control and regulate the carrier in its transportation of the interstate shipment. This brings the statute within the reasoning of the court in the case of *American Exp. Co. v. Iowa*, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182, where it was held that liquors shipped from one state into another under a *c. o. d.* contract could not be seized until they had actually been delivered to the consignee, because they were still in the course of interstate transportation until so delivered. In that case the state statute, had it been allowed to operate, would have regulated the completion of the interstate movement of such commodity.

See also *Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606; *Adams Exp. Co. v. Kentucky*, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633.

Mr. J. P. K. Bryan also filed a brief for plaintiffs in error:

The final test of this whole question is whether the legislation is a burden on commerce,—whether it directly affects interstate or international commerce. This is a test upon which the decisions of this court have proceeded.

Central R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 A. & E. Ann. Cas. 514.

The power of Congress to regulate commerce among the states is exclusive.

Brown v. Maryland, 12 Wheat. 419, 446, 6 L. ed. 678, 688; *Cook v. Pennsylvania*, 97 U. S. 574, 24 L. ed. 1018.

Interstate transportation is interstate commerce.

State Freight Tax Case, 15 Wall. 275, 21 L. ed. 161; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 312, 41 L. ed. 1017, 17 Sup. Ct. Rep. 540.

The clear intention of the Constitution was to confer the power to regulate interstate commerce exclusively upon Congress, and not to divide the power between the state legislatures and Congress. One of the chief objects of the Constitution was to rid commerce of the conflicting vexations and burdensome restrictions which, under the Articles of Confederation, had been imposed by the various states.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; *Passenger Cases*, 7 How. 384, 12 L. ed. 744; *State Freight Tax Case*, 15 Wall. 279, 21 L. ed. 162; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Fargo v. Michigan (Fargo v. Stevens)* 121 U. S. 238, 30 L. ed. 892, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Almy v. California*, 24 How. 169, 16 L. ed. 644; *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *American Exp. Co. v. Iowa*, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182.

The particular matter sought to be regulated by the South Carolina statute is in no sense local, but is national in character and importance, and obviously admits of national regulation. From the first, certain state laws relating to pilotage, quarantine, etc., were sustained notwithstanding an incidental effect upon interstate and foreign commerce.

Hall v. DeCuir, 95 U. S. 485, 487, 24 L. ed. 547, 548; *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 209, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed.

1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; *Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

If, indeed, the state ever possessed such power, it was only until Congress should act, and Congress having assumed it, the state is no longer entitled to exercise it. Since Congress has acted and has provided a system of laws regulating railroads and steamships as instruments of interstate and foreign commerce in great detail, it has excluded the power of the states to act upon the subject.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Sinnot v. Davenport*, 22 How. 227, 16 L. ed. 243.

The attempted defense of state legislation in violation of the Federal Constitution, that it is within the police power, is untenable in this case.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; *License Cases*, 5 How. 504, 599, 12 L. ed. 256, 299; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Robbins v. Taxing Dist.* supra.

The South Carolina statute, as applied in this case, plainly regulates interstate commerce, and is therefore void.

Western U. Teleg. Co. v. Pendleton, 122 U. S. 347-358, 30 L. ed. 1187-1189, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; *Central R. Co. v. Murphey*, supra; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 331, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *American Exp. Co. v. Iowa*, supra; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 129; *Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606.

Messrs. J. Fraser Lyon and W. H. Townsend filed a brief as *amici curiæ*:

The rule is that all parts of a statute, including provisos, are to be construed together, and effect given, if possible, to all. But it is contrary to reason as well as authority to extend by implication a proviso to cover that which is opposed to the express language of the main enactment.

Southgate v. Goldthwaite, 1 Bail. L. 367; *United States v. Dickson*, 15 Pet. 141, 10 L. ed. 689; *The Irresistible*, 7 Wheat. 551, 5 L. ed. 520; 26 Am. & Eng. Enc. Law, p. 681; *Endlich, Interpretation of Statutes*, §§ 184, 185.

A distinction exists between interstate commerce or an instrumentality thereof, on the one side, and the mere incidents which

may attend the carrying on of such commerce, on the other.

Hooper v. California, 155 U. S. 648, 655, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Williams v. Fears*, 179 U. S. 278, 45 L. ed. 190, 21 Sup. Ct. Rep. 128.

The penalty is imposed not directly upon interstate commerce itself, or during the transportation of the goods, but it arose by reason of default on the carrier's part after the transportation had terminated, and is in enforcement of the duty incumbent upon it by law to adjust and pay for damages arising by reason of its negligent default. The penalty is in no sense a burden on intercourse and traffic between the states, but it is in aid of such traffic, and, in the absence of congressional legislation to the contrary, is a proper subject of state legislation.

Morris-Scarboro-Mossitt Co. v. Southern Exp. Co. 146 N. C. 167, 15 L.R.A.(N.S.) 983, 59 S. E. 667.

The statute is not unlike one prescribing the time within which actions on contracts involving transactions of interstate commerce may be brought in the state courts.

Gulf, C. & S. F. R. Co. v. Eddins, 7 Tex. Civ. App. 127, 26 S. W. 161.

It is remedial as well as penal.

Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; *Johnson v. Southern P. Co.* 196 U. S. 17, 49 L. ed. 369, 25 Sup. Ct. Rep. 158.

It provides a remedy for a claimant wronged by the delict of a common carrier in failing to adjust within a reasonable time prescribed by statute (*Moody v. Southern R. Co.* 79 S. C. 299, 60 S. E. 711), a just claim founded on the common law or some valid statute, for loss or injury to goods in the carrier's possession, after the claim shall have been filed at the point of destination of the goods, in this state.

The delict *i. e.*, the failure to adjust and pay the claim, occurs, and the cause of action for the penalty given by this statute arises, at the point of destination of the goods, where the claim is filed within the state.

L. D. Riley & Son v. Southern R. Co. 81 S. C. 390, 62 S. E. 509.

The statute was designed to effectuate an important public purpose with respect to the duty of common carriers in this state, and the delict penalized occurred in this state.

Colleton Mercantile & Mfg. Co. v. Atlantic Coast Line R. Co. 82 S. C. 121, 62 S. E. 6.

Admitting that the duty to make prompt settlement for loss or damage to goods is an incident to the duty to transport and safely deliver (*Seegers Bros. v. Seaboard Air Line R. Co.* 73 S. C. 71, 121 Am. St. Rep. 921, 52 S. E. 797), it does not follow
54 L. ed.

that the state may not—at least, in the absence of congressional action—compel a carrier to discharge this incidental duty, the violation of which occurs in the state.

Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 624, 53 L. ed. 361, 29 Sup. Ct. Rep. 214.

Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of, or an obstruction to, interstate commerce, within the meaning of that clause of the Federal Constitution under discussion? We think not.

Western U. Teleg. Co. v. James, 162 U. S. 660, 40 L. ed. 1108, 16 Sup. Ct. Rep. 934.

The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits.

Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 137, 42 L. ed. 692, 18 Sup. Ct. Rep. 289; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 491, 48 L. ed. 273, 24 Sup. Ct. Rep. 132.

So the Arkansas court, speaking of a state statute imposing a penalty upon a carrier for failure to deliver freight to the holder of a bill of lading issued for an interstate shipment, in *Arkansas Southern R. Co. v. German Nat. Bank*, 77 Ark. 489, 113 Am. St. Rep. 160, 92 S. W. 524, said: "It is the duty of the carrier to deliver property specified in a bill of lading to the legal holder thereof. The object of the statute, and the effect, if obeyed, is to enforce this duty and protect the rights of the holder. In the absence of congressional legislation on the subject the state can do so."

No counsel for defendants in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

In No. 60 (*Charles v. Atlantic Coast Line R. Co.*), which was assumed by the supreme court of South Carolina to settle all the others, and to have been made the basis for the judgment of that court in all the cases, the state court found, as matter of fact, "the evidence showed that defendant

was in possession of the goods lost," and held as matter of law "that the statute in question, as it affects carriers doing business in this state who fail or refuse to adjust and pay the loss of or damage to goods while in their possession, is no unlawful interference with interstate commerce, even as applied to an interstate shipment."

It is thus apparent that the statute is construed by the court as only concerning property lost or damaged while in the possession of a carrier in the state of South Carolina.

It is this conclusion of law that the plaintiff in error asks this court to review.

In *Benning v. Atlantic Coast Line R. Co.* 78 S. C. 55, 12 L.R.A.(N.S.) 1217, 125 Am. St. Rep. 768, 58 S. E. 983, it was expressly decided that the act did not apply [130] to claims *for loss of property which never came into the possession of the defendant. In that case the state supreme court considered an act of May, 1903, and held it, for the reason given, to be unconstitutional, not as obnoxious to the 14th Amendment of the Constitution of the United States and the Constitution of South Carolina, but as amounting to an illegal attempt to regulate interstate commerce. And that "on principle, as well as under the authority of *Central R. Co. v. Murphey*, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 A. & E. Ann. Cas. 514, it is impossible to avoid the conclusion that the act of May, 1903, here under consideration, is unconstitutional." And further, that it was evident from the complaint that the action was intended to rest on the invalidity, under the act of May, 1903, of such a contract as § 1710 contemplates, and that therefore that section could have no application.

The court then considered the act of February, 1903, and said:

"The section of main importance here is the second, which provides for the recovery for loss of or damage to freight, and penalties for failure to adjust and pay such loss or damage within a certain time. The question vital to this case is whether the statute can be construed to impose upon one connecting carrier, liability for the default of another, unless such carrier obtains and gives the information, or uses due diligence to obtain it, as provided in § 1710 of the Civil Code. We do not think it can be so construed.

"The main enactment as to the recovery of damages and penalties thus begins in § 2: 'That every claim for loss of or damage to property *while in the possession of such common carrier* shall be adjusted and paid within forty days,' etc. The words we have italicized clearly limit the loss and

damage which a carrier is required to adjust and pay for to that which befalls while the goods are in the possession of such carrier, and excludes the idea of liability for loss or damage to the goods while in the possession of another carrier.

"It is true there is a proviso at the end of this section, 'that *no common carrier [131 shall be liable under this act for property which never came into its possession, if it complies with the provisions of § 1710, vol. 1, of the Code of Laws of South Carolina, 1902.' But as the body of the act does not make the carrier liable at all 'for goods which never came into its possession,' a proviso which exempts from liability for loss of or damage to such goods on certain conditions can have no effect. The act imposes no liability to which the exemption can be applied.

"The rule is that all parts of a statute, including *provisos*, are to be construed together, and effect given, if possible, to all. But it is contrary to reason as well as authority to *extend by implication a proviso* to cover that which is opposed to the express language of the main enactment. *Southgate v. Goldthwaite*, 1 Bail. L. 367; *United States v. Dickson*, 15 Pet. 141, 10 L. ed. 689; *The Irresistible*, 7 Wheat. 551, 5 L. ed. 520; 26 Am. & Eng. Enc. Law, p. 681; *Endlich*, Interpretation of Statutes, §§ 184, 185. The fact that the statute is penal adds force to this conclusion. We are of the opinion that the *proviso* of § 2 has no effect, and the act only imposes penalties upon the carrier for failing to adjust claims for loss occurring while the goods are in its own possession.

"It follows, the plaintiff in this case cannot sustain his recovery on the ground that the defendant was liable, under the act of February, 1903, for goods lost by a connecting carrier, because it failed to obtain and give information of the kind required in cases falling under that act, or to use due diligence to obtain such information.

"This penalty act of February will apply to the case, if the finding on the new trial should be that the loss occurred on the defendant's road, but not otherwise. It is attacked as unconstitutional under the interstate commerce clause of the Constitution of the United States. That question is discussed and decided against the defendant's contention in *Charles v. Atlantic Coast Line R. Co.* 78 S. C. 36, 125 Am. St. Rep. 762, 58 S. E. 927."

In *Charles v. Atlantic Coast Line R. Co.* supra, the action was brought in a magistrate court to recover the value of four *sacks of rice, alleged to have been [132 shipped from New Orleans, Louisiana, by Martin J. Wynne, to the plaintiff at

Timmons ville, South Carolina, and to have been lost while in the possession of the defendant carrier, and also to recover \$50 penalty for failure to adjust and pay the claim within ninety days, as prescribed by the act of February 23, 1903. The magistrate gave judgment against defendant for the amount claimed, and that judgment, on appeal, was affirmed by the circuit court, and then again by the supreme court of the state in this case. The supreme court held that the last proviso of the 2d section of the act of February, 1903, had no application to carriers into whose possession the goods had come, and referred to the opinion of the court in *Seegers Bros. v. Seaboard Air Line R. Co.* 73 S. C. 71, 73, 121 Am. St. Rep. 921, 52 S. E. 797, where it was said: "The duty to make prompt settlement for loss or damage to goods is but an incident of the duty to transport and deliver safely and with reasonable diligence. The statute in question was designed to effectuate an important public purpose; *viz.*, to compel the common carrier to perform with reasonable diligence the duty which peculiarly appertains to his business as a carrier of freight. The penalty is but a means to that end." And see same case, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28.

The supreme court, after making that quotation, thus proceeded:

"While it is not easy to define the exact limits of the operation of state laws as affecting interstate commerce, we have no hesitation in saying that the statute in question, as it affects carriers doing business in this state, who fail or refuse to adjust and pay the loss of or damage to goods while in their possession, is no unlawful interference with interstate commerce, even as applied to an interstate shipment. The penalty imposed is for a delict of duty appertaining to the business of a common carrier; and in so far as it may affect interstate commerce, it is an aid thereto by its tendency to promote safe and prompt delivery of goods, or its legal equivalent—prompt settlement of proper claim for damage. No penalty can attach *except upon the establishment in a court of a default of duty imposed by statute. The statute does not attempt to regulate interstate commerce, and imposes no tax or burden thereon. It is supported by the general principle declared in *Sherlock v. Alling*, 93 U. S. 99, 104, 23 L. ed. 819, 820, and enforced in *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 304, 8 Sup. Ct. Rep. 564, and *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28, that state legislation 'relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within the territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.'"

In the case of *Western U. Tele. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934, a statute of Georgia requiring telegraph companies to transmit and deliver dispatches with impartiality, good faith, and diligence, under penalty of \$100 in each case, in the absence of legislation by Congress on the subject, was held not to be an unwarrantable interference with interstate commerce as to messages without the state, and Mr. Justice Peckham, delivering the opinion of the court, said, p. 660:

"The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce, within the meaning of that clause of the Federal Constitution under discussion? We think not."

And see *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 137, 42 L. ed. 692, 18 Sup. Ct. Rep. 289; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 491, 48 L. ed. 273, 24 Sup. Ct. Rep. 132; *Missouri P. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 624, 53 L. ed. 361, 29 Sup. Ct. Rep. 214. *The [134 present cases fall within the rules there laid down, and *Central R. Co. v. Murphey*, 196 U. S. 195, 49 L. ed. 445, 25 Sup. Ct. Rep. 218, 2 A. & E. Ann. Cas. 514; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; and *McNeill v. Southern R. Co.* 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722, cited to the contrary, are really not in conflict therewith.

Judgments affirmed.

GEORGE E. ZARTMAN, Trustee in Bankruptcy of Francis Bacon, Plff. in Err.,
v.

FIRST NATIONAL BANK OF WATERLOO, NEW YORK.

(See S. C. Reporter's ed. 134-138.)

Bankruptcy — what are assets.

1. The advantage derived from a mistake made by a bankrupt when reducing to writing a contract made by him is not an asset in the hands of the trustee in bankruptcy, as part of the bankrupt estate.

[For other cases, see Bankruptcy, VI. a, in Digest Sup. Ct. 1908.]

Bankruptcy — title of trustee — reforming contract made by bankrupt.

2. The trustee in bankruptcy is not a bona fide purchaser for value, so as to bar the reformation in equity, for mistake, of a contract made by the bankrupt, but he takes the property of the bankrupt as the latter held it at the time of the petition, subject to all valid claims, liens, and equities.

[For other cases, see Bankruptcy, VII., in Digest Sup. Ct. 1908.]

[No. 74.]

Argued January 12, 1910. Decided February 21, 1910.

IN ERROR to the Supreme Court of the State of New York for the County of Seneca to review a judgment entered pursuant to the mandate of the Court of Appeals in that state, which had affirmed a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of the Equity Term of the Supreme Court, in favor of plaintiff in an action to reform, for mutual mistake, a written contract made by a bankrupt. Affirmed.

See same case below, in court of appeals, 189 N. Y. 533, 82 N. E. 1126; in supreme court, 113 App. Div. 612, 98 N. Y. Supp. 717.

Statement by Mr. Chief Justice Fuller:

This was a suit brought in the supreme court of the state of New York by the First National Bank of Waterloo, New York, against Francis Bacon and George E. Zartman, as Bacon's trustee in bankruptcy, to procure the reformation of a written contract made by plaintiff and defendant Bacon February 15, 1902.

Before the contract was made, Bacon was president of the First National Bank of Waterloo, New York, and also of the Waterloo Wagon Company. He was active in the office of the wagon company, while the business of the bank was looked after by its cashier, Becker. The Waterloo bank had ex-

tended credit to the wagon company and to Bacon individually, discounting paper and taking notes.

The Exchange National Bank of Seneca Falls, New York, *held, by assignment [135 from Bacon, 461 shares of the stock of the wagon company, and 253 shares of the Waterloo bank, as continuing collateral security for any existing or future indebtedness of Bacon or the wagon company.

The contract between Bacon and the Waterloo bank provided that the shares were "to be held by said bank as a continuing collateral security for the payment to it of any indebtedness or liability of any kind, absolute or contingent, due or not due, now existing or that may hereafter exist, arise, accrue, or be contracted, on the part of himself or of the Waterloo Wagon Company, Limited, to said bank, and the said Francis Bacon hereby agrees with the First National Bank of Waterloo that the said certificates of stock above named *are transferred to and may be held by the said First National Bank of Waterloo as a continuing collateral security for the payment to it of any indebtedness or liability of any kind, absolute or contingent, now existing or that may hereafter exist, arise, accrue, or be contracted on the part of the Waterloo Wagon Company, Limited, or himself, to said bank, and said shares of stock, upon their surrender by the Exchange National Bank, shall be deposited with the said First National Bank of Waterloo.*"

The words in italics were omitted from the contract by mutual mistakes made in preparing and executing it, and the New York supreme court, by its decision, reformed the contract by inserting them. In the meantime, however, Bacon had become a bankrupt, having been so adjudicated May 4, 1904, and defendant Zartman had been appointed trustee.

This action was begun October 17, 1904. The trustee alone defended.

The judgment was unanimously affirmed by the appellate division of the fourth department (113 App. Div. 612, 98 N. Y. Supp. 717), and, on appeal to the court of appeals, the decision of the appellate division was unanimously affirmed without opinion. 189 N. Y. 533, 82 N. E. 1126. The remittitur was filed below November 9, 1907, and this writ of error was thereupon allowed.

Mr. George E. Zartman, *in propria persona*, argued the cause and filed a brief for plaintiff in error:

To create a lien by pledge there must be a delivery or written assignment of certain specified property as security for the payment of certain definite obligations.

Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307; 3 Pom. Eq. Jur. 1235.

If Bacon had given the bank a chattel mortgage, and it had been expressly agreed between them that it should be filed at once, but they did not file it, there would be no lien as against creditors, because the statute of New York expressly provides that a chattel mortgage not filed is void as against creditors, and this has been held to be the general creditors, and is not limited to creditors with judgment and execution.

Stephens v. Perrine, 143 N. Y. 476, 39 N. E. 11.

And such rights of creditors may be enforced by a trustee in bankruptcy.

Skilton v. Codington, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790.

The time of the filing of the petition for adjudication of bankruptcy is the "dead line" separating the past and the future.

Re Pease, 4 Am. Bankr. Rep. 578.

The rights of all parties are to be adjusted as of the date of the filing of the petition. If a claim is not then a perfected lien, it cannot thereafter be made perfect.

Goldman v. Smith, 2 Am. Bankr. Rep. 107; Morgan v. Campbell, 22 Wall. 381, 393, 22 L. ed. 796, 799; Re McDonald, 31 Am. Bankr. Rep. 358; Security Warehousing Co. v. Hand, 74 C. C. A. 186, 143 Fed. 32, 16 Am. Bankr. Rep. 63.

The rights of the trustee in bankruptcy, as now representing the receiver in proceedings supplementary to execution, were not regarded by the state court.

Wrede v. Gilley, 132 App. Div. 293, 117 N. Y. Supp. 5, 21 Am. Bankr. Rep. 821; Ward v. Petrie, 157 N. Y. 307, 68 Am. St. Rep. 790, 51 N. E. 1002; First Nat. Bank v. Staake, 202 U. S. 141, 50 L. ed. 967, 26 Sup. Ct. Rep. 580; Re New York Economical Printing Co. 49 C. C. A. 133, 6 Am. Bankr. Rep. 616, 110 Fed. 514.

The trustee in this action is entitled to the same protection that would be given to a bona fide purchaser for value.

Re Booth, 3 Am. Bankr. Rep. 574, 98 Fed. 975; Re Thorp, 12 Am. Bankr. Rep. 195; Fourth Street Nat. Bank v. Milbourne Mills Co. 22 Am. Bankr. Rep. 442.

Mr. W. H. Sholes argued the cause, and, with Messrs. Hammond & Hammond, filed a brief for defendant in error:

The rule applicable to this case and to all similar cases is that the trustee takes the property of the bankrupt not as an innocent purchaser would, but as the debtor had it at the time of the partition, subject to all valid claims, liens, and equities.

Winsor v. McLellan, 2 Story, 492, Fed. Cas. No. 17,887; Donaldson v. Farwell, 93 U. S. 631, 23 L. ed. 993; Casey v. Credit

Mobilier, 2 Woods, 77, Fed. Cas. No. 2,496; Stewart v. Platt, 101 U. S. 731, 25 L. ed. 816; Re New York Economical Printing Co. 6 Am. Bankr. Rep. 615; Yeatman v. New Orleans Sav. Inst. 95 U. S. 764, 24 L. ed. 589; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306.

An attaching creditor is not a bona fide purchaser.

Sargent v. Sturm, 23 Cal. 359, 83 Am. Dec. 118; Thompson v. Rose, 16 Conn. 71, 41 Am. Dec. 121; Oswego Starch Factory v. Lendrum, 57 Iowa, 573, 42 Am. Rep. 53, 10 N. W. 900; American Merchants' Union Exp. Co. v. Willsie, 79 Ill. 92; Jordan v. Parker, 56 Me. 557; Thaxter v. Foster, 153 Mass. 151, 26 N. E. 434; Naugatuck Cutlery Co. v. Babcock, 22 Hun, 481; Mowrey v. Walsh, 8 Cow. 245; Devoe v. Brandt, 53 N. Y. 402; Bradley v. Obear, 10 N. H. 477; Poor v. Woodburn, 25 Vt. 234.

An assignee for the benefit of creditors is not a bona fide purchaser.

Wailes v. Couch, 75 Ala. 134; Belding Bros. v. Frankland, 8 Lea, 67, 41 Am. Rep. 630; Farley v. Lincoln, 51 N. H. 579, 12 Am. Rep. 182; Ratcliffe v. Sangston, 18 Md. 383; Bussing v. Rice, 2 Cush. 48.

An assignee in bankruptcy is not a bona fide purchaser.

Donaldson v. Farwell, supra; Montgomery v. Bucyrus Mach. Works, 92 U. S. 257, 23 L. ed. 656.

The principle that courts of equity will decree the correction of errors in written instruments, which have been caused by mistakes, etc., is nowhere more strongly upheld than in the United States courts.

Hunt v. Rhodes, 1 Pet. 1, 7 L. ed. 27; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589; Iverson v. Hutton, 98 U. S. 79, 25 L. ed. 66; Walden v. Skinner, 101 U. S. 577, 25 L. ed. 963; Elliott v. Sackett, 108 U. S. 132, 27 L. ed. 678, 2 Sup. Ct. Rep. 375; Adams v. Henderson, 168 U. S. 573, 42 L. ed. 584, 18 Sup. Ct. Rep. 179.

Mr. Chief Justice Fuller delivered the opinion of the court:

The jurisdiction in equity to decree the correction of errors in written contracts which have been caused by mutual mistake is firmly established and needs no citation of authority to sustain it. In the present case, the evidence of the mistakes in question was undisputed. We are not aware that the bankruptcy law has suspended that jurisdiction.

The position of the trustee in bankruptcy seems to be that the mistake made by Bacon in dictating or writing out the contract between himself and the Waterloo bank "is an asset in his hands, as part of the estate of the bankrupt;" but we cannot agree to

that. The trustee claims that he takes the same kind of title as a bona fide purchaser for value; but the rule applicable to this and all similar cases is that the trustee takes the property of the bankrupt, not as an innocent purchaser, but as the debtor had it at the time of the petition, subject to all valid claims, liens, and equities. *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306, and cases cited. And this is so well settled that our jurisdiction of the writ of error is exceedingly doubtful. Judge Williams, speaking for appellate division, fourth department, treated of this point thus:

"It is said that the bankruptcy of Bacon constituted a bar to the relief granted in this action. This cannot be true. The trustee took the bankrupt's property in the same condition and subject to the same liens as the bankrupt himself held it. The trustee is in no sense a bona fide purchaser for value, and entitled to protection as such. No new lien was created by the decision and judgment appealed from. The original lien was adjudicated and determined."

We concur in this view, and the judgment is affirmed.

139] *P. M. CHILDERS, Appt.,
v.

R. W. McCLAUGHRY, Warden of the
United States Penitentiary at Leaven-
worth, Kansas.

(See S. C. Reporter's ed. 139-145.)

Appeal — from district court — Federal question.

An order of a Federal district court denying relief by habeas corpus to a person convicted in a United States court for the Indian territory is not reviewable in the Federal Supreme Court as involving the construction of the Federal Constitution, where the allegation in the petition that the accused was deprived of his liberty without due process of law was based entirely upon the supposed want of jurisdiction in the court where the conviction was had over an offense committed during the interim between the passage of the Oklahoma enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335), and the admission of the state into the Union, which is a question involving the construction, and not the constitutionality, of the enabling act.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

[No. 110.]

NOTE.—On direct review in Federal Supreme Court of judgments of district and circuit courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

Submitted January 26, 1910. Decided February 21, 1910.

A PPEAL from the District Court of the United States for the District of Kansas to review an order denying relief by habeas corpus to a person convicted in the United States Court for the Northern District of the Indian Territory, of a crime committed between the date of the passage of the Oklahoma enabling act and the admission of that state into the Union. Dismissed for want of jurisdiction.

Statement by Mr. Chief Justice Fuller:

The Oklahoma enabling act was approved June 16, 1906 (34 Stat. at L. 267, chap. 3335); November 16, 1907, the state was admitted into the Union (35 Stat. at L. 2160).

Childers was indicted October 21, 1906, in the United States court for the northern district of the Indian territory, for having, on August 6, 1906, and within the jurisdiction of said court, murdered one Lena Atwood. He was tried and convicted, and on June 17, 1907, sentenced to "be imprisoned in the penitentiary situated at Fort Leavenworth, Kansas, for the term and period of his natural life, at hard labor." He was committed accordingly, and received at the United States penitentiary at Leavenworth, Kansas, by the warden, R. W. McClaughry, June 21, 1907.

November 29, 1907, Childers filed a petition for a writ of habeas corpus in the United States district court for the district of Kansas.

*The principal contention was that [140 the United States court in the Indian territory had no jurisdiction of the offense committed by Childers during the interim between the passage of the Oklahoma enabling act and the admission of the state, in view of the language of the enabling act, and especially of § 14. Some minor errors, not jurisdictional, were assigned. The district court considered the terms of the act, construed § 14, and denied the petition, and from that judgment an appeal was taken directly to this court.

The Oklahoma enabling act, approved June 16, 1906, provided:

"Sec. 13. That said state, when admitted, as aforesaid, shall constitute two judicial districts, to be known as the eastern district of Oklahoma and the western district of Oklahoma; the said Indian territory shall constitute said eastern district and the said Oklahoma territory shall constitute said western district. . . . The circuit and district courts for each of said districts, and the judges thereof, respective-

ly, shall possess the same powers and jurisdiction, and perform the same duties, required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. . . .

"Sec. 14. That all prosecutions for crimes or offenses hereafter committed in either of said judicial districts, as hereby constituted, shall be cognizable within the district in which committed, and all prosecutions for crimes or offenses committed before the passage of this act, in which indictments have not yet been found or proceedings instituted, shall be cognizable within the judicial district as hereby constituted in which such crimes or offenses were committed. . . .

"Sec. 15. That all appeals or writs of error taken from the supreme court of Oklahoma territory, or the United States court of appeals in the Indian territory, to the Supreme Court of the United States or the United States circuit court of appeals for the eighth circuit, previous to the final admission of such state, shall be prosecuted to [141] final determination as though "this act had not been passed. And all cases in which final judgment has been rendered in such territorial appellate courts, which appeals or writs of error might be had except for the admission of such state, may still be sued out, taken, and prosecuted to the Supreme Court of the United States or the United States circuit court of appeals under the provisions of existing laws. . . .

"Sec. 16. That all causes pending in the supreme and district courts of Oklahoma territory, and in the United States courts, and in the United States court of appeals in the Indian territory, arising under the Constitution, laws, or treaties of the United States, or affecting ambassadors, ministers, or consuls of the United States, or of any other country or state, or of admiralty or of maritime jurisdiction, or in which the United States may be a party, or between citizens of the same state, claiming lands under grants from different states; and in all cases where there is a controversy between citizens of said territories prior to admission and citizens of different states, or between citizens of different states, or between a citizen of any state and citizens or subjects of any foreign state or country, and in which cases of diversity of citizenship there shall be more than \$2,000 in controversy, exclusive of interest and costs, shall be transferred to the proper United States circuit or district court for final disposition. . . .

"Sec. 17. That all cases pending in the supreme court of said territory of Oklahoma and in the United States court of appeals in
54 L. ed.

the Indian territory, not transferred to the United States circuit and district courts in said state of Oklahoma, shall be proceeded with, held, and determined by the supreme or other final appellate court of such state as the successor of said territorial supreme court and appellate court, subject to the same right to review upon appeal or error to the Supreme Court of the United States now allowed from the supreme or appellate courts of a state under existing laws. Jurisdiction of all cases pending in the courts of original jurisdiction in said territories, not transferred to the United States circuit and district courts, shall devolve [142] upon and be exercised by the courts of original jurisdiction created by said state.

"Sec. 18. That the supreme court or other court of last resort of said state shall be deemed to be the successor of said territorial appellate courts. . . .

"Sec. 19. That the courts of original jurisdiction of such state shall be deemed to be the successor of all courts of original jurisdiction of said territories. . . .

"Sec. 20. That all cases pending in the district courts of Oklahoma territory and in the United States courts for the Indian territory at the time said territories become a state, not transferred to the United States circuit or district courts in the state of Oklahoma, shall be proceeded with, held, and determined by the courts of said state, the successors of said district courts of the territory of Oklahoma and United States courts for the Indian territory. . . .

"Sec. 21. That the constitutional convention may by ordinance provide for the election of officers for a full state government, including members of the legislature and five Representatives to Congress. . . . Such state government shall remain in abeyance until the state shall be admitted into the Union and the election for state officers held, as provided for in this act. . . ."

The act of March 4, 1907 (34 Stat. at L. 1286, chap. 2911), amended §§ 16, 17, and 20 of the Oklahoma enabling act so as to read as follows:

"Sec. 16. That all civil causes, proceedings, and matters pending in the supreme or district courts of Oklahoma territory, or in the United States courts or United States court of appeals in the Indian territory, arising under the Constitution, laws, or treaties of the United States, . . . shall be transferred to the proper United States circuit or district court established by this act, for final disposition, and shall therein be proceeded with in the same manner as if originally brought therein. . . .

"Prosecutions for all crimes and offenses committed within *the territory of [143] Oklahoma or in the Indian territory,

pending in the district courts of the territory of Oklahoma or in the United States courts in the Indian territory upon the admission of such territory as a state, which, had they been committed within a state, would have been cognizable in the Federal courts, shall be transferred to and be proceeded with in the United States circuit or district court established by this act for the district in which the offenses were committed, in the same manner and with the same effect as if they had been committed within a state. Prosecutions for all such offenses committed within either of said territories and pending in the supreme court of the territory of Oklahoma, or in the United States court of appeals in the Indian territory, upon the admission of such territories as a state, shall be transferred to the United States circuit courts created by this act for the district within which the offense was committed. . . .

"Sec. 17. That all causes, proceedings, and matters, civil or criminal, pending in the supreme court of the territory of Oklahoma, or in the United States court of appeals in the Indian territory, not transferred to the United States circuit or district courts in said state of Oklahoma, shall be proceeded with, held, and determined by the supreme court or other final appellate court of such state as the successor of said supreme court of the territory of Oklahoma and of the United States court of appeals in the Indian territory, subject to the same right to review upon appeal or writ of error to the Supreme Court of the United States now allowed from the supreme or final appellate court of a state under existing laws. . . .

"Sec. 20. That all causes, proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma territory, or in the United States courts in the Indian territory at the time said territories become a state, not transferred to the United States circuit or district courts in the state of Oklahoma, shall be proceeded with, held, and determined by the courts of said state, the successors of said district courts of 144] *the territory of Oklahoma, and the United States courts in the Indian territory. . . . All criminal cases pending in the United States courts in the Indian territory, not transferred to the United States circuit or district courts in the state of Oklahoma, shall be prosecuted to a final determination in the state courts of Oklahoma under the laws now in force in that territory."

Messrs. O. L. Rider and Luman F. Parker, Jr., submitted the cause for appellant.

Assistant Attorney General Harr submitted the cause for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court:

The jurisdiction of the district court was not in issue, nor, properly speaking, was the construction or application of the Constitution involved in this case. The real question before the district court was whether the United States court for the northern district of the Indian territory had jurisdiction of the offense for which Childers was undergoing punishment, in view of the provisions of the Oklahoma enabling act. The allegation in the petition, that Childers had been deprived of his liberty without due process of law, was based entirely upon the alleged want of jurisdiction in the United States court of the Indian territory to try him for the offense. The question before the lower court was simply one of statutory construction, and not of the unconstitutionality of the statute in question.

In the case of *Re Lennon*, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123, Lennon had been committed for contempt by the circuit court for the northern district of Ohio, and thereupon applied to the same court for a writ of habeas corpus, the petition alleging, as in this case, that he was restrained of his liberty in violation of the Constitution, and that the circuit court had no jurisdiction to commit him. The writ was refused, and a direct appeal was taken to this court.

*After pointing out that the jurisdiction of the circuit court to issue a writ of habeas corpus was not in issue, but that jurisdiction was entertained, this court said:

"Nor can the attempt be successfully made to bring the case within the class of cases in which the construction or application of the Constitution is involved in the sense of the statute, on the contention that the petitioner was deprived of his liberty without due process of law. The petition does not proceed on any such theory, but entirely on the ground of want of jurisdiction in the prior case over the subject-matter and over the person of petitioner, in respect of inquiry into which the jurisdiction of the circuit court was sought. If, in the opinion of that court, the restraining order had been absolutely void, or the petitioner were not bound by it, he would have been discharged, not because he would otherwise be deprived of due process, but because of the invalidity of the proceedings for want of jurisdiction. The opinion of the circuit court was that jurisdiction in the prior suit and proceedings existed, and the discharge was refused; but an appeal from that judgment directly to this court would not, there-

fore, lie on the ground that the application of the Constitution was involved as a consequence of an alleged erroneous determination of the questions actually put in issue by the petitioner."

Carey v. Houston & T. C. R. Co. 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63; Carey v. Houston & T. C. R. Co. 161 U. S. 126, 40 L. ed. 642, 16 Sup. Ct. Rep. 537; Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 470, 48 L. ed. 749, 753, 24 Sup. Ct. Rep. 489; Empire State Idaho Min. & Developing Co. v. Hanley, 205 U. S. 225, 232, 51 L. ed. 779, 782, 27 Sup. Ct. Rep. 476.

Appeal dismissed.

146] *O. C. LUDWIG, Secretary of State of Arkansas, Appt.,

v.

WESTERN UNION TELEGRAPH COMPANY.

(See S. C. Reporter's ed. 146-164.)

States — immunity from suit — enjoining state officers.

1. The immunity of a state from suit, under U. S. Const., 11th Amend., is not violated by maintaining a suit in a Federal court to enjoin the threatened proclamation by the secretary of state, in his official capacity, under the authority of a state statute which violates the Federal Constitution, that a foreign telegraph company is forbidden, under the penalty prescribed by such law, to continue to do local business in the state.

[For other cases, see States, 282-325, in Digest Sup. Ct. 1908.]

Foreign corporation — state exclusion from doing local business — interstate commerce.

2. An illegal burden on the interstate business of a foreign telegraph company, as well as a tax on its property beyond the jurisdiction of the state, is imposed by Ark. Laws 1907, p. 744, under which such company, as a condition of continuing to do a local business in the state, and of escaping the heavy penalties therein prescribed, must pay a given amount, based on all its capital stock, merely for filing its articles of incorporation with the secretary of state.

[For other cases, see Corporations, XII. b, 2; Commerce, 273-287, 368-375; Constitutional Law, 536-540, in Digest Sup. Ct. 1908.]

NOTE.—On suits against a state—see notes to *Murdock Parlor Grate Co. v. Com.* 8 L.R.A. 399; *Carr v. State*, 11 L.R.A. 370; *Beers v. Arkansas*, 15 L. ed. U. S. 991; *Hans v. Louisiana*, 33 L. ed. U. S. 842; *Tindall v. Wesley*, 13 C. C. A. 165; and *Murray v. Wilson Distilling Co.* 92 C. C. A. 25.

On suits against state officers as suits against state—see notes to *Sanders v. Saxton*, 1 L.R.A. (N.S.) 727; *Ex parte Young*, 13 L.R.A. (N.S.) 932; and *Beers v. Arkansas*, supra.

On recognition or exclusion of foreign
54 L. ed.

Injunction — against official action.

3. A case for injunctive relief is presented where the secretary of state threatens to issue a proclamation in his official capacity, under the authority of a state statute which violates the Federal Constitution, that a foreign telegraph company is forbidden, under the heavy penalties prescribed by that statute, to continue to do local business in the state.

[For other cases, see Injunction, I. j, in Digest Sup. Ct. 1908.]

[No. 45.]

Argued April 13, 14, 1909. Decided February 21, 1910.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas to review a decree enjoining the threatened publication by the secretary of state, in his official capacity, under the authority of a state statute, that a foreign telegraph company is forbidden, under the penalty prescribed by that statute, to continue to do local business in the state. Affirmed.

See same case below, 156 Fed. 152.

The facts are stated in the opinion.

Messrs. **Hal L. Norwood** and **William F. Kirby** argued the cause, and, with Messrs. **Joseph M. Hill** and **Otis T. Wingo**, filed a brief for appellant:

A state has plenary power to prescribe such terms as pleases it upon which foreign corporations may enter and do business. It has power to refuse admission to a foreign corporation not engaged in interstate commerce or governmental service, and to prescribe terms upon which a foreign corporation engaged in interstate commerce and the service of the government may do intrastate business. It has the power to prevent a foreign corporation from doing business at all within its borders, unless such prohibition is so conditioned as to violate the Federal or its own Constitution.

Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370; *American Smelting & Ref. Co. v. Colorado*, 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198, 9 A. & E. Ann. Cas. 978; *Security Mut. L. Ins. Co. v. Prewitt*, 202

corporations—see notes to *Cone Export & Commission Co. v. Poole*, 24 L.R.A. 289, and *M'Canna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13.

On corporate taxation and the commerce clause—see note to *Sandford v. Poe*, 60 L.R.A. 641.

On the taxation of corporate capital stock generally—see note to *State Bd. of Equalization v. People*, 58 L.R.A. 513.

On injunction to restrain acts of public officials—see *Mississippi v. Johnson*, 18 L. ed. U. S. 437.

U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 A. & E. Ann. Cas. 317; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Kehrler v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; State v. Lancashire F. Ins. Co. 66 Ark. 466, 45 L.R.A. 348, 51 S. W. 633; Woodson v. State, 69 Ark. 528, 65 S. W. 465; Western U. Teleg. Co. v. State, 82 Ark. 302, 101 S. W. 745; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; John Hancock Mut. L. Ins. Co. v. Warren, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535.

It may prescribe as such condition a forfeiture of its right to do business upon removal of a cause to a Federal court, or the bringing of suit in a Federal court without the consent of the opposite party.

Security Mut. L. Ins. Co. v. Prewitt, *supra*; Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148.

The court was without jurisdiction, this being a suit against the state.

Re Ayers, 123 U. S. 443, 487, 502, 503, 31 L. ed. 216, 228, 229, 8 Sup. Ct. Rep. 164; Fitts v. McGhee, 172 U. S. 516, 528, 43 L. ed. 535, 541, 19 Sup. Ct. Rep. 269; Western U. Teleg. Co. v. Andrews, 154 Fed. 95.

This statute must be construed to have been intended only to impose terms upon the right of a foreign corporation to carry on intrastate business, and so construed it is a valid statute.

Western U. Teleg. Co. v. State, 82 Ark. 321, 101 S. W. 748, 12 A. & E. Ann. Cas. 82; Osborne v. Florida; Pullman Co. v. Adams; Armour Packing Co. v. Lacy; and Kehrler v. Stewart,—*supra*; State v. Rocky Mountain Bell Teleph. Co. 27 Mont. 394, 71 Pac. 311; State ex rel. Beek v. Wagener, 77 Minn. 483, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134; State ex rel. Coleman v. Western U. Teleg. Co. 75 Kan. 609, 90 Pac. 307; Com. v. Gagne, 153 Mass. 205, 10 L.R.A. 442, 26 N. E. 449; Atty. Gen. ex rel. Commissioner of Corporations v. Electric Storage Battery Co. 188 Mass. 239, 74 N. E. 467, 3 A. & E. Ann. Cas. 631; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. 424

Rep. 958; Beasley v. Equitable Securities Co. 72 Ark. 610, 84 S. W. 224.

When the legislature adopts the statute of another state, the interpretation of such statute by the courts of that state is adopted with it; and how much the more should our own court's construction of an act re-enacted be conclusive in its interpretation.

Nebraska Nat. Bank v. Walsh, 68 Ark. 438, 82 Am. St. Rep. 301, 59 S. W. 952; McNutt v. McNutt, 78 Ark. 352, 95 S. W. 778. See also Hammond Packing Co. v. Arkansas; Armour Packing Co. v. Lacy; Kehrler v. Stewart; Pullman Co. v. Adams; and Osborne v. Florida,—*supra*.

The legislature is presumed to have intended to act within its power in passing this act.

Russell v. St. Louis Southwestern R. Co. 71 Ark. 456, 75 S. W. 725; Western U. Teleg. Co. v. State, 82 Ark. 315, 101 S. W. 748, 12 A. & E. Ann. Cas. 82.

The act is not in violation of the telegraph company's contract with the state, nor does it deprive it of its property without due process of law.

Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 621, 622, 43 L. ed. 575, 576, 19 Sup. Ct. Rep. 308; Pearsall v. Great Northern R. Co. 161 U. S. 667, 40 L. ed. 845, 16 Sup. Ct. Rep. 705; Grand Lodge, F. & A. M. v. New Orleans, 166 U. S. 143, 41 L. ed. 951, 17 Sup. Ct. Rep. 523; Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; St. Louis v. United R. Co. 210 U. S. 266, 52 L. ed. 1054, 28 Sup. Ct. Rep. 630.

The act does not discriminate against appellee, nor deny it the equal protection of the law.

Western U. Teleg. Co. v. State, 82 Ark. 318, 101 S. W. 748, 12 A. & E. Ann. Cas. 82; Woodson v. State, 69 Ark. 527, 65 S. W. 465; St. Louis, I. M. & S. R. Co. v. Paul, 64 Ark. 86, 37 L.R.A. 504, 40 S. W. 705, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75.

Messrs. Rush Taggart and George B. Rose argued the cause, and, with Mr. Henry D. Estabrook, filed a brief for appellee:

The decisions in *Ex parte Young*, 209 U. S. 124, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441; *Hunter v. Wood*, 209 U. S. 205, 52 L. ed. 747, 28 Sup. Ct. Rep. 472, establish beyond all question the jurisdiction of the court.

By discriminating between foreign and domestic corporations the statute com-

plained of denials to the telegraph company the equal protection of the law.

Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; American Smelting & Ref. Co. v. Colorado, 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198, 9 A. & E. Ann. Cas. 978; Yick Wo v. Hopkins, 118 U. S. 369, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064; 3 Clark & M. Priv. Corp. § 845, p. 2704; Chicago, R. I. & P. R. Co. v. Swanger, 157 Fed. 783.

The act violates the contract between the state and the telegraph company, and deprives the latter of its property without due process of law.

United States v. Central P. R. Co. 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038; St. Louis v. Western U. Teleg. Co. 148 U. S. 103, 37 L. ed. 385, 13 Sup. Ct. Rep. 485; Monongahela Nav. Co. v. United States, 148 U. S. 329, 37 L. ed. 469, 13 Sup. Ct. Rep. 622; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Pearsall v. Great Northern R. Co. 161 U. S. 661, 40 L. ed. 843, 16 Sup. Ct. Rep. 705; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Powers v. Detroit, G. H. & M. R. Co. 201 U. S. 544, 50 L. ed. 861, 26 Sup. Ct. Rep. 556; Dartmouth College v. Woodward, 4 Wheat. 637, 4 L. ed. 659; New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952.

The act infringes the rights conferred on the telegraph company by the act of Congress of July 24, 1866, as an agency of the United States government and as an instrumentality of commerce.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 133, 1 A. & E. Ann. Cas. 517; St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

This court is bound by a construction of a state statute made by the state supreme court; but we have yet to learn that it will yield its own judgment to what it thinks would probably be the judgment of the state court. Unless the act has been directly passed upon, this court exercises its own judgment in its construction, and it has always held that acts in general terms like this would be construed
54 L. ed.

as applying equally to interstate and domestic commerce, and therefore an invasion of the province of the national government.

Leloup v. Mobile and Crutcher v. Kentucky, *supra*.

Mr. Justice Harlan delivered the opinion of the court:

The Western Union Telegraph Company, a corporation of New York, doing business, both interstate and intrastate, in Arkansas, as it had done for many years, brought this suit against O. C. Ludwig, secretary of state of Arkansas, for the purpose of obtaining a decree that the statute of that state of May 13th, 1907, entitled, "An Act to Permit Foreign Corporations *to Do Business in Arkansas, and Fixing Fees to Be Paid by All Corporations," Acts of Ark. 1907, p. 744, was unconstitutional, null, and void, and enjoining the defendant, in his official capacity, from attempting to revoke, or proclaiming through official newspaper publications that he had revoked, the authority of the plaintiff to do business in Arkansas, or that it had no right to continue doing business in that state. The plaintiff, in its bill, asked such other and further relief as the case might require and as might seem just.

A temporary injunction was issued, and thereafter the defendant demurred and answered at the same time. The demurrer was on these grounds: That the court was without jurisdiction to hear and determine the case, "the same being, in effect, a suit against the state" by a citizen of another state, to prevent the enforcement of one of its criminal or penal statutes; that the facts stated in the bill are not sufficient to constitute a cause of action nor to warrant the relief asked; and that the bill was wholly without equity. The answer denied all the material allegations of the bill.

Subsequently, the plaintiff, by leave of the court, filed an amendment of its bill. To that amendment no answer was made, but, all parties being present, the cause was heard, without objection, on the demurrer to the bill. The demurrer was overruled, and the defendant having elected not to plead further, the injunction previously granted was made perpetual. From that order the present appeal was prosecuted.

The above statute, known as the Wingo act, whose constitutionality is questioned by the plaintiff, is as follows (the italics being ours):

"§ 1. Every company or corporation incorporated under the laws of any other state, territory, or country, including foreign railroad and foreign fire and life insurance companies, *now or hereafter doing business in this state*, shall file in the office

of the secretary of state in this state a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and 153] certified by the *proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this state, and shall also designate its general office or place of business in this state, and shall name an agent upon whom process may be served. Provided, before authority is granted to any foreign corporation to do business in this state, it must file with the secretary of state a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this state, or upon the secretary of state of this state, in any action brought or pending in this state, shall be a valid service upon said company; and, if process is served upon the secretary of state, it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this state in any Federal court, it shall be the duty of the secretary of state to forthwith revoke all authority to such company and its agents to do business in this state, and to publish such revocation in some newspaper of general circulation published in this state; and if such corporation shall *thereafter continue to do business in this state*, it shall be subject to the penalty of this act *for each day* it shall continue to do business in this state after such revocation.

"§ 2. Any foreign corporation *which shall fail to comply with the provisions of this act*, and shall do *any business in this state*, shall be subject to a fine of not less than \$1,000, to be recovered before any court of competent jurisdiction, and all such fines so recovered shall be paid into the general revenue fund of the county in which the cause of action shall accrue; and it is hereby made the duty of the prosecuting attorneys to institute said suits in the name of the state, for the use and benefit of the county in which the suit is brought, and such prosecuting attorney shall receive as his compensation one fourth of the amount recovered, and as an additional penalty, any 154] *foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid, cannot make *any contract in this state which can be enforced by it either in law or in equity*; and the complying with the provisions of this act

after suit is instituted shall in no way validate said contract.

"3. That all corporations hereafter incorporated in this state, and *all foreign corporations seeking to do business in this state*, shall pay into the treasury of this state *for the filing of said articles* a fee of \$25 *where the capital stock is \$50,000 or under*; \$75 where the capital stock is over \$50,000, and not more than \$100,000; and \$25 additional for each \$100,000 of capital stock.

"Any foreign mutual corporation having no capital stock shall be required to pay to the secretary of state for filing its articles of incorporation the sum of \$500. Provided, however, nothing in this section shall apply to fraternal orders that write insurance.

"§ 4. That act 185, approved April 17, 1907, and entitled, 'An Act to Provide a Manner in Which Foreign Corporations May Become Domestic Corporations, and for Other Purposes,' and all laws and parts of laws in conflict herewith, be and the same are hereby repealed; and that this act take effect and be in force from and after its passage." Acts of Ark. 1907, p. 744.

As the case was decided on demurrer to the bill, the material facts properly alleged are to be taken as true on this hearing. The case made by the plaintiff in its bill is substantially as will be now outlined.

The telegraph company was organized in 1851, and immediately thereafter began the work of constructing and operating telegraph lines. Its system extended throughout the United States and Canada, and connected with lines in Mexico and Central and South America by means of submarine cables, and with telegraph systems of foreign countries.

Among the lines so constructed, and forming a component part of the company's system, and connecting with its main office in New York, are lines within Arkansas, most of which *were constructed [155] since 1867, in which year the company accepted the terms and conditions of the act of Congress of July 24th, 1866, entitled, "An Act to Aid in the Construction of Telegraph Lines, and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes." 14 Stat. at L. 221, chap. 230, Rev. Stat. §§ 5263 to 5269, inclusive, U. S. Comp. Stat. 1901, pp. 3579 to 3582.

It should be stated in this connection that the bill alleges that the company's lines within Arkansas are upon the public domain and upon the military and post roads of the United States, are part of the postal routes and postal establishment of the United States, and, as such, the complainant has, under the Constitution and

laws of the United States, the power, and is under obligation, to transmit all messages for the government and for the public generally as much and as fully with respect to messages between points within the said state as interstate messages. The company's lines within Arkansas were constructed with the consent and permission of the state, certainly without objection on its part, and in accordance with its laws. The amount which the company, up to the bringing of this suit, had invested in lines within Arkansas, was \$153,000, and continuously since their construction the telegraph company has used them "for the transmission of telegraph messages for the government of the United States, and the several departments thereof, and for the public, as an instrumentality of the Postal Department and of commerce wholly within the state of Arkansas, and also for interstate commerce and commerce between points in said state and foreign countries, and thus said telegraph lines have been continuously employed in domestic, interstate, and foreign commerce since their construction."

The above act of 1907 requires that every foreign corporation doing or seeking to do business in the state should file in the office of the secretary of state a copy of its charter or articles of incorporation, duly authenticated, together with a statement of its assets and liabilities and the amount of its capital employed in the state, and designate its general office *or place of business therein, and the name of an agent upon whom process in any action brought or pending in the state may be served. The company tendered to the secretary of state a duly authenticated copy of a resolution of the board of directors, assenting to the designation of an agent upon whom process against the company might be served; also, the above required statement; "and offered to the secretary of state [who claimed to proceed under the above act of 1907] all reasonable fees for the filing and recording of the said papers." But the secretary of state refused and still refuses to file the same unless the telegraph company pays to him a fee of \$75 upon the first \$100,000 of its capital stock, and \$25 upon each additional \$100,000 of stock. The capital stock of the telegraph company being \$100,000,000, the sum which the secretary required to be paid as a condition of the company's right to have its articles of incorporation filed, and thereafter to continue doing business within Arkansas without incurring the penalties prescribed by the statute, was \$25,050.

We have seen that the act of 1907 provided that if any foreign corporation, with-

out the consent of the other party to any suit brought by or against it in any state court, should remove such suit to the Federal court, or institute a suit against a citizen of Arkansas in the Federal court, it became the duty of the secretary of state to forthwith revoke all authority in the company and its agents to do business in Arkansas, and publish such revocation in some newspaper of general circulation in the state; and if, after such revocation, the company continued to do any business in Arkansas, it became subject to a fine of not less than \$1,000 for each day it so continued, to be recovered by suits instituted by prosecuting attorneys in the name of the state, for the use and benefit of the county in which the suit was brought; so, if the company failed to comply with any of the provisions of the act, it became subject to a fine of \$1,000; further, if a foreign corporation failed or refused to file its articles of incorporation, as required, it could not "make any contract" in Arkansas "which can be enforced *by it either in law or [157 in equity." Before the bringing of this suit, the company had, in fact, instituted a suit in the United States circuit court to enjoin the prosecuting attorneys in the several districts of the state from proceeding against it to recover the penalties set forth in the act in question,—the suit of *Western U. Teleg. Co. v. Andrews*, this day decided. [216 U. S. 165, post, 430, 30 Sup. Ct. Rep. 286.]

It is alleged, and the demurrer admits, that the secretary of state has threatened to promulgate, and, unless restrained by order of court, will promulgate, a proclamation that the authority of the company to do business in Arkansas has been revoked, and publish the fact of such revocation in the newspapers, thereby making it appear that the company had become subject to the prescribed penalties to be recovered in suits brought by the state's prosecuting attorneys and incapacitated, if the statute be enforced against it, to make any contract in Arkansas, whatever its subject-matter, which is enforceable in law or equity.

The special grounds upon which the statute in question is alleged to be unconstitutional and void may be thus summarized:

1. It imposes upon the secretary of state the duty—in the event the company instituted a suit in the Federal court against a citizen of Arkansas, or removed to the Federal court, without the consent of the other party, any suit brought by or against it in any court of the state—to forthwith revoke its authority to do business within Arkansas, and subjects the company to the penalty of \$1,000 for each day's continuance

of such business in the state after such revocation.

2. If the company fails to file a copy of its articles of incorporation with the secretary of state, and does not pay, in advance of such filing, the required fee or tax, based on its *capital stock*, which represents its property and business everywhere, inside and outside of the state, it is made liable to a fine of \$1,000 for continuing, after such failure, to do business in Arkansas.

3. As the lines established by the company in Arkansas are *practically of no value unless used as the same have been located and constructed, any provision that would prohibit their being used for the purposes and as the same were constructed and designed to be used would deny it the equal protection of the laws and deprive it of its property without due process of law.

4. The state lays an unequal burden on the plaintiff as compared with corporations of Arkansas, in that domestic corporations, organized and existing at the time of the passage of the statute, are not required to pay into the treasury of the state any sum whatever upon their capital stock, but are allowed to continue their business without the payment of any sum; while corporations of other states, even those having lines within the state, under the protection thereof, are required to pay a large tax measured by their *entire capital stock, wherever employed*, for the privilege of continuing in Arkansas their established and existing business, whether the same be domestic or foreign commerce.

5. Upon the failure of the company to pay the required fee, based on its capital stock employed both within and without the state, the company is forbidden, or is not allowed, to make any contract within the state, which can be enforced either in law or equity, whether the same relates to domestic, interstate, or foreign commerce; whereby, it is alleged, the statute denies to the company the equal protection of the laws, and seeks to enforce an illegal exaction for the privilege of using its property for purposes of domestic, interstate, and foreign commerce.

6. As the company originally—some thirty or forty years ago—entered the state of Arkansas, and constructed and has operated its lines of telegraph, with the consent of the state, and during that period has extended and operated its lines within its limits, with its consent; as the state, from time to time, through legislative enactments, has not only recognized the company's right to transact business within its limits, but regulated its business and affairs; and as, during the above *period, with the knowledge and acquiescence of

the state, and in reliance upon such license, consent, and acquiescence, the company has expended large sums of money for the purpose of transmitting messages between the people of Arkansas, the state cannot withdraw its license and expel the company from its limits, even with respect to local business, without impairing the obligation of the company's contract with the state.

Such is the case as made by bill; and the relief asked is a decree declaring the statute unconstitutional, and restraining any attempt to collect said fee of \$25,050, and from imposing any of the penalties prescribed by it or by any provision therein (except the one requiring the designation of an agent upon whom process may be served in any suit brought against the telegraph company), and enjoining the defendant from attempting to revoke, or from proclaiming that he has revoked, its authority to do business in Arkansas.

The first contention of the appellant is that this action is one against the state within the meaning of the 11th Amendment of the Constitution, declaring that the judicial power of the United States shall not extend to any suit in law or equity against a state by a citizen of another state. This contention must be held untenable on the authority of *Western U. Teleg. Co. v. Andrews*, this day decided.

But the vital question in the case is as to the constitutionality of the Arkansas statute. It is insisted by the plaintiff, among other grounds, that the provision in the statute requiring a foreign corporation seeking to do business in the state to pay a fee based upon the amount of its capital stock, for *filing* with the secretary of state its articles of incorporation or association, is a device which, in effect and by its necessary operation, under the guise of regulating intrastate business, imposes a tax on the interstate business of such corporation, as well as a tax on its property used and permanently located outside of the state.

*Interpreting it according to the ordinary acceptance of its words, the statute does not discriminate between corporations engaged in interstate commerce and corporations whose business is intrastate in its character, so to make it clear that the state has not assumed to regulate or burden interstate business. Its words are unqualified and are made applicable to "*every* company or corporation incorporated under the laws of any other state, territory, or country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business in this state." § 1. "*Any* foreign corporation which shall fail to comply with the provisions of this act and

shall do any business in this state," etc. § 2. "All corporations hereafter incorporated in this state, and all foreign corporations seeking to do business in this state," etc. According to the words of the statute, not unreasonably construed, every corporation of another state, seeking to do business in Arkansas, whether interstate or domestic, in order that it may do business of any kind in Arkansas, without coming into conflict with the statute, must file a copy of its authenticated charter with the secretary of state; and it seems that before that officer will file such copy, the corporation must pay to him a given amount based upon its capital stock, representing, necessarily, all its business, interstate and intrastate, as well as all its property everywhere, *beyond as well as within the state*. If the foreign corporation, without first paying those amounts, does business of any kind in the state, it will incur not only the penalty of \$1,000 for so doing, but will forfeit its right to make any contract in the state, enforceable in law or equity,—whatever its subject-matter,—even if it be one relating to the business of the United States or to commerce among states. A statute of that kind would be palpably in conflict with the Constitution, and especially an invasion of rights under that instrument of a corporation engaged in interstate commerce and seeking to do business in Arkansas.

But it is said that the statute in question [161] should not be so *broadly construed. The reasons given for this contention are these: Before the statute here in question was passed, there was in force in Arkansas a statute (act of February 16th, 1899, as amended by the act of May 8th, 1899, Kirby's Dig., chap. 31) which was very similar, in many respects, to the act of 1907, now under examination. The state supreme court had occasion to determine the scope and effect of that act of 1899. Its decision was handed down March 18th, 1907, while the legislature of Arkansas was in session, and on the same day another decision was rendered, holding material parts of that act to be repealed. *Western U. Teleg. Co. v. State*, 82 Ark. 302, 101 S. W. 745; *Western U. Teleg. Co. v. State*, 82 Ark. 309, 101 S. W. 748. 12 A. & E. Ann. Cas. 82. These decisions, as counsel suggest, virtually left the state without any statute prescribing fees to be paid by foreign corporations. Thereafter, on May 16th, 1907, the legislature passed the statute here in question, known as the Wingo act, which, with slight exceptions not necessary to be mentioned, was substantially like the act of 1899. The supreme court of the state, in *Western U. Teleg. Co. v. State*, 82 Ark. 309, 314, 101 S. W. 748, 12 A. & E. Ann. Cas. 82, con-

struing the above act of 1899, had held that it was its duty, unless otherwise compelled by the plain, ordinary meaning of the words of a statute, to reject any construction that would bring it into conflict with the Constitution of the United States (*Grenada County v. Brogden* [*Grenada County v. Brown*] 112 U. S. 261, 28 L. ed. 704, 5 Sup. Ct. Rep. 125; *Cooley*, Const. Lim. § 218; *Atty. Gen. ex rel. Corporation Comrs. v. Electric Storage Battery Co.* 188 Mass. 239, 74 N. E. 467, 3 A. & E. Ann. Cas. 631); that it was too well settled to admit of debate, that "it is beyond the power of the state, under the guise either of a license tax or police regulation, to impose burdens upon interstate commerce, or to deny a foreign corporation the right to engage in such commerce in the state,"—citing *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1383; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; and *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829. Its conclusion in that case was that the act of 1899 "must be construed to have been intended only to impose terms upon the right of a foreign corporation to carry on intrastate business, and it was a valid statute." Now, the *argument at the bar was that [162 when the Wingo act was passed, the legislature must be deemed to have had in mind the judicial construction given to the previous act of 1899, and that it must be assumed that the same court would adhere to its already-expressed views; so that, if a case ever came before it hereafter that involved the meaning and scope of the Wingo act, expressed substantially in the same words as the act of 1899, the court would construe the Wingo act, as it construed the act of 1899, as intended only to apply to intrastate business, and not as having been enacted for the purpose of burdening or imposing illegal terms for the transaction of interstate business by foreign corporations in Arkansas.

But the acceptance of this view would not remove the difficulty which confronts the state in the present case. According to well-settled rules of statutory construction, the validity of a statute, whatever its language, must be determined by its effect or operation, as manifested by the natural and reasonable meaning of the words employed. *Henderson v. New York* (*Henderson v. Wickham*) 92 U. S. 259, 268, 23 L. ed. 543, 547. If a statute, by its necessary operation, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a state, or imposes a tax on its property outside of such state, then it is unconstitutional and void, although the state legislature may not have

intended to enact an invalid statute. But even if we should assume that the state court would construe the statute of 1907 as intended not to apply to interstate commerce, but only to local or intrastate business, we are, nevertheless, informed by its decision in *Western U. Teleg. Co. v. State*, 82 Ark. 309, 318, 101 S. W. 748, 12 A. & E. Ann. Cas. 82, that, in the opinion of the state court, the statute so construed is valid, and therefore the telegraph company, in order that it may safely continue local business in Arkansas, *must* first pay into the treasury of the state certain amounts based on its *entire capital stock for simply filing its articles of incorporation* with the secretary of state; and if it does not pay the specified fees, based on its entire capital stock, and yet continues to do intrastate

business *in Arkansas, it will incur the prescribed penalty of *one thousand dollars* for continuing to do business in the state, and, in addition, lose its power or right to make any enforceable contract in the state. These are, in effect, *conditions* upon which the telegraph company, lawfully engaged in interstate business, and entitled to be in Arkansas for such business, is permitted to enter the state to do local business within its limits. And these conditions have been prescribed, notwithstanding the company has been permitted for many years, long before the act here in question was passed, to do local business in the state with its permission and acquiescence, and has invested there large sums of money in preparing to serve the public efficiently in that kind of business. The capital stock of the company represents, we repeat, *all* its business, property, and interests throughout the United States and foreign countries, and the requirement that the company, engaged in interstate commerce, to continue to do a local business in Arkansas, and escape the heavy penalties prescribed, must pay a given amount (in this case \$25,050), based on all its capital stock, merely for filing its articles of incorporation with the secretary of state, is, in effect, a direct burden and tax on its interstate business, as well as on its property outside of the state.

The case cannot be distinguished in principle from *Western U. Teleg. Co. v. Kansas* and *Pullman Co. v. Kansas*, recently decided [216 U. S. 1, 56, ante, 355, 378, 30 Sup. Ct. Rep. 190, 232]. The difference in the wording of the Kansas and Arkansas statutes, cannot take the present case out of the ruling of the former cases. On the authority of the Kansas cases, and for the reasons stated in the opinions therein, we hold the statute in question to be unconstitutional and void, as illegally burdening interstate com-

merce and imposing a tax on property beyond the jurisdiction of the state.

Whether the statute of Arkansas is, in any particular, violative of the constitutional guaranty securing the equal protection of the laws, or of the guaranty prohibiting the deprivation of property, except by due process of law, or of any *other [164 constitutional guaranty, it is not necessary now to consider. What has been said is sufficient for the determination of the present case, and we do not at this time go further than is indicated in this opinion. Suffice it to say that the defendant threatens to issue, in his official capacity, and publish, in the newspapers, a proclamation to the effect—no matter upon what specific grounds—that the telegraph company is not authorized, but is forbidden, under penalty, by the laws of Arkansas, from continuing to do local business in that state. Such a proclamation, the court, as well as everyone else, must know, would not only produce confusion in and irreparable damage to the company's business in Arkansas, but would, in effect, declare that the company is not only subject to a prescribed penalty of \$1,000 for continuing to do local business in Arkansas, but is forbidden to make any contract whatever in that state that is enforceable in law or equity. In order to prevent the contemplated or threatened injury to the company, the court below properly made a decree perpetually enjoining the appellant, as secretary of state, his agents and attorneys, from making proclamation that the telegraph company has no authority to continue doing business in Arkansas.

Mr. Justice Moody heard the argument of this case, participated in its decision, and concurs in this opinion.

The CHIEF JUSTICE, Mr. Justice McKenna, and Mr. Justice Holmes dissent.

The decree below must be affirmed.
It is so ordered.

*WESTERN UNION TELEGRAPH [165
COMPANY, Appt.,

v.

P. R. ANDREWS, Clyde Going, R. E. Jeffey,
et al.

(See S. C. Reporter's ed. 165-167.)

States—immunity from suit—enjoining state officers.

Suits to enjoin prosecuting attorneys from bringing actions, under the authority of a

state statute which violates the Federal Constitution, to recover the penalties fixed by that statute for violations of its provisions, are not suits against a state, within the meaning of U. S. Const., 11th Amend., securing to the states immunity from suit.

[For other cases, see *States*, 282-325, in Digest Sup. Ct. 1908.]

[No. 8.]

Argued April 13, 14, 1909. Decided February 21, 1910.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas to review a decree dismissing, on the ground that it was a suit against the state, a bill against prosecuting attorneys to enjoin them from bringing actions, under the authority of a state statute alleged to violate the Federal Constitution, to recover the penalties fixed by that act for violations of its provisions. Reversed.

See same case below, 154 Fed. 95.

The facts are stated in the opinion.

Messrs. **Rush Taggart** and **George B. Rose** argued the cause, and, with Mr. **Henry D. Estabrook**, filed a brief for appellant.

Messrs. **Hal L. Norwood** and **William F. Kirby** argued the cause, and, with Messrs. **Joseph M. Hill** and **Otis T. Wingo**, filed a brief for appellees.

For contentions of counsel, see their briefs as reported in *Ludwig v. Western U. Teleg. Co.* ante, 423.

Mr. Justice **Day** delivered the opinion of the court:

This case grows out of alleged actions about to be taken to enforce against the Western Union Telegraph Company the penalties denounced in the act of May 13, 1907, of the legislature of Arkansas, entitled, "An Act to Permit Foreign Corporations to Do Business in Arkansas, and Fix Fees to Be Paid by All Corporations."

As this act has just been the subject of consideration in *Ludwig v. Western U.*

Teleg. Co. decided to-day [216 U. S. [166 146, ante, 423, 30 Sup. Ct. Rep. 280], it is unnecessary to set out at large the provisions of the statute in question.

The bill in this case was brought against the prosecuting attorneys of the seventeenth judicial circuits of the state of Arkansas to enjoin them from instituting actions against the Western Union Telegraph Company to recover the penalties of \$1,000 for each alleged violation of the act. It was averred in the bill that the defendant prosecuting attorneys would, unless restrained by the order of the court, institute numerous actions, as they had threatened to do, for the recovery of the penalties aforesaid. The learned district judge sustained the demurrer to the bill, and dismissed the case upon the ground that the action is, in effect, a suit against the state of Arkansas, and for that reason prohibited by the 11th Amendment to the Federal Constitution. The sole question presented upon this record is as to the correctness of that ruling.

Since the decision in the circuit court, this court has decided the case of *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441. In that case the previous cases in this court concerning the application of the 11th Amendment of the Constitution were fully considered, and it was then said by Mr. Justice Peckham, speaking for the court:

"The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

This doctrine is precisely applicable to the case at bar. The statute specifically charges the prosecuting attorneys with the duty of bringing actions to recover the penalties. It is averred in the bill, and admitted by the demurrer, that they threatened and were about to commence proceedings for that purpose. *The unconsti- [167 tutionality of the act is averred, and relief is sought against its enforcement. As this case is ruled, upon the question of jurisdiction, by the case of *Ex parte Young*, it is unnecessary to consider the question further. Upon the authority of that case the decree of the Circuit Court dismissing the bill for want of jurisdiction is reversed, and the cause remanded for further proceedings.

Reversed.

NOTE.—On suits against a state—see notes to *Murdock Parlor Grate Co. v. Com.* 8 L.R.A. 399; *Carr v. State*, 11 L.R.A. 370; *Beers v. Arkansas*, 15 L. ed. U. S. 991; *Hans v. Louisiana*, 33 L. ed. U. S. 842; *Tindall v. Wesley*, 13 C. C. A. 165; and *Murray v. Wilson Distilling Co.* 92 C. C. A. 25.

On suits against state officers as suits against state—see notes to *Sanders v. Saxton*, 1 L.R.A.(N.S.) 727; *Ex parte Young*, 13 L.R.A.(N.S.) 932; and *Beers v. Arkansas*, supra.

54 L. ed.

GUILLERMO ALVAREZ Y SANCHEZ,
Appt.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 167-176.)

Treaties — protection of property — quasi public offices.

1. The protection accorded to the property or rights of private individuals by the treaty of peace with Spain, December 10, 1898 (30 Stat. at L. 1754), art. 8, does not extend to the office of solicitor of the courts of first instance of the capital of Porto Rico, lawfully purchased in perpetuity, prior to the occupancy of Porto Rico by the military authorities of the United States, and the cession of that island to the United States.

[For other cases, see *Treaties*, II., in *Digest Sup. Ct.* 1908.]

Treaties — conflict with subsequent statute.

2. An act of Congress passed after a treaty takes effect must be respected and enforced despite any previous or existing treaty provision on the same subject.

[For other cases, see *Treaties*, 20-25, in *Digest Sup. Ct.* 1908.]

Constitutional law — due process of law — abolishing quasi public office — compensation.

3. Congress could, by the act of April 12, 1900 (31 Stat. at L. 77, 79, chap. 191), confiscate without compensation, so far as the Federal Constitution is concerned, the office of solicitor of the courts of first instance of the capital of Porto Rico, lawfully purchased in perpetuity, prior to the occupation of Porto Rico by the military authorities of the United States, and the cession of that island to the United States.

[For other cases, see *Constitutional Law*, 490-499, in *Digest Sup. Ct.* 1908.]

[*Nc.* 69.]

Submitted January 11, 1910. Decided February 21, 1910.

APPEAL from the Court of Claims to review a judgment sustaining a demurrer to the complaint in an action to recover from the United States the value of the office of solicitor of the courts of first instance of the capital of Porto Rico, held by the claimant before and during the war with Spain. Affirmed.

See same case below, 42 Ct. Cl. 458.

The facts are stated in the opinion.

NOTE.—On the construction and operation of treaties—see note to *United States v. The Amistad*, 10 L. ed. U. S. 826.

As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

432

Mr. S. Mallet-Prevost submitted the cause for appellant:

Subsequent to the protocol, and prior to the exchange of ratifications of the treaty of Paris, the United States held Porto Rico by military occupation, which could not affect the sovereignty of Spain, and did not destroy the property in the office of the appellant.

Wheaton, *International Law*, 4th ed. § 545; Vattel, *Nations*, bk. 3, chap. 13, §§ 197, 198; Davis, *International Law*, p. 333.

The mere fact of military occupation did not give the military forces sovereign rights. The rights of military occupation are distinctly limited.

Hall, *International Law*, 2d ed. p. 430.

Nor does the mere fact of military occupation have the effect to abrogate or destroy public offices or the title thereto.

Ketchum v. Buckley, 99 U. S. 188, 25 L. ed. 473.

The treaty of Paris confirmed the appellant's property rights.

De Camara v. Brooke, 135 Fed. 391; 22 Ops. Atty. Gen. 617; *United States v. Reynes*, 9 How. 151, 13 L. ed. 83; *Strother v. Lucas*, 12 Pet. 410-466, 9 L. ed. 1137-1159; *Ponce v. Roman Catholic Apostolic Church*, 210 U. S. 309, 52 L. ed. 1074, 28 Sup. Ct. Rep. 737.

While the United States may take real or personal property whenever its necessities or the exigencies of the occasion demand, the Constitution; in the 5th Amendment, guaranties that when this governmental right is asserted it shall be attended by compensation.

United States v. Lynah, 188 U. S. 445, 465, 47 L. ed. 539, 546, 23 Sup. Ct. Rep. 349.

The provisions of the Constitution relating to life, liberty, and property are applicable to Porto Rico.

Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.

It is immaterial whether the property so taken is of a tangible or an intangible nature.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 329, 37 L. ed. 463, 469, 13 Sup. Ct. Rep. 622; *De Camara v. Brooke*, supra.

Assistant Attorney General John Q. Thompson and Mr. Franklin W. Collins submitted the cause for appellee:

The invading army has the right to confiscate the property of all public enemies.

Hall, *International Law*, 5th ed. pp. 471, 472, 474, 481, 504, 533, 535; Whiting, *War Powers under Const.* 2d ed. pp. 340, 342, 347, 348; 2 Halleck, *International Law*, pp. 75-77; Taylor, *International Law*, p. 539;

216 U. S.

United States v. Pacific R. Co. 120 U. S. 228, 30 L. ed. 634, 7 Sup. Ct. Rep. 490.

Public offices are mere agencies or trusts, and not property as such.

Providence Tool Co. v. Norris, 2 Wall. 55, 17 L. ed. 870; State ex. rel. Atty. Gen. v. Hawkins, 44 Ohio St. 113, 5 N. E. 228; Burroughs v. Peyton, 16 Gratt. 470; Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009.

The office in question is not in harmony with the spirit of our institutions.

Leitensdorfer v. Webb, 20 How. 176, 15 L. ed. 891.

The office was extinguished when Spain's sovereignty ceased, because, being political and appurtenant to the Crown, the office could exist only by virtue of such sovereignty.

State ex rel. Savannah v. Dews, R. M. Charl. (Ga.) 397.

Acquired territory is held by the new sovereignty subject to its institutions, and not to the laws of the former sovereignty.

Vattel, Nations, bk. 1, chap. 19, §§ 210, 244, 245; Vattel, Nations, bk. 2, chap. 7, § 80; Pollard v. Hagan, 3 How. 225, 11 L. ed. 571.

Where the enforcement of the foreign law would contravene some important and established policy of the state of the forum, or where such enforcement would contravene the canons of morality established by civilized society, the enforcement of such foreign laws is forbidden.

Minor, Conf. L. chap. 2, § 5, p. 9; Chicago, R. I. & P. R. Co. v. McGlinn, 114 U. S. 546, 29 L. ed. 271, 5 Sup. Ct. Rep. 1005.

Mr. Justice Harlan delivered the opinion of the court:

The appellant, an inhabitant and citizen of Porto Rico, seeks to recover from the United States the value of a certain office held by him in that island before and during the war with Spain, of which office, it is alleged, he was illegally deprived by the United States. A demurrer to the complaint was sustained and judgment given for 172] the United States, the *opinion of the court of claims being delivered by Chief Justice Peelle. 42 Ct. Cl. 458, 472.

The complaint, which, on demurrer, was adjudged to be bad, presents—using substantially the words of the complaint—the following case:

In the year 1878, the claimant, Sanchez, purchased from one Florenzio Berrios y Lopez, for a valuable consideration, the office known as "numbered procurador [solicitor] of the courts of first instance of the capital of Porto Rico," at Guayamo, in perpetuity, and in the same year the governor general of Porto Rico issued a provisional

patent in his favor. In 1881, the claimant's tenure of the office was approved and confirmed, and a final patent therefor was issued by the King of Spain, in accordance with the laws, practice, and custom of Spain and Porto Rico governing the sale, surrender, and transfer of such an office. The claimant, it is alleged, thereby became vested with all the legal rights and privileges appertaining to the office.

From the date of the provisional patent issued to him until, as will be presently stated, he was deprived of his office, August 31st, 1899, the claimant exercised all the rights and privileges belonging to the office of procurador or solicitor. Under the laws of Spain and Porto Rico, it will be assumed, the office was transferable in perpetuity, and vested the incumbent with exclusive rights and privileges, and, as a consequence thereof, the claimant was entitled, under the laws of Spain in force in Porto Rico, during all the time he held the office, to perform its duties and receive its fees and emoluments, which, prior to August 31st, 1899, averaged, it is alleged, more than \$200 per month, of which he could not be legally deprived except by due process of law.

On the 10th day of December, 1898, [30 Stat. at L. 1754], a treaty of peace between the United States and Spain was concluded, and having been duly ratified by the respective countries, was duly proclaimed April 11th, 1899. The treaty contained these provisions: "Spain cedes to the United States the island of *Porto Rico and other is- [173 lands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrões." Art. 2. "And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be." Art. 8.

A military government was organized in Porto Rico and was maintained there from October, 1898, up to and after April 30th, 1900. On the latter date, General Davis, as military governor, issued what is known as general order 134, containing these, among other, paragraphs: "11. The office of solicitor ('procurador') is abolished. Those who have heretofore practised as such before any court, and are of good repute, shall, in default of lawyers, have the right to be appointed municipal judges or clerks of mu-

nicipal courts. 12. Hereafter, litigants who do not appear personally shall be represented before the supreme court and district courts exclusively by a lawyer, no powers of attorney being necessary therefor; it shall be the duty of the courts to suspend from the practice of his profession any lawyer who shall, without authority, assume to represent a litigant; but this shall not affect the civil or criminal liability which such lawyer may thereby incur. In the municipal courts, litigants may represent themselves or may be represented by an attorney in fact, resident of the place. 13. For the purpose of conducting the proceedings, lawyers may make use of such agents as they may by writing designate to the court." That order was issued without notice to claimant and without any complaint being made as to the manner in which he was exercising his rights or discharging his duties.

174] *On the 12th day of April, 1900, Congress passed (to take effect May 1st, 1900) what is known as the Foraker act, temporarily to provide revenues and civil government for Porto Rico, and for other purposes. That act contained this provision: "Sec. 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico, or by act of Congress of the United States." 31 Stat. at L. 77, 79, chap. 191.

The reasonable value, the claimant alleges, of the "transferable" or "numbered procurador of the courts of first instance of the capital of Porto Rico," in perpetuity, was \$50,000, for which amount he asks judgment. No compensation has ever been made to claimant for the loss of his office, and no action has been taken on his present claim, either by Congress or by any department of the United States government.

Such is the case made by the claimant in his petition.

The claimant proceeds in his petition on the ground that the effect of the 8th section of the act of Congress of April 12th, 1900, was to confiscate, finally and effectually, without compensation to him, the office which he claims to have lawfully purchased in perpetuity, prior to the occupation of Porto Rico by the military forces of the United States, and the cession of that island to this country; which confiscation, he in-

sists, could not have been legally done without violating the treaty between the United States and Spain which was in force when the act of 1900 was passed.

We do not think that the present claim is covered by the treaty. It is true that a treaty negotiated by the United States is a part of the supreme law of the land, and that it is *expressly provided in the [175 treaty in question that it "cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds . . . of private individuals." But, clearly, those provisions have no reference to public or quasi public stations, the functions and duties of which it is the province of government to regulate or control for the welfare of the people, even where the incumbents of such stations are permitted, while in the discharge of their duties, to earn and receive emoluments or fees for services rendered by them. The words in the treaty, "property . . . of private individuals," evidently referred to ordinary private property, of present, ascertainable value, and capable of being transferred between man and man.

When the United States, in the progress of the war with Spain, took firm, military possession of Porto Rico, and the sovereignty of Spain over that island and its inhabitants and their property was displaced, the United States, the new sovereign, found that some persons claimed to have purchased, to hold in perpetuity, and to be entitled, without regard to the public will, to discharge the duties of certain offices or positions which were not strictly private positions in which the public had no interest. They were offices of a quasi public nature, in that the incumbents were officers of court, and in a material sense connected with the administration of justice in tribunals created by government for the benefit of the public. It is inconceivable that the United States, when it agreed in the treaty not to impair the property or rights of private individuals, intended to recognize, or to feel itself bound to recognize, the salability of such positions in perpetuity, or to so restrict its sovereign authority that it could not, consistently with the treaty, abolish a system that was entirely foreign to the conceptions of the American people, and inconsistent with the spirit of our institutions. It is true that Congress did not, we assume, intend by the Foraker act to modify the treaty, but, if that act were deemed inconsistent with the treaty, the act would *pre- [176 vail; for an act of Congress, passed after a treaty takes effect, must be respected and enforced, despite any previous or existing treaty provision on the same subject. *J. Ribas y Hijo v. United States*, 194 U. S.

315, 324, 48 L. ed. 994, 996, 24 Sup. Ct. Rep. 727, and authorities cited. If, originally, the claimant lawfully purchased, in perpetuity, the office of solicitor (procurador) and held it when Porto Rico was acquired by the United States, he acquired and held it subject, necessarily, to the power of the United States to abolish it whenever it conceived that the public interest demanded that to be done. The intention of Congress in relation to the office of solicitor or procurador by the Foraker act cannot be doubted;—indeed, its abolition by Congress is made the ground of the present action and claim. Upon the acquisition of Porto Rico, that island was placed under military government, subject, until Congress acted in the premises, to the authority of the President as Commander in Chief acting under the Constitution and laws of the United States. Porto Rico was made a department by order of the President on the 18th of October, 1898. By his sanction, it must be presumed, general order No. 134 was made, abolishing the office of solicitor or procurador. That order was recognized by Congress, if such recognition was essential to its validity, when Congress, by the Foraker act of 1900, provided that the laws and ordinances of Porto Rico, then in force, should continue in full force and effect, *except* “as altered or modified by military orders in force” when that act was passed. It is clear that claimant is not entitled to be compensated for his office by the United States because of its exercise of an authority unquestionably possessed by it as the lawful sovereign of the island and its inhabitants. The abolition of the office was not, we think, in violation of any provision of the Constitution, nor did it infringe any right of property which the claimant could assert as against the United States. See *O'Reilly de Camara v. Brooke*, 209 U. S. 45, 49, 52 L. ed. 676, 677, 28 Sup. Ct. Rep. 439. The judgment of the Court of Claims must be affirmed.

It is so ordered.

177] *PRESIDENT, MANAGERS, AND COMPANY OF THE MONONGAHELA BRIDGE COMPANY, Plffs. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 177-195.)

Constitutional law — delegation of power.

1. Legislative and judicial powers are not unconstitutionally delegated to the Secretary of War by the provision of the river and harbor act of March 3, 1899 (30 Stat. at L. 1121, 1153, chap. 425, U. S. Comp. 54 L. ed.

Stat. 1901, p. 3545), § 18, empowering that official, when satisfied, after a hearing of the parties interested, that a bridge over a navigable water way of the United States is an unreasonable obstruction to navigation, to require such changes or alterations as will render navigation reasonably free, easy, and unobstructed.

[For other cases, see Constitutional Law, 139-171, in Digest Sup. Ct. 1908.]

Commerce — Federal control over bridges — power of Secretary of War.

2. The Secretary of War is not invested with arbitrary power in the premises by the provision of the river and harbor act of March 3, 1899, § 18, empowering him, when satisfied that a bridge over an interstate water way is an unreasonable obstruction to navigation, to require such changes or alterations as will render navigation reasonably free, easy, and unobstructed, since he is bound, before making any decision or taking final action, to notify the parties interested of any proposed investigation by him, to give them an opportunity to be heard, and to allow reasonable time to make such alterations as he finds to be necessary to free navigation.

[For other cases, see Commerce, II. c, in Digest Sup. Ct. 1908.]

Eminent domain — what is a taking — removing obstruction to navigation.

3. The action of the Secretary of War in requiring changes in a bridge over an interstate water way within a specified time, and after the parties have been heard, conformably to the act of March 3, 1899, § 18, enacted to secure navigation against unreasonable obstruction, is not such a taking of private property for public use as must, under the Federal Constitution, be preceded by making, or sufficiently securing, compensation to the owners of the bridge.

[For other cases, see Eminent Domain, 96-124a, in Digest Sup. Ct. 1908.]

Commerce — Federal control over bridges.

4. A bridge over an interstate water way, although erected under the sanction of a state, and although not an illegal structure,

NOTE. — As to what constitutes a taking of private property for public use—see notes to *Memphis & C. R. Co. v. Birmingham*, S. & T. River R. Co. 18 L.R.A. 166; *D. M. Osborne & Co. v. Missouri P. R. Co.* 37 L. ed. U. S. 156; *Sweet v. Rechel*, 40 L. ed. U. S. 188; *A. Backus Jr. & Sons v. Fort Street Union Depot Co.* 42 L. ed. U. S. 853; and *High Bridge Lumber Co. v. United States*, 16 C. C. A. 468.

On the power of Congress to regulate commerce—see notes to *State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co.* 6 L.R.A. 579; *Bullard v. Northern P. R. Co.* 11 L.R.A. 246; *Re Wilson*, 12 L.R.A. 624; *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Brown v. Maryland*, 6 L. ed. U. S. 678; *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; and *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041.

or an unreasonable obstruction to navigation in the condition of commerce and navigation at the date of its erection, must be taken as having been constructed with knowledge of the paramount power of Congress to regulate commerce among the states, and subject to the condition or possibility that Congress might, at some time after its construction, and for the protection or benefit of the public, exert its constitutional power to protect free navigation as it then was against unreasonable obstructions.

[For other cases, see Commerce, II. c, in Digest Sup. Ct. 1908.]

Commerce — Federal control over bridges — compensation for alteration.

5. The mere silence of Congress and its failure directly to interfere and prevent the original construction of a bridge erected under the sanction of a state, over an interstate water way, imposes no constitutional obligation upon the United States to make compensation for subsequent changes or alterations which the public good, in its judgment, requires.

[For other cases, see Commerce, II. c; Eminent Domain, 128-137, in Digest Sup. Ct. 1908.]

Commerce — Federal control over bridges — removing obstruction to navigation — hearing.

6. A bridge company convicted for failure to make the alterations in a bridge over an interstate water way which the Secretary of War, acting under the authority of the act of March 3, 1899, § 18, requires, was afforded the reasonable opportunity to be heard, contemplated by that law, upon the question whether the bridge was, in fact, an unreasonable obstruction to navigation, where the company had full notice of the action of the officer of Engineers, who, under the order of the Secretary, made a tentative examination of the facts, and appeared at the regular final hearing before that officer, with liberty to contest the facts, and introduce any evidence pertinent to the case, and the decision of the Secretary of War was based on the Engineer officer's report of all the facts adduced before him, and which constituted the basis of his conclusion that the bridge was an unreasonable obstruction to navigation.

[For other cases, see Commerce, II. c, in Digest Sup. Ct. 1908.]

[No. 91.]

Argued January 19, 1910. Decided February 21, 1910.

IN ERROR to the District Court of the United States for the Western District of Pennsylvania to review a conviction of a bridge company for failing to make the alterations in a bridge over an interstate water way, which the Secretary of War required. Affirmed.

See same case below, on motion for new trial, 160 Fed. 712.

The facts are stated in the opinion.

Mr. D. T. Watson argued the cause, and, with Mr. James H. Beal, filed a brief for plaintiffs in error:

The court below erred in refusing the offer of the bridge company to prove that the bridge was not an unreasonable obstruction to the navigation of the river, and that the changes in the bridge, ordered by the Secretary of War, were not necessary; and in also ruling that the proceedings before the Secretary of War were conclusive, and not subject to the examination of the courts.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 707, 28 L. ed. 571, 4 Sup. Ct. Rep. 663; Twining v. New Jersey, 211 U. S. 78, 101, 53 L. ed. 97, 107, 29 Sup. Ct. Rep. 14; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234, 236, 41 L. ed. 979, 983, 984, 17 Sup. Ct. Rep. 581; Londoner v. Denver, 210 U. S. 386, 52 L. ed. 1112, 28 Sup. Ct. Rep. 708; Kilbourn v. Thompson, 103 U. S. 168, 182, 26 L. ed. 377, 384; Rider v. United States, 178 U. S. 251, 44 L. ed. 1057, 20 Sup. Ct. Rep. 838; Salem v. Eastern R. Co. 98 Mass. 431, 96 Am. Dec. 650; Miller v. Horton, 152 Mass. 540, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100; Stone v. Heath, 179 Mass. 385, 60 N. E. 975; Lowe v. Conroy, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 A. & E. Ann. Cas. 341; Pearson v. Zehr, 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854; State v. Main, 69 Conn. 123, 36 L.R.A. 623, 61 Am. St. Rep. 30, 37 Atl. 80; Gaines v. Waters, 64 Ark. 612, 44 S. W. 353; McGehee, Due Process of Law, pp. 372-376; North American Cold Storage Co. v. Chicago, 211 U. S. 306, 53 L. ed. 195, 29 Sup. Ct. Rep. 101; Fisher v. McGirr, 1 Gray, 36, 61 Am. Dec. 381; Com. v. New Bedford Bridge Co. 2 Gray, 339; Rosenberger v. Harris, 136 Fed. 1003; United States ex rel. Turner v. Williams, 194 U. S. 295, 48 L. ed. 986, 24 Sup. Ct. Rep. 719; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; People ex rel. Copcutt v. Board of Health, 140 N. Y. 1, 23 L.R.A. 481, 37 Am. St. Rep. 522, 35 N. E. 320.

Whether a nuisance exists is always ultimately a mixed question of law and of fact, to be determined by a court.

Cooley, Const. Lim. 7th ed. 883, and note; Dill. Mun. Corp. 4th ed. ¶ 374; Wood, Nuisances, §§ 22, 483, 493; Frostburg v. Hitchins, 99 Md. 628, 59 Atl. 49; Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203; Teass v. St. Albans, 38 W. Va. 19, 19 L.R.A. 802, 17 S. E. 400; People ex rel. Copcutt v. Board of Health, supra; Yates v. Mil-

waukeee, 10 Wall. 497, 19 L. ed. 984; Mississippi & M. R. Co. v. Ward, 2 Black, 485, 492, 17 L. ed. 311, 314; Health Dept. v. Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833.

A public trial, such as U. S. Const. art. 3, and the 6th Amendment guarantee to the owner of the bridge, being charged with a crime, necessarily involves the question of the guilt or innocence of the defendant, and the courts will not pass arbitrarily and convict arbitrarily when the defendant offers to prove that he is not guilty of maintaining a nuisance, merely on the *ipse dixit* of the Secretary of War to the contrary. The courts must and will, of themselves, investigate and determine that question.

Callan v. Wilson, 127 U. S. 540, 549, 557, 32 L. ed. 223, 226, 228, 8 Sup. Ct. Rep. 1301; Schiek v. United States, 195 U. S. 65, 70, 49 L. ed. 99, 102, 24 Sup. Ct. Rep. 826, 1 A. & E. Ann. Cas. 585; Ex parte Milligan, 4 Wall. 3, 121, 18 L. ed. 281, 295; Schaezlein v. Cabaniss, 135 Cal. 466, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755; Health Dept. v. Trinity Church, *supra*.

At common law the owner of a bridge charged with maintaining a nuisance was entitled to a jury trial on the question whether the bridge was an unreasonable obstruction to navigation.

R. v. Betts, 4 Cox, C. C. 213; R. v. Burt, 11 Cox, C. C. 399; R. v. Russell, 6 Barn. & C. 587; R. v. Russell, 3 El. & Bl. 950; R. v. Tindall, 6 Ad. & El. 143.

If the court below be correct, and the power rests with the Secretary to establish his own test and law, it may be a varying test; this would seem to be utterly at variance with our system of law.

Yiek Wo. v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Baltimore v. Radeeke, 49 Md. 217, 33 Am. Rep. 239; Louisville & N. R. Co. v. Com. 99 Ky. 136, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866.

The Federal courts have jurisdiction to review the decisions of the executive departments on questions of law or of mixed law and fact, though no right of review is expressly given by statute.

Wisconsin C. R. Co. v. Forsythe, 159 U. S. 46, 61, 40 L. ed. 71, 76, 15 Sup. Ct. Rep. 1020; American School v. McAnnulty, 187 U. S. 94, 108, 110, 47 L. ed. 90, 96, 97, 23 Sup. Ct. Rep. 33; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 314, 47 L. ed. 1064, 1072, 23 Sup. Ct. Rep. 692; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 323, 41 L. ed. 175, 176, 54 L. ed.

16 Sup. Ct. Rep. 1018; Johnson v. Drew, 171 U. S. 93, 100, 43 L. ed. 88, 91, 18 Sup. Ct. Rep. 800; Hardin v. Jordan, 140 U. S. 377, 401, 35 L. ed. 431, 440, 11 Sup. Ct. Rep. 808, 838; Williamson v. United States, 207 U. S. 425, 462, 52 L. ed. 278, 297, 28 Sup. Ct. Rep. 163; United States v. United Verde Copper Co. 196 U. S. 207, 214, 215, 49 L. ed. 449, 452, 453, 24 Sup. Ct. Rep. 222.

Due process of law is a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.

Hovey v. Elliott, 167 U. S. 418, 42 L. ed. 221, 17 Sup. Ct. Rep. 841.

Parties are entitled to a fair hearing before judgment, not merely to an opportunity to convince a judge who had already prejudged the case.

Stitzel's Estate, 221 Pa. 230, 18 L.R.A. (N.S.) 284, 70 Atl. 749; Reynolds v. United States, 98 U. S. 145, 154, 25 L. ed. 244, 246.

This court has a number of times established the rule as to whether a bridge is or is not an unreasonable obstruction to navigation, and there has been no variation in that rule in all the cases where the question was raised.

Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 591, 14 L. ed. 249, 280; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 682, 27 L. ed. 442, 444, 2 Sup. Ct. Rep. 185; Newport & C. Bridge Co. v. United States, 105 U. S. 470, 493, 496, 26 L. ed. 1143, 1151, 1152; Huse v. Glover, 119 U. S. 543, 547, 30 L. ed. 487, 489, 7 Sup. Ct. Rep. 313; Gilman v. Philadelphia, 3 Wall. 713, 729, 18 L. ed. 96, 100; Cardwell v. American River Bridge Co. 113 U. S. 205, 209, 28 L. ed. 959, 960, 5 Sup. Ct. Rep. 423; Mississippi & M. R. Co. v. Ward, 2 Black, 485, 494, 495, 17 L. ed. 311, 315, 316; Monongahela Nav. Co. v. United States, 148 U. S. 325, 37 L. ed. 467, 13 Sup. Ct. Rep. 622; Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365, 368, 41 L. ed. 747, 748, 17 Sup. Ct. Rep. 357.

There is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.

Garfield v. United States, 211 U. S. 249, 262, 53 L. ed. 168, 174, 29 Sup. Ct. Rep. 62.

If the act of 1899 should be so construed as to authorize the Secretary of War to apply his own rule in determining whether a bridge was an unreasonable obstruction to navigation, and that rule was different from the rule established in the Escanaba

Transportation Case, then the act of Congress was unconstitutional, because it vests in one and the same person the legislative power to make the law and the judicial power to determine whether the defendant had violated the law; and this is inconsistent with our theory of government.

Wong Wing v. United States, 163 U. S. 228, 237, 41 L. ed. 140, 143, 16 Sup. Ct. Rep. 977; *United States ex rel. Turner v. Williams*, 194 U. S. 279, 291, 295, 48 L. ed. 979, 984, 986, 24 Sup. Ct. Rep. 719; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 485, 38 L. ed. 1047, 1060, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 457, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Rosenberger v. Harris*, supra.

If the statute is construed as was done in the court below, and the Secretary makes the law and then applies it to the facts and finally decides, then it is unconstitutional because it does not furnish an ultimate resort to the courts for the bridge owner whose bridge is threatened.

Public Clearing House v. Coyne, 194 U. S. 515, 48 L. ed. 1101, 24 Sup. Ct. Rep. 789; *Wong Wing v. United States*; *United States ex rel. Turner v. Williams*; *Interstate Commerce Commission v. Brimson*; *Chicago, M. & St. P. R. Co. v. Minnesota*; and *Rosenberger v. Harris*, supra.

If, on the contrary, the Secretary must follow the rule established by this court in the *Escanaba Case*, then the Secretary acts in a judicial capacity, and the act is unconstitutional because it delegates to him a judicial power, and gives him power to decide questions of law, which decision of the Secretary the court below held to be final.

Cooley, Const. Lim. 7th ed. 883, and note; *Dill. Mun. Corp.* 4th ed. ¶ 374; *Wood*, Nuisances, §§ 22, 483, 493; *Frostburg v. Hitchins*; *Hutton v. Camden*; *Teass v. St. Albans*; *People ex rel. Copcutt v. Board of Health*; *Yates v. Milwaukee*; and *Mississippi & M. R. Co. v. Ward*,—supra.

The failure to obey the Secretary of War is punished by excessive fines.

Willeox v. Consolidated Gas Co. 212 U. S. 19, 53, 54, 53 L. ed. 382, 400, 29 Sup. Ct. Rep. 192; *Ex parte Young*, 209 U. S. 123, 163, 168, 52 L. ed. 714, 730, 732, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441.

The power delegated by the act of 1899 was not merely executive.

United States v. Matthews, 146 Fed. 306; *United States v. Ormsbee*, 74 Fed. 207; *United States v. Grimaud*, 170 Fed. 205.

The act is unconstitutional because it really takes private property for public use without compensation.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *West Chicago Street R. Co. v. Illinois*, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518.

Pennsylvania has never complained that the bridge company had disregarded the terms of its charter forbidding interference with navigation, and this, so far as the charter is concerned, is conclusive on the United States.

People v. Rensselaer & S. R. Co. 15 Wend. 131, 30 Am. Dec. 33; *Wilson v. Black Bird Creek Marsh Co.* 2 Pet. 250, 7 L. ed. 414; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 2, 31 L. ed. 630, 8 Sup. Ct. Rep. 811; *Lake Shore & M. S. R. Co. v. Ohio*, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Mobile County v. Kimball*, 102 U. S. 697, 26 L. ed. 238.

Solicitor General Bowers argued the cause and filed a brief for defendant in error:

When plaintiff in error was chartered and when its bridge was built the public already possessed, as a matter of law, and they have since had—certainly against the plaintiff in error—all the rights to use and improve the Monongahela river for navigation which belong to the public in navigable rivers generally; and so this case is directly within *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *Union Canal Co. v. Landis*, 9 Watts, 232; *Coovert v. O'Conner*, 8 Watts, 470; *Dubois v. Glaub*, 52 Pa. 242; *People v. Gutchess*, 48 Barb. 656; *Pierrepoint v. Lovelless*, 72 N. Y. 216; *State v. Dibble*, 49 N. C. (4 Jones, L.) 111; *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; *Dugan v. Bridge Co.* 27 Pa. 309, 67 Am. Dec. 464; *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 595, 52 L. ed. 630, 635, 28 Sup. Ct. Rep. 341.

The act of Congress properly may, and in fact does, make the Secretary of War's decision conclusive that the bridge is an unreasonable obstruction. Plaintiff in error had no right to retry that question before the jury in this proceeding for violation of the Secretary's order.

Marshall Field & Co. v. Clark, 143 U. S. 649, 693, 36 L. ed. 294, 310, 12 Sup. Ct. Rep. 495; *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249.

The bridge never became, in a legal view, part of the national road from Cumberland, Maryland; and if it had, the order of the Secretary of War, requiring changes in the bridge for avoidance of obstruction of navigation, would still be valid.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 586, 50 L. ed. 596, 606, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; New Orleans Gaslight Co. v. Drainage Commission, *supra*.

Mr. Justice Harlan delivered the opinion of the court:

This is a criminal information by the United States under § 18 of the river and harbor act of March 3d, 1899, against the president, managers, and company of the Monongahela Bridge Company, a Pennsylvania corporation.

That section is as follows: "That whenever the Secretary of War shall have good reason to believe that any railroad or 186] *other bridge now constructed, or which may hereafter be constructed, over any of the navigable water ways of the United States, is an unreasonable obstruction to the free navigation of such waters, on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and, in giving such notice, he shall specify the changes recommended by the Chief of Engineers, that are required to be made, and shall prescribe, in each case, a reasonable time in which to make them. If, at the end of such time, the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, wilfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars; and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so of-

fending to the penalties above prescribed: Provided, That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court, either by the United States or by the defendants." 30 Stat. at L. 1121, 1153, chap. 425, U. S. Comp. Stat. 1901, p. 3545.

*The jury returned a verdict of guilty, and a motion in arrest of judgment was made upon various grounds, the principal one being that the section of the above act of 1899 was unconstitutional, null, and void. That motion was denied, and a motion for new trial having been overruled, the defendant was adjudged to pay to the United States a fine of \$1,000 and the costs of prosecution. From that judgment the case comes directly to this court under the authority of the proviso in the above act. § 18.

It is essential to a clear understanding of the questions raised by the bridge company that we state certain facts disclosed by the record.

The bridge company was incorporated under an act passed by the general assembly of Pennsylvania in 1830; and in 1833, by authority of that commonwealth, it constructed the bridge in question over the Monongahela river. The structure is known as the Brownsville bridge, between the towns of West Brownsville and Bridgeport. The charter of the company provided, among other things, that "the erection of said bridge shall not obstruct the navigation of said river so as to endanger the passage of rafts, steamboats, or other water craft." Pa. Laws 1829-30, p. 105.

On the 29th of April, 1903, the Secretary of War, Mr. Root, was petitioned by numerous companies and individuals to have an investigation made of the bridge "as to its obstruction of navigation," and if it was found to be an obstruction of that character, "to have the means provided to compel it to be raised or equipped in such a way to relieve river people from the obstruction, making the height necessary to allow free navigation." The petition proceeded: "The coal in pools, one, two, three and four below Brownsville has been practically exhausted, and the Pittsburg district will, at no distant date, be forced to get its supply above Brownsville, in the fifth pool. The petitioners recognize how impossible it will be to build or improve lock No. 3 unless the elevation of the Brownsville bridge be made at once." This petition was *referred [188 by the chief of Engineers to Major Sibert of the Corps of Engineers, for investigation and report. The latter officer reported, among other facts, that ". . . 4. The height of

this bridge is such that the average of the boats engaged in interstate commerce between the states referred to above [Pennsylvania and West Virginia] are prevented from passing under the bridge at a stage of water materially less than that which floods the walls of the locks of the Monongahela river. 5. A bridge that prevents the use of the locks owned by the government of the United States until the same are placed out of service by means of high water is, in the opinion of this office, an unreasonable obstruction to navigation. . . . 7. This bridge is an old, covered, wooden bridge, constructed some time between 1830 and 1840. 8. In the opinion of this office, this bridge is one that certainly requires action under § 18, river and harbor act of March 3, 1899. 9. It is therefore respectfully recommended that it be proceeded against in the manner specified under the law referred to above, both on account of insufficient height and length of span, and that, in the notice for a hearing in the case of this bridge, the changes proposed be such as to give a least clearance 52 feet under a channel span of 400 feet wide; the length of side spans to be determined from the developments at the hearing. It is considered that one and one-half years is a reasonable time in which to make the necessary changes in this bridge." The Chief of Engineers indorsed that report and recommended that the papers be returned to Major Sibert, with instructions to hold a public hearing, after due notice to interested parties, as required by the law and the orders of the War Department.

Under date of May 23d, 1904, Major Sibert made a report to the Chief of Engineers, from which it appears that the parties interested were given a hearing, all parties being present. That report stated: "3. These hearings, as this office understands it, were held for the purpose of securing and forwarding such information as would enable the Secretary of War to decide whether or not there is good reason to believe 189] that the *bridge in question is an unreasonable obstruction to navigation. 4. Stripped of all unnecessary verbiage the question for determination is: Is there good reason to believe that a bridge that prevents the better class of towboats actually navigating the Monongahela river, the commerce of which stream is about 10,000,000 tons annually, from passing under it for 17.7 days per year, and prevents the packets actually navigating said stream from passing under it for 52.1 days per year, all as determined by the official records kept by the United States, an unreasonable obstruction to navigation? The above days are days that the boats in question cannot pass under the

bridge, but can pass through the locks that the government of the United States has provided for their use. Would a railroad company consider that there was good reason to believe that its traffic was unreasonably obstructed by another highway if its passenger and express business were absolutely stopped for 52.1 days per year and its freight business so stopped for 17.7 days per year, when the same could be overcome at a reasonable cost to the obstructing highway, which latter highway was the last built? . . . This office is of the opinion that the following should constitute the grounds upon which a conclusion should be reached as to whether or not any particular bridge unreasonably obstructs navigation: 1st. Every bridge should be so constructed as to permit the passage under it or through it, with reasonable safety, of the average-sized boat actually navigating the stream, at all practical stages of water. 2d. Any bridge that does not permit the passage of such boat at such stages of water needlessly obstructs the use of the river highway, and exists under conditions that are not reasonable, since it is impracticable to raise or lower a stream, and it is always practicable to either build a bridge high enough and of sufficient width of span to allow the passage of such boats at such times as mentioned above, or to place a draw in the bridge. 3d. Where the topographical conditions are such that bridges can be made of such heights, without prohibitive cost, as to permit, at all navigable stages of *water, the passage of boats [190 best suited to the river commerce, it is for the best interest of both the land traffic and the river traffic that bridges be so constructed. . . . Based upon the foregoing, the essential features of which are the facts that towboat navigation with the better class of boats actually in use is prevented for 17.7 days of the year from passing under this bridge when the same could pass through the locks Congress has provided for such navigation, and that the packets actually navigating this stream are prevented from passing under this bridge at such time for 52.1 days in the year, and from the fact that Congress has specified in the two acts passed in the present year that a least clearance of 54 feet is needed for the navigation of this pool, whereas the bridge in question has only 40.2 feet, this office is of the opinion that there is good reason to believe that the bridge owned by the Monongahela Bridge Company, at Brownsville, Pennsylvania, is an unreasonable obstruction to navigation, and therefore respectfully recommends that the Monongahela Bridge Company (George W. Lenhart, president, Brownsville, Pennsylvania, be

given notice to make the following changes in its bridge crossing the Monongahela river at Brownsville, Pennsylvania, on or before August 1, 1905, to wit: That the bridge be so altered as to give a channel span of not less than 390 feet in length between the face of the right abutment, as now located, and the center of the pier; and that the said channel span shall give a clearance height at the left, or pier, end, of not less than 52 feet, and at the right, or abutment, end, of not less than 54 feet above the fourth pool of the Monongahela river. This will permit of the construction of the bridge in accordance with plan as shown in sheet 3, exhibit B, submitted by the bridge company."

The Chief of Engineers concurred in the views expressed and conclusions reached by Major Sibert, and recommended that notice be served accordingly.

Subsequently, August 10th, 1904, the Secretary of War, Mr. Taft, issued the following official notice, addressed to the bridge [191] company: "Whereas, the Secretary of War has good reason to believe that the bridge of the Monongahela Bridge Company across the Monongahela river, at Bridge street, in the borough of Bridgeport, Pennsylvania, and commonly known as the Brownsville bridge, is an unreasonable obstruction to the free navigation of the said Monongahela river (which is one of the navigable water ways of the United States), on account of insufficient height and length of span; and whereas, the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation under it reasonably free, easy, and unobstructed, to wit: so alter said bridge as to give a channel span of not less than 390 feet in length between the face of the right abutment, as now located, and the center of the pier; and that the said channel span shall give a clearance height of not less than 52 feet above the fourth pool of the Monongahela river; and whereas, to August 1, 1905, is a reasonable time in which to alter the said bridge, as described above: Now, therefore, in obedience to, and by virtue of, § 18 of an act of Congress of the United States, entitled, 'An Act Making Appropriations for the Construction, Repair, and Preservation of Certain Public Works on Rivers and Harbors, and for Other Purposes,' approved March 3, 1899, I, William H. Taft, Secretary of War, do hereby notify the said Monongahela Bridge Company to alter the said bridge as described above, and prescribe that said alterations shall be made and completed on or before August 1, 1905." This notice was duly served August 15th, 1904, on the bridge company, and the com-

pany failed to comply with the direction given by the Secretary of War.

Thereupon the present information was filed, charging the bridge company with having wilfully failed, refused, and neglected to comply with the above order of the Secretary of War.

In view of this statement, an extended examination of the authorities would seem to be unnecessary; for substantially *all [192 the material questions raised on this writ of error are, we think, concluded by former decisions cited in the margin.†

This court has heretofore held, upon full consideration and after an examination of the adjudged cases:

1. That the 18th section of the river and harbor act of March 3d, 1899, could not reasonably be taken as a delegation of legislative and judicial power to an executive department of the government; that the statute did not, in any real, constitutional sense, delegate to the Secretary of War any power that must, under our system of government, be exclusively exercised either by the legislative or judicial branch of the government; that, under its paramount power to regulate commerce on and over the navigable waters of the United States, Congress could require that such waters be freed from unreasonable obstructions to navigation; that the statute in effect prescribed the general rule, applicable to all

†Union Bridge Co. v. United States, 204 U. S. 369, 51 L. ed. 528, 27 Sup. Ct. Rep. 367; The Aurora v. United States, 7 Cranch, 382, 3 L. ed. 378; Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St. 77; Moers v. Reading, 21 Pa. 188; Locke's Appeal, 72 Pa. 491, 498, 13 Am. Rep. 716; Butterfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518; Dugan v. Bridge Co. 27 Pa. 303, 67 Am. Dec. 464; Cooke v. Boston & L. R. Corp. 133 Mass. 185; Lake Erie & W. R. Co. v. Cloghish, 143 Ind. 347, 42 N. E. 743; Lake Erie & W. R. Co. v. Smith, 61 Fed. 885; Indiana ex rel. Muncie v. Lake Erie & W. R. Co. 83 Fed. 284, 287; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341.

navigable waters, that free navigation should not be hampered by unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects; that instead of exerting its power by direct legislation in each case of a bridge alleged to constitute an unreasonable obstruction to navigation, Congress charged the Secretary of War with the duty of ascertaining, in each case, upon notice to the parties concerned, whether the particular 193] *bridge came within the general rule prescribed; that any other method was impracticable, in view of the vast and varied interests of the nation, requiring legislation from time to time; that the Secretary of War, proceeding under the act of 1899, could not be said to exercise strictly legislative or judicial power any more than when, upon investigation, the head of a department ascertains, under the direction of Congress, whether a particular applicant for a pension belonged to a class of persons who, under a general rule prescribed by Congress, were entitled to pensions; and that a denial to Congress of authority, under the Constitution, to delegate to an executive department or officer the power to determine some fact or some state of things upon which the enforcement of its enactment may depend, would often render it impossible or impracticable to conduct the public business, and to successfully carry on the operations of the government.

2. That the act of 1899 did not invest the Secretary of War with arbitrary power in the premises, since, in reference to any bridge alleged to constitute an unreasonable obstruction to navigation, he was bound, before making any decision or taking final action, to notify the parties interested of any proposed investigation by him, give them an opportunity to be heard, and allow reasonable time to make such alterations as he found to be necessary to free navigation.

3. That to require alterations or changes in a particular bridge, within a specified time, and after the parties have been heard, was not such a taking of private property for public use as must, under the Constitution, be preceded by the making of or sufficiently securing compensation to the owners of the bridge.

Although the Brownsville bridge was originally constructed under the authority of the commonwealth of Pennsylvania, and may not, at the date of its erection, have been an illegal structure or an unreasonable obstruction to navigation in the condition, at that time, of commerce and navigation on the Monongahela river, the bridge must 194] be taken as having been *constructed with knowledge, on the part of all, of the paramount power of Congress to reg-

ulate commerce among the states, and subject to the condition or possibility that Congress might, at some time after its construction, and for the protection or benefit of the public, exert its constitutional power to protect free navigation as it then was against unreasonable obstructions; that the mere silence of Congress, and its failure to directly interfere and prevent the original construction of the bridge, under the authority of Pennsylvania, imposed no constitutional obligation on the United States to make compensation for subsequent changes or alterations which the public good in its judgment, required to be made.

The adjudged cases fully sustain the judgment of the court below. We are asked to consider whether the opinion in *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367,—the case upon which the government mainly relies,—should not be modified. We perceive no reason for so doing. We adhere to what was said in that case.

It is urgently insisted that the defendant did not have such a hearing as it was entitled to have under the law on the question whether the bridge was in fact an unreasonable obstruction to navigation. This is a mistake. The bridge company had full notice of the action of the Engineer officer, who, under the order of the Secretary of War, made a tentative examination of the facts, and it appeared at the regular, final hearing before that officer, with liberty to contest the facts and introduce any evidence pertinent to the case. It does not appear that it offered any evidence that was rejected. It was not subjected to any mode of procedure that interfered in any degree with a full and fair disclosure of the material facts. The Engineer officer, after the hearing before him,—the bridge company being represented at the hearing,—found that the bridge was an unreasonable obstruction to navigation. He reported to the Secretary of War all the facts that were adduced before him, and which constituted the basis of his conclusion. And the decision of the Secretary was based on *the facts so reported to him. [195] That, it must be assumed on this record. It does not appear that the Secretary disregarded the facts, or that he acted in an arbitrary manner, or that he pursued any method not contemplated by Congress. It was not for the jury to weigh the evidence and determine, according to *their* judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the Secretary. That was immaterial; for Congress intended by its legislation to give the same force and effect to

the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that executive officers conform their action to the mode prescribed by Congress. Learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary might be the action of executive officers proceeding under an act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise. Suffice it to say that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property.

We find no error of law in the record, and the judgment must be affirmed.

It is so ordered.

Mr. Justice Brewer dissents.

196] *CITIZENS' CENTRAL NATIONAL BANK OF NEW YORK, Plff. in Err.,
v.

R. ROSS APPLETON, Receiver of the Cooper Exchange Bank.

(See S. C. Reporter's ed. 196-206.)

National bank — powers — ultra vires as defense.

A national bank which, in pursuance of a previous agreement with its debtor, that he will devote to the discharge of his indebtedness, a part of the proceeds of a loan to be obtained by him from another bank, requests the making of such loan, and guarantees its payment at maturity, must account to the lending bank for the sum which it receives for its own use in the execution of the agreement, even though such guaranty

is beyond its powers under the national banking statutes.

[For other cases, see Banks, IV. g, in Digest Sup. Ct. 1908.]

[No. 113.]

Argued January 27, 28, 1910. Decided February 21, 1910.

IN ERROR to the Supreme Court of the State of New York in and for the County of New York, to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which had reversed a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of the Supreme Court at Special Term, which dismissed, on demurrer, an action to recover from a national bank a sum of money received by it out of the proceeds of a loan made by another bank to a debtor of the defendant bank, at its request, and upon its guaranty. Affirmed.

See same case below, in court of appeals, 190 N. Y. 417, 83 N. E. 470; in supreme court, 116 App. Div. 404, 101 N. Y. Supp. 1027.

The facts are stated in the opinion.

Mr. John A. Garver argued the cause, and, with Mr. James M. Beek, filed a brief for plaintiff in error:

The contract sued on was *ultra vires* and void, and no action upon it can be maintained.

Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co. 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; Oregon R. & Nav. Co. v. Oregonian R. Co. 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409; Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393, 36 L. ed. 738, 12 Sup. Ct. Rep. 953; Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173; McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 553, 43 L. ed. 1082, 19 Sup. Ct. Rep. 817.

It makes no difference that the defendant may have received benefit from the contract.

California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; First Nat. Bank v. Hawkins, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. Rep. 613.

NOTE. — On estoppel of corporation to set up plea of *ultra vires*—see notes to Miller v. American Mut. Acci. Ins. Co. 20 L.R.A. 765, and Central Transp. Co. v. Pullman's Palace Car Co. 35 L. ed. U. S. 55.

54 L. ed.

The law of New York in regard to the maintenance of an action on an *ultra vires* contract which has been performed is exactly contrary to that which is recognized in this court.

Bath Gaslight Co. v. Claffy, 151 N. Y. 24, 36 L.R.A. 664, 45 N. E. 390; Central Transp. Co. v. Pullman's Palace Car Co. supra.

The national bank act provides a complete system for the establishment and government of national banks.

Cook County Nat. Bank v. United States, 107 U. S. 445, 448, 27 L. ed. 537, 538, 2 Sup. Ct. Rep. 561.

The necessity for uniform construction has been recognized by this court.

Tullock v. Mulvane, 184 U. S. 497, 505, 46 L. ed. 657, 663, 22 Sup. Ct. Rep. 372; Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638. See also Frank v. Mercantile Nat. Bank, 182 N. Y. 268, 108 Am. St. Rep. 805, 74 N. E. 841.

Messrs. John W. Hutchinson, Jr., and Julius M. Mayer argued the cause, and, with Mr. H. Snowden Marshall, filed a brief for defendant in error:

The defendant in error is entitled to recover the \$10,000 which it gave up on the faith of the guaranty, and which was received by the guarantor.

Gaines v. Miller, 111 U. S. 395, 397, 28 L. ed. 466, 467, 4 Sup. Ct. Rep. 426; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; Aldrich v. Chemical Nat. Bank, 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 644, 19 L. ed. 1008, 1018; United States v. State Nat. Bank, 96 U. S. 30, 36, 24 L. ed. 647; Louisiana v. Wood, 102 U. S. 294, 26 L. ed. 153; Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 151, 43 L. ed. 108, 114, 18 Sup. Ct. Rep. 808.

Mr. Justice Harlan delivered the opinion of the court:

This action was commenced in the Supreme court of New York by the receiver of the Cooper Exchange Bank, a New York corporation, against the Citizens' Central National Bank of New York, a national bank corporation formed by the consolidation (Rev. Stat. §§ 5220 and 5221, U. S. Comp. Stat. 1901, p. 3503), of the Central National Bank of the city of New York with the National Citizens' Bank of the same city. The action was dismissed on demurrer to the complaint, and that judgment was affirmed in the appellate division. 116 App. Div. 404, 101 N. Y. Supp. 1027. But on appeal to the highest court of New York, the judgment was reversed (190 N. Y. 417, 83 N. E. 470), and the cause was remitted to the su-

preme court of that state for judgment in accordance with the opinion of the former court.

The complaint alleges—

That the defendant, the Citizens' Central National Bank of New York, by the consolidation referred to, acquired all the assets and became subject to the liabilities of the Central National Bank of that city.

That on and prior to January 4th, 1904, one Michael Samuels was indebted to the Central National Bank in the sum of \$10,000.

That "at the instance and request of Samuels, trading under the name of Mikael Samuels & Company, and the Central National Bank of the city of New York," the Cooper Exchange Bank loaned and advanced to the former the sum of \$12,000, Samuels executing his written obligation, dated January 4th, 1904, "to return or repay the [201 same on or before four months after date with interest, and at the same time, the Central National Bank of the city of New York, under seal, executed a written guaranty for the payment of the debt, as follows: "For and in consideration of \$1 and other good and valuable considerations, the Central National Bank of the city of New York hereby guarantees to the Cooper Exchange Bank the payment at maturity of a loan of \$12,000, made this day to Mikael Samuels & Company by the Cooper Exchange Bank."

That previous to the obtaining of said loan of \$12,000, Samuels "agreed with the said Central National Bank to pay to it the said sum of \$10,000 of the said \$12,000 so obtained, and the said loan was obtained by the said Mikael Samuels and was guaranteed by the said Central National Bank in order that the said Central National Bank might obtain the said sum of \$10,000, which it did receive and which was owed to it by the said Samuels."

That previous to the maturity of the loan, namely, on January 30th, 1904, only a few weeks after the loan was made, Samuels was adjudged a bankrupt. And—

That no part of said loan had ever been paid, except \$1,000, which was paid April 7th, 1906.

The court of appeals of New York—Cullen, Ch. J., delivering the opinion—held and the counsel for the Cooper Exchange Bank conceded in that court, that no recovery could be had against the guaranteeing bank in excess of the amount actually received by it out of the \$12,000 loaned, as above stated. 190 N. Y. 417, 83 N. E. 470. The case being remitted to the inferior state court, judgment was therefor rendered against the defendant only for \$10,000, with interest from January 4th, 1904, with costs in all courts.

The plaintiff in error insists that the guaranty given by the Central National Bank to the Cooper Exchange Bank was beyond its power, was in violation of the national banking act, and, therefore, could not be made the 202] foundation of an *action against the guarantor bank. But this action need not be regarded as one on the written contract of guaranty, but as based on an implied contract between the Cooper Exchange Bank and the Central National Bank, whereby the latter, under the circumstances disclosed by the record, came under a duty to account to the former for the \$10,000 of the \$12,000 actually paid to Samuels *at its request and on its guaranty*. The law would be very impotent to do justice if it could not, under those circumstances, and without violating established legal principles, compel the Central National Bank to recognize and discharge that duty. Samuels owed the Central National Bank \$10,000, and—with knowledge, perhaps, of his financial condition—he was put forward by that bank to obtain \$12,000 from the Cooper Exchange Bank, so that it could get \$10,000 out of that sum, for its own use. The circumstances show that the latter bank would not have loaned the money to Samuels except at the request and on the guaranty of the Central National Bank. All this, it may be observed, occurred under a previous agreement between the Central National Bank and Samuels, that that bank was to have \$10,000 of the \$12,000 in discharge of its claim upon him. In short, the Central National Bank, by means of the device mentioned, got \$10,000 of the money of the Cooper Exchange Bank for its own use, and having used it for its own benefit, it now seeks to avoid liability therefor, upon the ground that it was not allowed by the law of its creation to execute the guaranty in question. We know of no adjudged case that stands in the way of relief being granted as asked by the plaintiff. But there are many that will authorize such relief.

In Logan County Nat. Bank v. Townsend, 139 U. S. 67, 74, 35 L. ed. 107, 110, 11 Sup. Ct. Rep. 496, it appears that a national bank purchased, at a stipulated price, certain municipal bonds, which it agreed to return to the seller upon demand, or replace them at the same or a less price. Demand was subsequently made on the bank to return or replace the bonds according to the agreement. But it failed to do either, and when sued for 203] the value of the bonds it *pleaded. as a defense, the absence, under the law of its creation, of any authority or power on its part to make the above contract. This court said: "If it be assumed, in accordance with the bank's contention, that it was without power to purchase these bonds, to 54 L. ed.

be replaced to the plaintiff, on demand, the question would still remain, whether, notwithstanding the act of Congress defining and limiting its powers, it was exempt from liability to the plaintiff for the value of the bonds, if it refused, upon demand, to replace or surrender them at the same or a less price. . . . And from the time of such demand and its refusal to return the bonds to the vendor or owner, it becomes liable for their value upon grounds apart from the contract under which it obtained them. It could not rightfully hold them under or by virtue of the contract, and, at the same time, refuse to comply with the terms of purchase. If the bank's want of power, under the statute, to make such a contract of purchase, may be pleaded in bar of all claims against it based upon the contract,—and we are assuming, for the purposes of this case, that it may be,—it is bound, upon demand, accompanied by a tender back of the price it paid, to surrender the bonds to its vendor. The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the national banking act. 'The obligation to do justice,' this court said in *Marsh v. Fulton County*, 10 Wall. 676, 684, 19 L. ed. 1040, 1043, 'rests upon all persons, natural and artificial; and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation.'

The case of *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498, is equally in point. A vice president of a national bank, without authority from it, borrowed money from another national bank, and placed the amount in still another bank to the credit of the bank which he assumed to represent in the transaction. The national bank in whose name the *money was deposited drew [204 the money out by check and applied it in discharge of its own valid obligations; and when it was sought to hold it liable, the defense, in part, was that the original borrowing was not only unauthorized by it, but was in violation of the national banking act. Upon an extended review of the authorities, this court said: "As the money of the Chemical Bank was obtained under a loan negotiated by the vice president of the Fidelity Bank, who assumed to represent it in the transaction, and, as the Fidelity Bank used the money so obtained in its banking business and for its own benefit, the latter bank, having enjoyed the fruits of the transaction, cannot avoid accountability to the New York bank, even if it were true, as con-

tended, that the Fidelity Bank could not, consistently with the law of its creation, have itself borrowed the money. . . . If the latter bank in this way used the money obtained from the Chemical Bank, it is under an implied obligation to pay it back or account for it to the New York bank. It cannot escape liability on the ground merely that it was not permitted by its charter to obtain money from another bank. Suppose the Fidelity Bank, by its check upon the Chemical Bank, had drawn the whole \$300,000 at one time, and now had the money in its possession, unused? It would not be allowed to hold the money even if it were without power, under its charter, to have borrowed it from the Chemical Bank for use in its business. Or suppose a national bank, in violation of the act of Congress, takes as security for a loan made by it a deed of trust of real estate, and subsequently causes the property to be sold and the proceeds applied in payment of its claim against the borrower, a surplus being left in its hands, which it uses in its business or in discharge of its obligations. If sued by the borrower for the amount of such surplus, could the bank successfully resist payment upon the ground that the statute forbade it to make a loan of money on real estate security? Common honesty requires this question to be answered in the negative. But it could not be so answered if it be true that the Fidelity [205] Bank could *use in its business and for its benefit money obtained by one of its officers from another bank, under the pretense of a loan, and be discharged from liability therefor upon the ground that it could not itself have directly borrowed from the other bank the money so obtained and used. There is nothing in the acts of Congress authorizing or permitting a national bank to appropriate and use the money or property of others for its benefit without liability for so doing."

These views are supported by many other adjudged cases. In *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 60, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478, the court, speaking by Mr. Justice Gray, said: "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms,

but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." So, in *Pullman's Car Co. v. Central Transp. Co.* 171 U. S. 138, 151, 43 L. ed. 108, 114, 18 Sup. Ct. Rep. 808, the court, speaking by Mr. Justice Peckham, said: "The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or to make compensation for it." Other cases are cited in the margin.†

*We need not go farther. It is entire- [206] ly clear that the judgment against the defendant bank—which came into the possession of the property, and was subject to the liabilities, of the Central National Bank—was consistent with sound legal principles and was intrinsically right, even if the guaranty in question was beyond the power of the guaranteeing bank, under the national banking statutes. Whatever may be said as to the validity of the written guaranty, now alleged to be illegal, the judgment can be supported as based wholly on the implied contract, which made it the duty of the Central National Bank, under the facts disclosed, to account to the Cooper Exchange Bank for the money obtained from the latter in execution of the agreement made by the former with the borrower.

The judgment must be affirmed.

It is so ordered.

GREAT NORTHERN RAILWAY COMPANY,
Plff. in Err.,

v.

STATE OF MINNESOTA.

(See S. C. Reporter's ed. 206-233.)

Taxes — exemption — transfer or renewal of immunity.

A contract exemption from taxation does not survive a purchase by the state at a sale on foreclosure of the property and fran-

†*Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 644, 19 L. ed. 1008, 1018; *United States v. State Nat. Bank*, 96 U. S. 30, 36, 24 L. ed. 647, 648; *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153; *Parkersburg v. Brown*, 106 U. S. 487, 503, 27 L. ed. 238, 245, 1 Sup. Ct. Rep. 442; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 74, 78, 35 L. ed. 107, 110, 112, 11 Sup. Ct. Rep. 496; *Ditty v. Dominion Nat. Bank*, 22 C. C. A. 376, 43 U. S. App. 613, 615, 75 Fed. 769; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496; *Perkins v. Boothby*, 71 Mc. 94, 97; *Bank of Lakin v. National Bank*, 57 Kan. 183, 45 Pac. 587.

chises of a railway company; and a subsequent grant by the state, made when the state Constitution prohibited the granting of special privileges with respect to taxation, of all the rights, benefits, privileges, property, franchises, and interests which the state had acquired under its purchase, could not carry such exemption to the grantee.

[For other cases, see Taxes, 436-452, in Digest Sup. Ct. 1908.]

[No. 359.]

Argued November 5, 8, 1909. Decided February 21, 1910.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which, affirming in part and reversing in

NOTE.—On corporate taxation as affected by the contract clause of the Federal Constitution—see note to *Adams v. Yazoo & M. Valley R. Co.* 60 L.R.A. 33.

On the power of the state legislature to exempt from taxation—see note to *Hogg v. Mackay*, 19 L.R.A. 77.

On impairing obligation of contract for exemption from taxation—see note to *Wicomico County v. Bancroft*, 70 C. C. A. 294.

Exemption from taxation as surviving foreclosure sale.

A right to commuted taxation, or to an exemption from taxation, cannot be acquired through a mortgage foreclosure of the franchises property rights and privileges of a corporation, unless the statute in point in clear language distinctly authorizes the immunity to continue, and the decrees follow the statute. *Arkansas Midland R. Co. v. Berry*, 44 Ark. 17.

A charter right to exemption from taxation does not pass under a statutory provision that in case of the foreclosure of a mortgage on corporate property, and a sale thereunder, all the franchises, rights, and privileges of the mortgaged company shall pass to the mortgagee. *Lake Drummond Canal & Water Co. v. Com.* 103 Va. 337, 68 L.R.A. 92, 49 S. E. 506.

The franchises of a railroad do not include all its rights, privileges, and immunities, but such only as are essential to the operation of the road, and without which it would be of little value, such as the right to run cars, take tolls, appropriate earth and gravel for roadbed, take water for engines, etc., etc.; hence, the sale of the road, its property and franchises, upon mortgage foreclosure, does not convey to the purchaser the exemption from taxation given by the charter of the company. Such an exemption, if not a mere personal privilege not transferable to a third party, can in any event pass only by express and definite terms of conveyance. *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860.

Very like *GREAT NORTHERN R. Co. v. MINNESOTA* is *Trask v. Maguire*, 18 Wall. 391, 21 54 L. ed.

part a judgment of the District Court of Ramsey County, in that state, directed the entry of a judgment in favor of the state in an action to recover a balance alleged to be due the state from a railroad company on account of taxes. Affirmed.

See same case below, 106 Minn. 303, 119 N. W. 202.

The facts are stated in the opinion.

Mr. William R. Begg argued the cause and filed a brief for plaintiff in error:

The act of May 22, 1857, and each of its provisions, was, by the Constitution of the state, adopted and continued in force as a contract of the state.

Gunn v. Barry, 15 Wall. 610, 623, 21 L. ed. 212, 215; *New Orleans Gaslight Co. v.*

L. ed. 938, holding that a grant by the state to a railroad corporation of all the rights, franchises, privileges, and immunities which were enjoyed under its charter and the laws amendatory thereof by an older railroad company acquired by the state upon mortgage foreclosure, when the old company had an exemption from taxation resting in an irrevocable contract, does not carry over to the grantee such exemption, especially after a new Constitution prohibiting all exemptions has in the meantime come into operation.

A judicial sale of the charter of a bank, "together with all rights, privileges, and franchises thereunder," does not carry an exemption from taxation of shares of stock given by the charter to shareholders, where there was no sale of any specific shares of stock, and the sale was made after the state Constitution had prohibited exemptions from taxation, although purchasers of the charter were recognized by the legislature as a corporation. *Mercantile Bank v. Tennessee*, 161 U. S. 164, 40 L. ed. 656, 16 Sup. Ct. Rep. 461.

A judicial sale of the property of a railway company to enforce the statutory lien of the state upon the property owned by the company, or incident to, or necessary for, its business, does not carry with it to the purchaser any immunity from taxation which that company enjoyed. *Wilson v. Gaines*, 103 U. S. 417, 26 L. ed. 401.

Immunity from taxation does not pass to the purchaser of a railroad upon the sale thereof under a decree foreclosing the lien of the state, reserved to secure its bonds, even where the purchaser stipulates for a full and perfect title to the road, with its franchises and privileges. *East Tennessee, V. & G. R. Co. v. Hamblen County*, 102 U. S. 273, 26 L. ed. 152; *Picard v. East Tennessee, V. & G. R. Co.* 120 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640.

To the same effect is *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813.

The authority of a railway company to borrow money "on the credit of the company and on the mortgage of its charter

Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 672, 29 L. ed. 516, 524, 6 Sup. Ct. Rep. 252; *Bier v. McGehee*, 148 U. S. 137, 140, 37 L. ed. 397, 398, 13 Sup. Ct. Rep. 580.

The acts of March 2, 1865, and March 4, 1865, do not impose additional taxation, but merely modify the original contract as to taxation.

Chicago, M. & St. P. R. Co. v. Pfaender, 23 Minn. 223; *St. Paul v. St. Paul & S. C. R. Co.* 23 Minn. 474; *State v. Northern P. R. Co.* 36 Minn. 209, 30 N. W. 663; *Stevens County v. St. Paul, M. & M. R. Co.* 36 Minn. 471, 31 N. W. 942; *Traverse County v. St. Paul, M. & M. R. Co.* 73 Minn. 425, 76 N. W. 217.

and works" does not confer power to convey to bondholders by way of mortgage, and, on foreclosure, to purchasers, all the property of the company and all its franchises, including the franchise of becoming and being a corporation in the sense of acquiring the right to organize as such under the act as successor to, and substitute for, the original company, precisely as if the act had named them as incorporators, and endowed them with the corporate faculty, so that an exemption from taxation contained in the charter will apply to the substituted corporation as though no change of corporate existence had taken place; and, where the new corporation did not become a corporate body until after the provisions of a new Constitution forbidding exemptions from taxation took effect, it was thereby incapable in law of having or enjoying the privilege of holding its property exempt from taxation. *Memphis & L. R. R. Co. v. Railroad Comrs.* (*Memphis & L. R. R. Co. v. Berry*) 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299.

In *Wicomico County v. Bancroft*, 70 C. C. A. 287, 135 Fed. 977, it was held that an immunity from taxation for a term of years, enjoyed by a railway company under a special act, passed to the purchaser of the railway property at a sale on foreclosure, where the laws of the state (Md. Code 1888, art. 23, §§ 187, 188) authorized the purchasers of a railway at a judicial sale to form a new corporation with all the "powers, rights, immunities, privileges, and franchises" possessed or enjoyed by the older company before the sale.

The value of this case as an authority is materially lessened by the reversal of the decision, though upon other grounds, in 203 U. S. 112, 51 L. ed. 112, 27 Sup. Ct. Rep. 21, and by the adoption of precisely the contrary view in the subsequent case of *Baltimore, C. & A. R. Co. v. Wicomico County*, 103 Md. 277, 63 Atl. 678, which held, following *Baltimore, C. & A. R. Co. v. Ocean City*, 89 Md. 89, 42 Atl. 922, and *Baltimore, C. & A. R. Co. v. Wicomico County*, 93 Md. 113, 48 Atl. 853, that the powers, rights, immunities, privileges, and fran-

The legislature of the state had power under the Constitution to make a valid and irrevocable contract modifying the provisions as to taxation of the act of May 22, 1857.

First Div. St. Paul & P. R. Co. v. Parcher, 14 Minn. 297, Gil. 224; *State v. Winona & St. P. R. Co.* 21 Minn. 318; *Chicago, M. & St. P. R. Co. v. Pfaender*, 23 Minn. 221; *St. Paul v. St. Paul & S. C. Co.* supra; *State v. Northern P. R. Co.* 36 Minn. 207, 30 N. W. 663; *Stevens County v. St. Paul, M. & M. R. Co.* 36 Minn. 472, 31 N. W. 942; *State ex rel. Marr v. Stearns*, 72 Minn. 223, 75 N. W. 210; *Traverse County v. St. Paul, M. & M. R. Co.* supra; *New Jersey v. Yard*, 95 U. S. 104, 115, 116, 24 L. ed. 352, 354, 355; *State, United R. & Canal Co., Prose-*

chises which were vested in the purchaser were only such as passed under the sale and such others as might be necessary to conduct the new corporation, and enable it successfully to maintain and operate its railroad, and therefore did not include an exemption from taxation.

In Tennessee, however, it was held that the sale of a railroad upon foreclosure of the lien of the state thereon by a decree in chancery adjudging by the direct authority of an enabling statute that not only the property, but all the rights, franchises, privileges, and immunities, pass to the purchaser, carried over to a new railroad corporation which purchased the line at the judicial sale the right of tax exemption enjoyed and belonging to the delinquent company, although, by an intervening amendment of the state Constitution, the legislature might not have power to grant *de novo* a like exemption to a new corporation. *Knoxville & O. R. Co. v. Hicks*, 9 Baxt. 442.

The court distinguished the cases of *Trask v. Maguire* and *Morgan v. Louisiana*, supra, by saying that the exemptions involved in those cases were less broad than that in the case at bar, where the road as a whole, with all its appurtenances and franchises as an entirety, was exempt. It thought such an exemption more than a mere personal privilege; that it was an integral part of the franchises.

Of this decision, Waite, Ch. J., afterwards said that it "distinctly adjudged that not only the property of the old company, but all its rights, franchises, privileges, and immunities, as defined by the charter and laws and the decree in the cause, passed to and vested in the new company;" whence, it followed that the tax immunity was included and also passed. *East Tennessee, V. & G. R. Co. v. Hamblen County*, supra.

The same state court took a similar view of another railroad foreclosure a little later. *State v. Nashville, C. & St. L. R. Co.* 12 Lea, 583.

And in Texas it was also said that, while it was true, as a general proposition, that an exemption from taxation held by a railroad corporation in virtue of its charter or

cutors, v. Railroad Taxation Comrs. 37 N. J. L. 248.

If the acts of March 2, 1865, and March 4, 1865, did not modify the original contract as to taxation, the original contract remains in full force.

Stevens County v. St. Paul, M. & M. R. Co. and State, United R. & Canal Co., Prosecutors, v. Railroad Taxation Comrs. *supra*.

The acceptance of the acts of March 2, 1865, and March 4, 1865, by the St. Paul Company, bound all its successors in ownership of the roads involved.

Chicago, M. & St. P. R. Co. v. Pfaender, 23 Minn. 220; State v. Northern P. R. Co. *supra*.

The state, as trustee of the lands granted by the United States to aid in the construction of the railroads here involved, had power under the state Constitution to pass the acts of March 2, 1865, and March 4, 1865.

First Div. St. Paul & P. R. Co. v. Parcher, *supra*; St. Paul v. St. Paul & S. C. R. Co. 23 Minn. 471; Traverse County v. St. Paul, M. & M. R. Co. 73 Minn. 422, 76 N. W. 217; Stearns v. Minnesota, 179 U. S. 223, 240, 252, 253, 45 L. ed. 162, 172, 177, 178, 21 Sup. Ct. Rep. 73.

Independent of its power to make a valid contract modifying a previously existing irrevocable contract, and of its power and authority as trustee of the land grant, the legislature of the state had constitutional power to enact gross earnings tax laws.

State ex rel. Marr v. Luther, 56 Minn. 156, 57 N. W. 464.

The contract does not create an exemption from taxation, but provides a commuted or substituted form of taxation. It is a tax against property, not against the person.

Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73; St. Paul v. St. Paul & S. C. R. Co. *supra*; State v. Northern P. R. Co. 32 Minn. 295, 20 N. W. 234; Hennepin County v. St. Paul, M. & M.

R. Co. 33 Minn. 535, 24 N. W. 196; Ramsey County v. Chicago, M. & St. P. R. Co. 33 Minn. 537, 24 N. W. 313; Todd County v. St. Paul, M. & M. R. Co. 38 Minn. 163, 36 N. W. 109; St. Paul Co. v. St. Paul, M. & M. R. Co. 39 Minn. 113, 38 N. W. 925; State ex rel. Marr v. Luther, 56 Minn. 160, 57 N. W. 464; Traverse County v. St. Paul, M. & M. R. Co. 73 Minn. 425, 76 N. W. 217; Minneapolis & St. L. R. Co. v. Koerner, 85 Minn. 150, 88 N. W. 430; State v. Northwestern Telegraph. Exch. Co. 107 Minn. 390, 120 N. W. 538.

The contract was not personal to the Minnesota Company, but, with the railroads and the other franchises, powers, privileges, and immunities granted by the charter, was transferable to the successors of that company.

First Div. St. Paul & P. R. Co. v. Parcher, *supra*; State v. Winona & St. P. R. Co. 21 Minn. 316; First Div. St. Paul & P. R. Co. v. St. Paul, 21 Minn. 526; Chicago, M. & St. P. R. Co. v. Pfaender, *supra*; St. Paul v. St. Paul & S. C. R. Co. 23 Minn. 469; Nobles County v. Sioux City & St. P. R. Co. 26 Minn. 298, 3 N. W. 701; State v. St. Paul, M. & M. R. Co. 30 Minn. 313, 15 N. W. 307; State v. Northern P. R. Co. *supra*; Hennepin County v. St. Paul, M. & M. R. Co. 33 Minn. 534, 24 N. W. 196; Ramsey County v. Chicago, M. & St. P. R. Co. *supra*; Stevens County v. St. Paul, M. & M. R. Co. 36 Minn. 470, 31 N. W. 942; State v. Northern P. R. Co. 36 Minn. 209, 30 N. W. 663; Todd County v. St. Paul, M. & M. R. Co. *supra*; St. Paul v. St. Paul, M. & M. R. Co. 39 Minn. 112, 38 N. W. 925; Hennepin v. St. Paul, M. & M. R. Co. 42 Minn. 238, 44 N. W. 63; Traverse County v. St. Paul, M. & M. R. Co. 73 Minn. 424, 76 N. W. 217; State Assessors v. Morris & E. R. Co. 49 N. J. L. 193, 7 Atl. 838; Central R. & Bkg. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757; Philadelphia, W. & B. R. Co. v. Maryland, 10 How. 376, 394, 13 L. ed. 461, 469; Tomlinson v. Branch, 15 Wall. 460,

other contract law would not pass to a purchaser upon foreclosure of its property and franchises by mere force of the decree of sale, but was extinguished, yet, when such an exemption arose under a statute declaring in express terms that the said railroad company and its successors and their capital stock, rights, franchises, railroads constructed and to be constructed, rolling stock, and all other property then or thereafter owned or possessed by said company or its successors were exempted and released from all state, county, town, city, municipal, and other taxes; closing with a further declaration that such statute shall be held to constitute an irrevocable contract between the state and the said company, its successors and assigns,—the case is taken

out of the general rule. International & G. N. R. Co. v. Smith County, 65 Tex. 21; International & G. N. R. Co. v. Anderson County, 59 Tex. 654.

While, perhaps, in general, a total or partial exemption from taxation of a railroad corporation is a personal privilege which ordinarily does not pass upon a mortgage foreclosure sale of its rights, privileges, franchises, and immunities, yet, when such privilege has been expressly permitted by constitutional amendment to be made the subject of a mortgage, and the state acquires and conveys it after foreclosure to another company, it must be held to have inured to the new corporation. First Div. St. Paul & P. R. Co. v. Parcher, 14 Minn. 297, Gil. 224.

21 L. ed. 189; *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326, 327; *Delaware Railroad Tax*, 18 Wall. 206, 21 L. ed. 888; *Chesapeake & O. R. Co. v. Virginia*, 94 U. S. 718, 24 L. ed. 310; *Green County v. Conness*, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. Rep. 69; *Southwestern R. Co. v. Wright*, 116 U. S. 231, 29 L. ed. 626, 6 Sup. Ct. Rep. 375; *Tennessee v. Whitworth*, 117 U. S. 139, 146, 29 L. ed. 833, 835, 6 Sup. Ct. Rep. 649; *Given v. Wright*, 117 U. S. 648, 29 L. ed. 1021, 6 Sup. Ct. Rep. 907; *State ex rel. Marr v. Luther*, 56 Minn. 161, 57 N. W. 464; *Vermont & C. R. Co. v. Vermont C. R. Co.* 63 Vt. 25, 10 L.R.A. 562, 3 Inters. Com. Rep. 488, 21 Atl. 262, 731; *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa, 300, 51 L.R.A. 763, 83 N. W. 1074.

Neither the transferability of the contract as to location nor the capacity of the St. Paul Company, the First Division Company, the Manitoba Company, and the plaintiff in error to acquire the contract, has been destroyed by the Constitution of the state of Minnesota.

First Div. St. Paul & P. R. Co. v. Parcher; *State v. Winona & St. P. R. Co.*; *St. Paul v. St. Paul & S. C. R. Co.*; *Stevens County v. St. Paul, M. & M. R. Co.*; *Traverse County v. St. Paul, M. & M. R. Co.*; and *Gunn v. Barry*,—supra; *State ex rel. Hahn v. Young*, 29 Minn. 550, 9 N. W. 737; *Dartmouth College v. Woodward*, 4 Wheat. 518, 652, 4 L. ed. 629, 663; *Planters' Bank v. Sharp*, 6 How. 301, 321, 12 L. ed. 447, 456; *Walker v. Whitehead*, 16 Wall. 314, 21 L. ed. 357; *Houston & T. C. R. Co. v. Texas*, 170 U. S. 243, 256, 42 L. ed. 1023, 1027, 18 Sup. Ct. Rep. 610; *New Jersey v. Yard*, 95 U. S. 104, 116, 24 L. ed. 352, 355.

The contentions that the act of May 22, 1857, and the amendatory acts, created a valid contract which passed by transfer to the successors of the Minnesota Company, and vested in the Manitoba Company and plaintiff in error as an appurtenant to the lines of railroad, are *res judicata* in favor of the plaintiff in error.

First Div. St. Paul & P. R. Co. v. Parcher; *Stevens County v. St. Paul, M. & M. R. Co.*; and *Traverse County v. St. Paul, M. & M. R. Co.*,—supra; *Gunter v. Atlantic Coast Line R. Co.* 200 U. S. 273, 284–287, 50 L. ed. 477, 483–485, 26 Sup. Ct. Rep. 252; *People ex rel. Bryant v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 56; *Baltimore, C. & A. R. Co. v. Wicomico County*, 93 Md. 113, 48 Atl. 855; *State ex rel. Smyth v. Kennedy*, 60 Neb. 300, 83 N. W. 88.

Plaintiff in error is the successor in interest and privy in estate of the Manitoba Company, the First Division Company, the St. Paul Company, and the Minnesota Com-

pany, and is entitled to the benefit of the judgments in the cases referred to.

Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 289, 292, 50 L. ed. 477, 486, 487, 26 Sup. Ct. Rep. 252; *Baldwin v. Maryland*, 179 U. S. 220, 221, 45 L. ed. 160, 161, 21 Sup. Ct. Rep. 105; *Stone v. Farmers' Bank*, 174 U. S. 409, 412, 43 L. ed. 1027, 1028, 19 Sup. Ct. Rep. 880; *Southern P. R. Co. v. United States*, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 Sup. Ct. Rep. 18; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 396, 42 L. ed. 202, 210, 17 Sup. Ct. Rep. 905; *Deposit Bank v. Frankfort*, 191 U. S. 499, 512, 48 L. ed. 276, 281, 24 Sup. Ct. Rep. 154; *Kurtz v. St. Paul & D. R. Co.* 61 Minn. 24, 63 N. W. 1; *People ex rel. Robarts v. Beaudry*, 91 Cal. 213, 27 Pac. 612; *People v. Linda Vista Irrig. Dist.* 128 Cal. 477, 61 Pac. 86; *People ex rel. Bryant v. Holladay*, supra; *Chicago, M. & St. P. R. Co. v. Racine*, 123 Wis. 102, 100 N. W. 1033; *Georgia R. & Bkg. Co. v. Wright*, 132 Fed. 915; *Baltimore, C. & A. R. Co. v. Wicomico County*, supra; *Grunert v. Spalding*, 104 Wis. 193, 78 N. W. 606, 80 N. W. 589; *State ex rel. Smyth v. Kennedy*, supra.

The questions were in issue and were decided in the three cases referred to.

First Div. St. Paul & P. R. Co. v. Parcher; *Stevens County v. St. Paul, M. & M. R. Co.*; and *Traverse County v. St. Paul, M. & M. R. Co.*,—supra.

The judgments are conclusive as evidence, because, if pleaded, they would be a bar.

Thompson v. Roberts, 24 How. 233, 16 L. ed. 648; *Nichol v. Levy*, 5 Wall. 433, 442, 443, 18 L. ed. 596–599; *Gunter v. Atlantic Coast Line R. Co.* supra.

Even if the cases are binding only on the principle of *stare decisis*, it would seem that they should be followed.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; *United States v. Burlington & M. River R. Co.* 98 U. S. 334, 341, 25 L. ed. 198, 200; *Brown v. United States*, 113 U. S. 568, 570, 28 L. ed. 1079, 1080, 5 Sup. Ct. Rep. 648; *United States v. Hill*, 120 U. S. 169, 180, 30 L. ed. 627, 631, 7 Sup. Ct. Rep. 510; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Carson v. Smith*, 5 Minn. 78, Gil. 58, 77 Am. Dec. 539; *State ex rel. Loring v. Benedict*, 15 Minn. 198, Gil. 153; *Faribault v. Misener*, 20 Minn. 396, Gil. 347; *Ames v. Lake Superior & M. R. Co.* 21 Minn. 241; *Green v. Knife Falls Boom Corp.* 35 Minn. 161, 27 N. W. 924; *Willis v. Mabon* (*Willis v. St. Paul Sanitation Co.*) 48 Minn. 140, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; *State v. Moffett*, 64 Minn. 292, 67 N. W. 68; *State v. Northern P. R. Co.* 95 Minn. 43, 103 N. W. 731; *State v. Evans*, 99 Minn.

220, 108 N. W. 958, 9 A. & E. Ann. Cas. 520.

There has been no merger of the Manitoba lines with the lines of other companies, so as to waive the benefits of the contract.

Chicago, M. & St. P. R. Co. v. Pfander, 23 Minn. 217; State v. St. Paul, M. & M. R. Co. 30 Minn. 311, 15 N. W. 307; State v. Northern P. R. Co. 32 Minn. 294, 20 N. W. 234; State v. Northern P. R. Co. 36 Minn. 207, 30 N. W. 663; State v. St. Paul Union Depot Co. 42 Minn. 142, 6 L.R.A. 234, 43 N. W. 840; Minncapolis & St. L. R. Co. v. Koerner, 85 Minn. 149, 88 N. W. 430.

Messrs. George T. Simpson and George W. Peterson argued the cause and filed a brief for defendant in error:

An exemption from taxation, contained in a railroad charter, does not apply to extensions authorized by subsequent laws.

Southwestern R. Co. v. Wright, 116 U. S. 231, 29 L. ed. 626, 6 Sup. Ct. Rep. 375; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; Chicago, B. & K. C. R. Co. v. Guffey (Chicago, B. & K. C. R. Co. v. Missouri) 120 U. S. 569, 30 L. ed. 732, 7 Sup. Ct. Rep. 693.

An exemption from or a right to a limited taxation, belonging to a corporation, is a privilege altogether personal to the grantee, incapable of transference to another save by a specific enabling law couched in explicit language apt to the purpose.

Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; Adams v. Yazoo & M. Valley R. Co. 60 L.R.A. 33, note; Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; Lake Drummond Canal & Water Co. v. Com. 103 Va. 337, 68 L.R.A. 92, 49 S. E. 506; Rochester v. Rochester R. Co. 182 N. Y. 99, 70 L.R.A. 773, 74 N. E. 953; Norfolk & W. R. Co. v. Pendleton, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. Rep. 413; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Phoenix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471.

The state could not have created in 1879 a new corporation with an irrepealable and unchangeable gross earnings tax privilege. It could not confer such a privilege on either a new or an old corporation by way of original grant, or by consenting to a transfer from an old to a new corporation.

Trask v. Maguire, 18 Wall. 391, 21 L. ed. 938; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; Keokuk & W. R. Co. v. Missouri, 152 U. S. 54 L. ed.

303, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; Gulf & S. I. R. Co. v. Hewes, supra; Northern C. R. Co. v. Maryland, 187 U. S. 258, 47 L. ed. 167, 23 Sup. Ct. Rep. 62; Bloxham v. Florida C. & P. R. Co. 35 Fla. 625, 17 So. 902; Mercantile Bank v. Tennessee, 161 U. S. 161, 40 L. ed. 656, 16 Sup. Ct. Rep. 461; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Wellman v. Chicago & G. T. R. Co. 83 Mich. 592, 47 N. W. 489; Memphis & L. R. R. Co. v. Railroad Comrs. (Memphis & L. R. R. Co. v. Berry) 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299; Chesapeake & O. R. Co. v. Miller, supra; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; Rochester R. Co. v. Rochester, 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469; Yazoo & M. Valley R. Co. v. Vicksburg, 209 U. S. 358, 52 L. ed. 833, 28 Sup. Ct. Rep. 510.

If there ever was a contract right to the 3 per cent gross earnings tax and the accompanying exemption, it was lost by the extension of the road into other states, and by the consolidation with the Eastern Minnesota lines in the Great Northern system in 1902.

Maine C. R. Co. v. Maine, 96 U. S. 499, 24 L. ed. 836.

Mr. Justice Harlan delivered the opinion of the court:

This suit by the state of Minnesota against the Great Northern *Railway [212 Company, a corporation organized and existing under the laws of that state, has for its object to recover the balance alleged to be due the state on account of taxes from the railway company, under a statute known as chapter 253 of the General Laws of Minnesota of 1903.

The controlling question in the case relates to the constitutionality of certain sections of that statute, as follows: "§ 1. Every railroad company owning or operating any line of railway situated within or partly within this state shall, during the year 1905, and annually thereafter, pay into the treasury of this state, in lieu of all taxes and assessments upon all property within this state, owned and operated for railway purposes by such company, including the equipment, appurtenances, appendages, and franchises thereof, a sum of money equal to 4 per cent of the *gross earnings* derived from the operation of such line of railway within this state; and the annual payment of such sum shall be in full and in lieu of all other taxes and assessments upon the property and franchises so taxed. The lands acquired by public grants shall be and remain exempt from taxation until sold or contracted to be sold

or conveyed, as provided in the respective acts whereby such grants were made or recognized. § 2. The term 'gross earnings derived from the operation of such line of railway within this state,' as used in § 1 of this act, is hereby declared and shall be construed to mean all earnings on business beginning and ending within the state, and a proportion based upon the proportion of the mileage within the state to the entire mileage over which such business is done of earnings on all interstate business passing through, into, or out of the state." Minn. Gen. Laws 1903, chap. 253, p. 375.

The effect of the statute, Minnesota asserts, was to place the Great Northern Railway Company, as to rates, on the same basis of taxation as other railroads in the state. But the company contended in the courts below, and contends here, that the requirement to pay for 1905 and annually thereafter 4 per cent of the gross earnings [213] derived from the operation of its railroad within the state was in violation of a statute enacted May 22d, 1857, by the territory of Minnesota, incorporating the Minnesota & Pacific Railroad Company, and which fixed 3 per centum of the gross earnings of that company's railroad property as a tax in lieu of all taxes and assessments whatever. Minn. Sess. Laws 1857, Extra Sess. §§ 1, 4, 8. The provisions in the latter statute, it is alleged, constituted a contract with that company (the remote predecessor of the defendant company), which was protected, in favor of the latter by the contract clause of the Constitution of the United States, as well as by the clause of the 14th Amendment, forbidding the deprivation of property without due process of law. All this was disputed by the state.

The gross earnings of the company during 1905 were, it is conceded, \$18,540,396.27, 4 per cent of which, \$741,615.85, the state demanded under the act of 1903. The company paid \$620,878.47 on account of gross earnings for 1905, and refused to pay more. For the difference, \$120,737.38, with interest, the state claimed judgment. The railway company admitted its liability to pay 4 per cent on the gross earnings derived from certain lines operated by it in 1905, but denied liability in excess of 3 per cent on the gross earnings derived, during the same period, from certain other lines. It insisted that the sum paid by it before being sued herein was all that could be legally demanded by the state for the year 1905.

The trial court made certain findings of fact and announced certain conclusions of law that were not satisfactory to either party. But it was stipulated that, on the basis of those findings and conclusions,

the state would be entitled to a judgment for \$32,285.94, with interest from July 11th, 1908, and costs; and for that sum judgment was given by the trial court against the railway company. Each party prosecuted an appeal to the supreme court of Minnesota. That court sustained the state's appeal, and reversed the judgment, with directions to enter judgment in favor of the state for the entire amount it had *sued for,—\$120,737.88, with interest. [214 106 Minn. 303, 119 N. W. 202. Hence this writ of error by the railway company.

It is necessary to a clear understanding of the question of contract, as well as the objections raised against the act of 1903, that we state certain facts in the history of the taxation of railroad property in Minnesota.

By an act approved February 26th, 1857, Congress authorized the people of the territory of Minnesota to form a constitution preparatory to its admission into the Union as a state on an equal footing with the original states. 11 Stat. at L. 166, chap. 60. And by an act passed March 3d, 1857, it made a grant of lands to the territory to aid in the construction of railroads between certain points, with branches between certain other points, and provided that the lands so granted should be subject to the future disposal by the legislature of the territory or future state for the purposes expressed by Congress, and no other. 11 Stat. at L. 196, chap. 99, §§ 1, 3.

In execution of the trust created by that act of Congress, the legislative assembly of the territory, by the above act of May 22d, 1857, incorporated the Minnesota & Pacific Railroad Company, investing it with all the powers, privileges, franchises, and immunities incident to a corporation, and empowering it to survey, locate, construct, maintain, and operate a railroad with one or more tracks or lines between certain named places; to which end it was authorized to enter upon and appropriate lands belonging to the territory or future state, not exceeding a prescribed width throughout the entire length of its railroad. Minn. Sess. Laws 1857, Extra Sess. p. 1, §§ 1, 4, 18.

The 18th section of the latter act constitutes an important feature in this case. So much of that section as is material in determining this case is as follows: "*In consideration of the grants, privileges, and franchises herein conferred on the said Minnesota & Pacific Railroad Company, the said company shall and will, on or before the 1st day of March in each year, *pay into [215 the treasury of the territory or future state, 3 per centum of the gross earnings of the said railroad, for the year ending on the last day of the preceding December, in lieu of*

all taxes and assessments whatever, . . . and for securing to the territory or state the payment of the aforesaid per centum it is hereby declared that the state shall have a lien upon the railroads of the said company, and upon all other property, estate, and effects of the said company, whether real, personal, or mixed, and the lien hereby secured shall take and have precedence of all demands, decrees, and judgments against the said company. The first payment shall be made on the 1st day of March next after 50 miles of said railroad shall be completed, and such payment shall be in lieu of all taxes and in full of all claims of the territory or state for the grant hereby made; and, in consideration of such annual payments, the said company shall be forever exempt from all assessments and taxes whatever by the territory, or state which shall succeed the territory, or by any county, city, town, village, or other municipal authority in the territory or state, upon all stock in the said 'Minnesota & Pacific Railroad Company,' whether belonging to said company or to individuals, and upon all its franchises or estate, real, personal, or mixed, held by said company, and said land granted by said act of Congress hereby authorized to be conveyed to the said Minnesota & Pacific Railroad Company shall be exempt from all taxation till sold and conveyed by said company." This act, it must be remembered, was passed before Minnesota became a state.

By an act approved May 11th, 1858, Minnesota was admitted into the Union as a state, with the Constitution it had adopted by popular vote on the 13th of October previous (11 Stat. at L. 285, chap. 31); which Constitution provided that all taxes to be raised in the state "shall be as *nearly equal as may be*, and all property on which taxes are to be levied shall have a *cash valuation and be equalized and uniform throughout the state.*" Another section in the same article required that 216] *"laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property, according to its true value in money;"* also, that certain specified kinds of property, devoted to charitable and public uses, "shall, by general laws, be exempt from taxation." Art. 9, §§ 1, 3. But *railroad property was not included in such exemptions*; therefore, after the state Constitution went into operation, railroad property—if no inviolable contract controlled the matter—was taxable in Minnesota only on the basis fixed in that instrument.

On the 23d of June, 1860, there was a 54 L. ed.

foreclosure of two mortgages (the principal one having been executed July 31st, 1858, and a supplementary one executed November 27th, 1858) which the Minnesota & Pacific Railroad Company, under the authority of an act of the legislature, had given to secure moneys borrowed by it as well as certain bonds it had issued. Those mortgages covered the company's line and all its property and franchises. Their validity is not questioned in this case. The state, being the highest and best bidder at the foreclosure sale, became the purchaser on the 23d of June, 1860, and by that purchase, the supreme court of Minnesota has said, "the state became vested with all the railroad properties, and, no redemption being made, the company became wholly divested of its rights."

Subsequently, on March 8th, 1861, the legislature passed an act entitled, "An Act to Facilitate the Construction of the Minnesota & Pacific Railroad," which provided "that the road, lands, property, rights, franchises, privileges, and immunities belonging or pertaining to the Minnesota & Pacific Railroad Company, prior to the sale and purchase thereof by the governor on the 23d day of June, 1860, on behalf of the state, and now claimed or held by the state, and all bonds and securities of the said company, held by the state, shall be and are hereby released, discharged, and restored to the said company free of all liens or claims thereon held by or *in behalf of the state." § 1. [217 The act named certain conditions to be performed by the company in respect of the proposed railroad, and, if they were not performed by the time specified, then all the rights and benefits conferred upon said company "shall be forfeited to the state absolutely, without any further act or ceremony whatever." Minn. Laws 1861, chap. 5, p. 235. The company having failed wholly to comply with the conditions prescribed, all the rights, privileges, franchises, and immunities granted to it by the last-named act were resumed by and reinvested in the state.

Thereafter, by an act of March 10th, 1862, the legislature, with a view of facilitating the construction of the Minnesota & Pacific Railroad, and of amending and continuing the act of incorporation relating thereto, granted to certain named parties under the corporate name of the St. Paul & Pacific Railroad Company "all the rights, privileges, property, franchises, and interests" granted by the territory of Minnesota to the Minnesota & Pacific Railroad Company by the above act of May 22d, 1857, "with all the immunities, rights, property, benefits, and privileges which the said Minnesota & Pacific Railroad Company had,

or might or could have, by reason of the passage of said act, free and clear of all liens thereon, and free from all liens and claims of the state of Minnesota against the same, except such as are retained by the provisions of this act." Minn. Special Laws 1862, chap. 20.

We take from the opinion of the supreme court of the state this additional statement of facts: "By chapter 3, p. 174, Sp. Laws 1864, the St. Paul & Pacific Company was authorized to issue one or more classes of preferred stock, and to enter into agreements or contracts with the holders thereof for the administration of the portion of the road to which the stock might pertain, and for the independent organization by such holders to enable them separately or in conjunction with the general directors of the road to exercise supervision and control of their separate portion of the road. Under this act, preferred stock was duly issued, and 218] *the holders thereof, acting under the statute just referred to, organized and incorporated the First Division of the St. Paul & Pacific Railroad Company, which company, through its officers, thereafter cooperated with the St. Paul & Pacific Company in the construction of the road. The act incorporating the latter-named company contained no express reference to the rate or system of taxation to be imposed upon the company, but it is claimed that all the provisions on this subject contained in the old Minnesota & Pacific Company's charter passed by the terms of the act incorporating it, and were included within the designation of 'rights, privileges, and immunities.' However, by chapter 6, p. 40, Sp. Laws 1865, an act to facilitate the completion of the St. Paul & Pacific Railroad and branches [March 2d, 1865], the legislature imposed a different rate of taxation than that contained in the Minnesota & Pacific Company's charter, in this: that by this act the company was required to pay during the first three years after 30 miles of its road had been completed, 1 per cent of its gross earnings, 2 per cent during the succeeding seven years, and thereafter 3 per cent. The act also contained a provision that the lands of the company should be subject to taxation as soon as sold, leased, or contracted to be sold or leased. The St. Paul & Pacific Company formally accepted this act, and the First Division Company thereafter complied with its terms and provisions by paying the rate of taxation thereby imposed. The organization of the First Division Company was legalized and confirmed by chap. 1, p. 11, Sp. Laws 1866. Between 1862 and 1871, both these companies separately executed trust deeds and mortgages covering the main line of the

road and all its branches, according to the ownership of the same by the separate companies, thereby conveying to the mortgagees or trustees all property, rights, privileges, franchises, and immunities held, owned, or possessed by either company. Both companies made default in the payment of the indebtedness secured by these instruments, and they were duly *fore- [219 closed in the manner prescribed by law, John S. Barnes, for himself and associates, being the purchaser at the sale made under the foreclosure as to the branch line. Thereafter, Barnes and his associates incorporated under the laws of the state the St. Paul, Minneapolis, & Manitoba Railroad Company, and to this company they conveyed all rights acquired under the foreclosure stated. Therefore the mortgage on the main line was foreclosed and the Manitoba Company became the purchaser. By these foreclosures the Manitoba Company became the sole owner of all rights, privileges, and property of the two other companies. The Manitoba Company leased its line, together with all property rights, franchises, privileges, and immunities to the defendant Great Northern Company, incorporated under the laws of the state for the term of 999 years. The old Pacific and the First Division Companies paid taxes to the state upon the basis of the act of 1865, already referred to, viz., 1 per cent for the first three years after the completion of 30 miles of road, 2 per cent for the succeeding seven years, and thereafter, and until their rights passed from them by the foreclosure proceedings, just referred to, at the rate of 3 per cent of their gross earnings. The Manitoba Company paid this rate at all times during its ownership and operation of the road."

In 1871, the provisions of the state Constitution in relation to the taxation of railroad property were extended by an amendment. That amendment was as follows: "Art. 4, § 32(a). Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this state, or operating its road therein, or which may be hereafter organized, shall, in lieu of all other taxes and assessments upon their real estate, roads, rolling stock, and other personal property, at and during the time and periods therein specified, pay into the treasury of this state a certain percentage therein mentioned of the gross earnings of such railroad companies now existing or hereafter organized, shall, before the same *shall take ef- [220

the state, voting at the election at which the same shall be submitted to them." This amendment was submitted to popular vote and approved by the electors. It thereby became, to all intents and purposes, a part of the Constitution. Minn. Const. art. 4, § 32a.

After the adoption of that amendment, the legislature passed the above act of 1903, increasing the tax to be paid for 1905 and annually thereafter on the *gross earnings of railroads* operated within the state to 4 per cent. That act was submitted to a vote of the electors, and was sustained by the requisite majority.

As already stated, the railway company insists that the territorial act of May 22d, 1857, incorporating the Minnesota & Pacific Railroad Company, constituted a valid and irrevocable contract with that company, of which its successors in interest could avail themselves, and that its obligation could not be subsequently impaired by any legislative enactment, or by any provision of the state Constitution adopted in 1858, after the act of 1857 was passed, or as amended in 1871.

We have seen that the (old) Minnesota & Pacific Railroad Company was required, by the territorial act of May 22d, 1857, "in consideration of the grants, privileges, and franchises" conferred upon it, to pay annually into the treasury of the territory or future state 3 per centum of its gross earnings for the preceding year, in lieu of all taxes and assessments whatever, and that, "in consideration of such annual payments," the company should be forever exempt from all assessments and taxes whatever, territorial, state, or municipal, upon all its stock, by whomsoever held, and upon all its franchises or estate, real, personal, or mixed, and that the land granted by Congress, and conveyed to the company under the authority of the state, should be exempt from all taxation until sold and conveyed by it.

The supreme court of the state expressed doubt whether the act of 1857 was so worded as to constitute, in itself, a contract that would prevent the territory or the state from adopting and enforcing any different rule of taxation from that prescribed by that act. We share this doubt of the state court, that act being alone considered, and we are somewhat justified in so doing by the fact that the state legislature, by the act of 1865, changed the rate of taxation as to this property, then operated by the St. Paul & Pacific Company (a predecessor of the plaintiff), which had undertaken to complete the contemplated railroad and branches. The act of 1865 seems to have been accepted and complied with by the successors in interest of the Minnesota & Pacific Railroad Company, and amounted, as

the court below well said, to a practical construction by the parties of the alleged contract of exemption to be found in the territorial act of 1857. But we forbear any direct decision of this question, for there are other grounds upon which our judgment will be based.

The state court recognized the doctrine as firmly established that a legislature, unless restrained by state constitutional provisions, may contract to limit its power of taxation. But it held that, as taxation was essential to the existence and operations of government, an exemption from taxes cannot be presumed from doubtful language, but must be expressed in words so clear and explicit as to leave no reasonable doubt that the exemption was intended to be given. And such is the settled rule announced by this court in cases familiar to counsel, and too numerous to be cited. Passing without direct decision the question whether the act of 1857 constituted, in itself, an irrevocable contract as between the territory and the (old) Minnesota & Pacific Railroad Company, the supreme court of Minnesota considered the question whether the contract was personal to that particular company, or "did it become attached as an appurtenant to the charter, rights, franchises, and privileges of the company, and pass down the line to the defendant?" The first clause of that question was answered by the court in the affirmative; the latter in the negative,—the court citing, in support of its conclusions, the following cases: *Morgan v. Louisiana*, 93 U.S. 217, 23 L. ed. 860; *Chesapeake & O. R. Co. v. Miller*, 114 U.S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U.S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Rochester v. Rochester R. Co.* 182 N.Y. 99, 70 L.R.A. 773, 74 N.E. 953; *Memphis & L. R. R. Co. v. Railroad Comrs.* (*Memphis & L. R. R. Co. v. Berry*) 112 U.S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299. We need not extend the discussion upon that point.

But the state court said, and correctly, that there was another and stronger reason why it should be adjudged that an irrevocable contract did not and could not pass to the companies that claimed to have succeeded to the rights of the Minnesota & Pacific Railroad Company. That reason is suggested by the facts and circumstances now to be stated by us.

The rights, franchises, privileges, or immunities of every kind covered by the above territorial act of 1857 were wholly lost to the old Minnesota & Pacific Railroad Company when the state, by its purchase of June 23d, 1860, at the foreclosure sale, became completely reinvested with them. Those rights, franchises, privileges, and im-

munities were swept away from that company by that sale. Now, *when that purchase was made*, the territory had become a state, with a constitution expressly requiring the equal and uniform taxation of all real and personal property in the state upon a cash basis, and authorized the exemption from taxation of certain specified kinds of property, devoted to public and charitable uses; but, as we have seen, *railroad property was not included among the properties that could be so exempted*. It is, therefore, to be taken that the Constitution of the state, after it went into operation in 1858, required all railroads to be taxed by an equal and uniform rule and on a cash basis. The state having, by its purchase, become reinvested, in 1860, with all the rights, franchises, and privileges granted to the Minnesota & Pacific Railroad in 1857, could, speaking generally, have disposed of such interests at will; but, clearly, it could not have disposed of the interests acquired by its purchase, in any manner that was inconsistent with, or which would [223] have rendered nugatory, *the requirements or injunctions of the state Constitution. Even if the territorial act of 1857, considered alone, might have been regarded as a contract with the state in respect of the amount of the tax to be paid by the railroad company named in it, that contract ceased to have any force, as against the state, when the state, in 1860, became, by purchase at foreclosure sale, the owner of all the rights, property, immunities, and franchises of the company. The legislature of the state could not, *after the state Constitution went into operation*, have reinvested the old railroad company with such property, rights, immunities, or franchises, or have transferred them to a new corporation or to a consolidated railroad corporation created by the union of prior corporations, *accompanied* by an exemption from taxation that was inconsistent with the Constitution. Therefore, when, by the act of March 3th, 1861, the state released and restored to the Minnesota & Pacific Railroad Company the road, lands, property, rights, franchises, privileges, and immunities which had belonged to that company prior to the state's purchase of 1860, there did not go, there could not have gone, with that release or restoration, an exemption from taxation that was forbidden by the state Constitution then in operation. That instrument stood in the way of such legislation. And, upon like grounds, it must be held that no qualified or partial exemption from taxation could have been acquired by the St. Paul & Pacific Railroad Company under the act of March, 1862, which assumed to pass to that company all the rights, benefits,

privileges, property, franchises, and interests of the Minnesota & Pacific Company, which the state had acquired by its second purchase. It was not competent for the legislature, *after* the state Constitution went into operation, to agree, for the state, that the payment of any *given per cent of the gross earnings* of the railroad corporation should be in lieu of all other taxation. The Constitution again stood in the way.

Apart from the decision of the supreme court of Minnesota in this case, the views just expressed are abundantly supported *by adjudged cases. It is well to look [224] at some of those cases, because the question relates to the existence or nonexistence of a contract protected as to its obligation by the Constitution of the United States; and upon that question this court must exercise its independent judgment. *Douglas v. Kentucky*, 168 U. S. 489, 492, 42 L. ed. 553, 554, 18 Sup. Ct. Rep. 199, and authorities there cited.

In *Trask v. Maguire*, 18 Wall. 401, 404, 409, 21 L. ed. 944, 945, 947, it appeared that a railroad company was incorporated with an exemption from state and county taxes. The corporation obtained a loan from the state. The act under which the loan was made and the bonds given to secure it provided that the acceptance of such bonds should be a mortgage of the road and every part thereof for the benefit of the state. *Subsequently*, the state adopted a new Constitution, which declared that no property, real or personal, should be exempt from taxation, except such as was used exclusively for public schools or belonged to the United States, and also forbade the legislature to pass any special laws exempting the property of any named person or corporation from taxation. The legislature passed an act under which proceedings were instituted against defaulting railroad companies to foreclose the state's lien. Pending those proceedings, another act was passed, declaring that any corporation purchasing at such a foreclosure sale should have the same power, franchises, rights, and privileges, and be subject to the same liabilities and restrictions, as the corporation whose property and franchises were to be sold. A sale was had and the state became the purchaser of the defaulting railroad and its appurtenances. It was then sold to a private person, who, with his associates, organized a new corporation with the same name as the old one. The question was whether the last corporation was entitled to the immunity from taxation granted to the original company. This court, speaking by Mr. Justice Field, said: "When the state became the purchaser, *the immunity ceased*; the property stood in its hands pre-

cisely the same as any other unencumbered property of the state, exempt from taxation. **225]** not by virtue of any previous *stipulation with the company, but as all property of the state is thus exempt. Subsequently, the road and its appurtenances, and all the franchises, which, under the new Constitution of Missouri, adopted in 1865, were transferable by the state, were sold by the commissioners to McKay, Vogel, and Simons, who conveyed the same to Thomas Allen, who, with others, in July, 1867, became incorporated under the name of the St. Louis & Iron Mountain Railroad Company. That company is still in existence, and is one of the defendants herein. To it Allen transferred all the rights and privileges acquired by him from his vendors, and all which they acquired from the state. The act under which the sale was made provided that the purchasers of the road should have all the rights, franchises, privileges, and immunities which were enjoyed by the defaulting company under its charter and laws amendatory thereof, subject to the limitations and conditions therein contained, and not inconsistent with the act authorizing the sale. The new company thus acquired all the immunity from taxation which the original company had possessed, if it were competent for the legislature *at the time, under the new Constitution*, to confer this privilege. The question, therefore, is whether the legislature was competent to grant the immunity claimed, under that Constitution, which went into operation on the 4th of July, 1865, previous to the passage of any of the acts authorizing the proceedings under which the new company acquired its rights. . . . The inhibition of the Constitution applies in all its force *against the renewal of an exemption equally as against its original creation; and this inhibition the legislature could not disregard in providing for the sale of the property which it had purchased.*"

The Trask Case was cited with approval in *Morgan v. Louisiana*, 93 U. S. 217, 224, 23 L. ed. 860, 862, and *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 254, 27 L. ed. 922, 925, 3 Sup. Ct. Rep. 193, 200.

In the latter case it appeared that, at a particular date, the legislature of Florida passed an act that was valid under the existing state Constitution, which exempted from taxation the capital stock of railroad companies accepting its provisions. **226]** *The road, property, franchises, and privileges under that act were acquired by a certain railroad company; there was a foreclosure and sale under which the road, property, and franchises were ultimately acquired by another railroad company, and the legislature, by an act, declared that the latter

company, as assignees of the original company, should have the same exemption as the old company. But, *before the above foreclosure, a new state Constitution came into operation*, which provided for an uniform and equal rate of taxation, and that the property of corporations, whenever created, should be subject to taxation. This court, speaking by Mr. Justice Matthews, said: "It does not weaken this conclusion to say that the exemption contained in the internal improvement act of 1855 was authorized by the Constitution of the state then in force, which may be admitted, and that it was assignable in its nature or by its terms, in such manner that it became impressed upon the property itself into whosoever hands it should afterwards come. . . . *After the adoption of the Constitution of Florida of 1868*, there could be no corporation created capable in law of accepting and enjoying such an exemption, for that was prohibited by the constitutional provisions that have been cited. In the case of the Pensacola & Louisville Railroad Company, 1872, the capacity at that time to receive this privilege depended altogether upon the legislative act amending its charter to that effect; and if any doubt as to this might be reasonably entertained, certainly none can arise as to the Pensacola Railroad Company, which derived all its powers and its very existence from legislation dependent for its validity wholly upon the Constitution of 1868. The prohibition which forbids the legislature from exempting the property of railroad corporations from taxation makes it impossible for the legislature to create such a corporation capable in law of acquiring and holding property free from liability to taxation."

In *Memphis & L. R. R. Co. v. Railroad Comrs.* (*Memphis & L. R. R. Co. v. Berry*) 112 U. S. 609, 623, 28 L. ed. 837, 842, 5 Sup. Ct. Rep. 299, 305, which was a case in which a railroad claimed an exemption *from taxation, enjoyed by its predecessor, this court said: "It is, of course, the law in force *at the time the transaction is consummated and made effectual* that must be looked to as determining its validity and effect. This is the principle on which this court proceeded in deciding the case of *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185. The franchise *to be a corporation* remained in, and was exercised by, the old corporation, notwithstanding the mortgage of its charter, until the new corporation was formed and organized; it was then surrendered to the state, and by a new grant, then made, passed to the corporations of the new corporation, and was held and exercised by them under the constitutional restrictions then existing. Our con-

clusions, then, are, that the exemption from taxation contained in the 28th section of the act of January 11, 1853, was intended to apply only to the Memphis & Little Rock Railroad Company as the original corporation organized under it; that it did not pass by the mortgage of its charter and works, as included in the transfer of the franchise to be a corporation, to the mortgagees or purchasers at the judicial sale; that the franchises embraced in that conveyance were limited to those which had been granted as appropriate to the construction, maintenance, operation, and use of the railroad as a public highway, and the right to make profit therefrom; and that the appellant, not having become a corporate body until after the restrictions in the Constitution of 1874 took effect, was thereby incapable in law of having or enjoying the privilege of holding its property exempt from taxation." That case was referred to with approval in *Mercantile Bank v. Tennessee*, 161 U. S. 161, 40 L. ed. 656, 16 Sup. Ct. Rep. 461, where it was held that a sale of a corporate charter and franchises transferred to the purchaser only the right to reorganize as a corporation, "subject to the laws, constitutional and otherwise, existing at the time of the organization."

A case in point is *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 312, 38 L. ed. 450, 455, 14 Sup. Ct. Rep. 592, 596. Under the authority of a legislative enactment, passed in 1869, a Missouri corporation was consolidated in 1870 with an Iowa corporation, created in 1857, *and the charter of which contained an exemption of its stock from taxation for a specified period. The consolidated road was sold in 1886 under a decree of foreclosure of a mortgage given by the Iowa corporation, and conveyed to the Keokuk & Western Railroad Company. The latter company claimed the benefit of the exemption contained in the charter of the company created in 1857. *Between that date and the passage of the act of 1869, a new state Constitution was adopted*, and it provided that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this state, to counties, or to municipal corporations within this state." [Art. 11, § 16.] After considering the general question whether an immunity from taxation passed to the purchaser of the franchises, rights, and privileges of a railroad company under a foreclosure of a mortgage, the court said: "But the decisive answer to this objection is that the legislature had no power, in 1869, to extend to a new corporation created by the consolidation an exemption contained in an act

passed in 1857, before the Constitution was adopted, and hence that, under the terms of this act, we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, *it doubtless applies to all corporations thereafter formed, either by original charter or by the consolidation of prior corporations under the act of 1869.*"

In *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 23, 45 L. ed. 395, 407, 21 Sup. Ct. Rep. 240, 248, which related to an exemption from taxation claimed by a company consolidated in 1892 by the union of companies organized in 1882, and which consolidation was held to create a new corporation, this court said: "But it is scarcely necessary *to say that, if the consoli- [229] dation of 1892 resulted in a new corporation, it would come into existence under the Constitution of 1890, with the disabilities attaching thereto, among which is the provision that 'the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals.' Even if the legislature, in these several acts of consolidation, had expressly provided that the new corporation thereby formed should be exempted from taxation, the higher law of the Constitution would be interpreted as nullifying it to that extent. A similar remark may be made with regard to the provision that these companies might consolidate upon such terms as they should agree upon. Obviously, such terms must be consistent with the law existing at the time of the consolidation. . . . Under no circumstances would they be interpreted as conveying rights to the new corporation which the legislature was incompetent to confer."

In *Rochester R. Co. v. Rochester*, 205 U. S. 236, 254, 255, 51 L. ed. 784, 791, 792, 27 Sup. Ct. Rep. 469, 475, in respect to a legislative enactment assuming to transfer to a particular corporation an exemption granted to a former corporation, the court, after a full reference to the adjudged cases, held: "No corporation can receive by transfer from another an exemption from taxation or governmental regulation which is inconsistent with its own charter or with the Constitution or laws of the state then applicable, and this is true, even though, under legislative authority,

the exemption is transferred by words which clearly include it;" that "those who seek and obtain the benefit of a charter of incorporation must take the benefit under the conditions and with the burdens prescribed by the laws *then in force*, whether written in the Constitution, in general laws, or in the charter itself."

The recent case of *Yazoo & M. Valley R. Co. v. Vicksburg*, 209 U. S. 358, 364, 365, 52 L. ed. 833, 834, 835, 28 Sup. Ct. Rep. 510, 512, was the case of a consolidated corporation claiming the benefit of an exemption legally given to its predecessor before the adoption of a state Constitution prohibiting the exemption of corporate property **230**] *erty* *from taxation. This court said: "The exemption to the former constituent company could not inure to the consolidated company without, in effect, ignoring the constitutional provision. . . . The formation of the consolidated company was not imposed upon the complainant; it had the privilege of standing upon such rights as it had, by contract or otherwise, under the former legislation in force before the adoption of the new Constitution. When it saw fit to enter into the consolidation and form a new corporation, in 1892, the Constitution *then in force* in the state became the law of its corporate being, and the requirement that corporate property should not be exempt from taxation then became binding upon it, as upon all other corporations formed under the new organic law."

In view of the adjudged cases, it would seem clear that after the Minnesota Constitution went into operation in 1858, the legislature could not, by legislation or otherwise, enter into a binding contract for a complete or partial exemption, either in favor of the corporation originally created by the territory in 1857, or in favor of a new railroad corporation, or of one created by the consolidation of old corporations. It must have been controlled by the fundamental law of the state. So the highest court of Minnesota has held in this case. And so we hold. It follows that legislative acts relating to the property and railroads here in question, and passed after the state Constitution took effect, which proceeded, in the matter of taxation, on grounds of taxation different from those established by that instrument, were ineffectual.

We have not deemed it necessary in this discussion to refer in detail to the numerous cases in the supreme court of the state, which have been cited by counsel. This course has been pursued for two reasons: 1. The state court, in its opinion in the present case, said: "That the question here presented, *viz.*, whether the provisions of the Minnesota & Pacific Company's charter on **54 L. ed.**

the subject of the earnings tax constituted an irrevocable contract was not involved in any prior litigation between *the state **[231]** and the railroad company, and as what was said in the previous cases bearing upon the question was wholly unnecessary to the decision of the particular case, and therefore not of binding force or effect, we take up and dispose of the present case as though the question were, as it is, here for the first time." We accept that view of the state court as to the scope of its own decisions. 2. The question just stated—the question of the existence or nonexistence of a binding contract with the state—is one peculiarly for the final determination of this court. The authorities heretofore cited by us show that upon an issue of that kind this court must, upon its own responsibility and independent judgment, determine the legal rights of the parties under the clause of the Federal Constitution protecting the obligation of contracts against being impaired by state legislation.

In the present case it is gratifying that there is a concurrence of views between this court and the state court upon the question whether the plaintiff in error, the Great Northern Railway Company, described by the state court as the "successor in interest of all the prior companies," was entitled, as upon contract, to claim the benefit of the 3 per centum gross earnings tax provision in the act of 1857. And this seems to be a determination of the only question of a Federal nature arising on this writ of error and which should be now decided; for, if the contention of the railroad company as to that question be overruled,—as both this court and the state court agree that it must be,—it would only remain to inquire whether the act of 1903, prescribing a 4 per centum gross earnings tax, was authorized by the state Constitution, as amended in 1871. The supreme court of the state adjudges that it was so authorized, but that is a state or local question upon which this court need not express its opinion. It is true that one of the assignments of error before the state court was that the act of 1903 was inconsistent with the due-process clause of the Federal Constitution. But the suggestion was not much pressed in argument; and it cannot, under the evidence *before us in this case, be assumed that **[232]** the rate prescribed by the act of 1903 is confiscatory, either in its nature or in its necessary operation. If, when the act of 1903 was passed, the state was not fettered by inviolable contracts in respect of the taxation of the gross earnings of railroad property, there was nothing to prevent the legislature, instructed by a popular vote, from prescribing an uniform gross-earnings tax

for all railroad property operated in the state. There being no adequate proof showing the contrary, the rate prescribed by that act must be taken as being within the power of the legislature to establish, and not as being confiscatory. There is absolutely nothing in the record that would justify the conclusion that the rate fixed by the act of 1903 was confiscatory in its nature; that is, wanting in the due process of law enjoined by the Constitution.

One other matter deserves notice. Some reference was made at the argument to *Stearns v. Minnesota*, 179 U. S. 223, 230, 240, 253, 45 L. ed. 162, 165, 172, 177, 21 Sup. Ct. Rep. 73. There is nothing in the judgment in that case which at all conflicts with or controls the decision in this case. That case involved only the question whether certain lands owned by the defendant railroad companies, but which were not used in the operation of their roads in the state, were subject to taxation according to their value, or were exempted from ordinary rule of taxation by virtue of statutes, like that of 1857, passed after the state Constitution took effect. A similar question was adverted to in the present case, and the state supreme court, referring to the charter of the Minnesota & Pacific Railroad Company, said: "Two distinct provisions on the subject of taxation were embodied therein, the first providing for a gross-earnings tax in lieu of all other taxes and assessments, and second, an exemption of the land granted until sold or contracted to be sold by the company." Observing that the exemption in question did not pass as an appurtenant to the railroad properties in question, and was not included within the expression, "rights, privileges, and immunities," citing *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 66, 46 L. ed. 233] 86, 22 Sup. Ct. Rep. 26; *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; *Lake Drummond Canal & Water Co. v. Com.* 103 Va. 337, 68 L.R.A. 92, 49 S. E. 506; *Rochester v. Rochester R. Co.* 182 N. Y. 99, 70 L.R.A. 773, 74 N. E. 953; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198,—the court said: "A distinction must not be overlooked, when considering the assignability of a tax exemption, between those imposing a commuted system in lieu of property taxes, and those exempting specific property. In the former case, the system does not attach to the corporation or concern thus taxed, nor to any particular property, and necessarily is personal, and not assignable. But where, as in the case at bar, specific land is granted to a railroad company to aid in the construction of a railroad, and is specifically exempted from taxation until sold by the com-

pany, and the company accepts, in consideration of the exemption, the exemption attaches to and follows the land. *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. ed. 303; *State v. Hicks*, 9 Yerg. 486, 30 Am. Dec. 423; *International & G. N. R. Co. v. State*, 75 Tex. 356, 12 S. W. 685. In such case, as we have frequently held, as will be shown later, the exemption is appurtenant to and passes with the land to a succeeding corporation assuming the burden attached to it." In the *Stearns Case* the court determined only the question whether the lands of the railroad company were taxable. It held, upon the showing there made, that there was a valid contract with the railroad companies in respect to the taxation of the lands there in question which it was beyond the power of the state to impair by legislation. Nothing beyond that was actually adjudged in the *Stearns Case*. No such question arises in the present case. There is no attempt here to tax the lands granted by the territorial act of 1857 or by any other act. The state sues only for the balance due to it on account of taxes imposed by the act of 1903 on the gross earnings of property used and operated within its limits for railroad purposes.

Perceiving no error in the record as to the Federal question involved, the judgment must be affirmed.

It is so ordered.

*CHICAGO GREAT WESTERN [234
RAILWAY COMPANY, Plff. in Err.,

v.

STATE OF MINNESOTA.

(See S. C. Reporter's ed. 234-240.)

Taxes — exemption — renewal of immunity.

A charter exemption from taxation which has ceased and become void for failure to construct a railroad within the time limited by its charter cannot be revived by a subsequent statute, enacted when the state Constitution prohibited the granting of special privileges with respect to taxation, recognizing the legal existence of the railway company at that time, and waiving the right to declare a forfeiture.

[For other cases, see *Taxes*, 436-452, in Digest Sup. Ct. 1908.]

[No. 377.]

NOTE. — On corporate taxation as affected by the contract clause of the Federal Constitution—see note to *Adams v. Yazoo & M. Valley R. Co.* 60 L.R.A. 33.

On the power of state legislatures to exempt from taxation—see note to *Hogg v. Mackay*, 19 L.R.A. 77.

On impairing obligation of contract for exemption from taxation—see note to *Wicomico County v. Bancroft*, 70 C. C. A. 294.

216 U. S.

Argued and submitted November 8, 1909.
Decided February 21, 1910.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which, reversing a judgment of the District Court of Ramsey County, in that state, directed the entry of a judgment in favor of the state, for a balance alleged to be due the state from a railway company on account of taxes. Affirmed.

See same case below, 106 Minn: 290, 119 N. W. 211.

Statement by Mr. Justice Harlan:

This suit, like that of the Great Northern R. Co. v. Minnesota, just decided [216 U. S. 206, ante, 446, 30 Sup. Ct. Rep. 344], involves the constitutionality, as applied to the plaintiff in error, of chapter 253, General Laws of Minnesota of 1903, requiring every railroad company owning or operating any line of railway in that state to pay an annual tax, commencing with 1905, equal to 4 per cent of the gross earnings derived from the operation of such line within the state.

The gross earnings received by the defendant company during the year 1905 amounted to \$1,248,890.93, 4 per cent of which is \$49,959.24. The state alleges that the defendant refused to pay and has paid only \$24,979.62, leaving a balance of \$24,979.62, for which amount the state asked judgment.

235] *The court of original jurisdiction sustained the company's contention that it was liable only to a sum equal to 2 per cent of its gross earnings, and gave judgment for the defendant. That court was of opinion that a certain statute of the territory of Minnesota, approved March 1st, 1856 (Laws of 1856, chap. 47), constituted a valid contract between the territory and state of Minnesota, on one side, and the Minnesota & Northwestern Railroad Company, on the other, and fixed the lawful rate of taxation to be paid by that company at 2 per cent of its gross earnings; that said contract was never forfeited or lost by the company, but was transferred and passed, first to the Chicago, St. Paul, & Kansas City Railway, and subsequently to the defendant herein; and that the statute of 1903, fixing the tax at 4 per cent of the company's gross earnings, was unconstitutional when applied to the defendant herein. The judgment was reversed by the supreme court of Minnesota, with directions to enter judgment in favor of the state for the full amount stated in its complaint. 106 Minn. 300, 119 N. W. 211.

The facts and issues are so fully and accurately set forth by the supreme court of
54 L. ed.

Minnesota that we take from its opinion the following statement of the case: "This action, like that of State v. Great Northern R. Co. 106 Minn. 303, 119 N. W. 202 [filed herewith], involves the validity of chapter 253, p. 375, General Laws 1903, increasing the rate of the gross earnings tax upon railroad companies in this state to 4 per cent. As in the Great Northern Case, defendant asserts an irrevocable contract, under which it claims the right forever to discharge its tax liability by the payment of a 2 per cent rate. The fixed rate claimed by the Great Northern Company was 3 per cent. The determination of the case involves, as in the other case, the construction of an old territorial railroad charter, the facts with reference to which are as follows:

"By chap. 47, p. 121, Territorial Laws 1854, the Minnesota & *Northwestern Rail- [236 road Company was duly incorporated and authorized to construct a railroad within the limits of the territory, the line of which road, in a general way, was therein designated. The act was accepted by the persons named as incorporators, but no effort was made by them to construct the road. By chap. 58, p. 148, Laws of 1855, the act incorporating the company was amended by adding thereto, among other things, a provision requiring the company to construct and equip 50 miles of its road within three years after the passage of the amendment, and the entire line within six years, in default of which, the act provided, the charter of the company and all grants and rights thereby conferred 'shall cease and be void.' This act also contained a clause reserving to the legislature the right of amendment after the expiration of twenty years. In the original charter, and also in the amendment just mentioned, the company was required to pay into the treasury of the territory or future state 7 per cent of its net earnings. Whether this was intended as a substitute for taxes to be levied and collected in the usual way was not expressly stated. But in 1856, by chap. 47 of the laws of that year (p. 76), the charter was again amended by imposing a 2 per cent gross earnings tax in lieu of all other taxes. It is upon this act and the rate of taxation therein imposed that defendant relies in support of its defense. Defendant claims to have succeeded to all the rights of this old company, including the right to an irrevocable 2 per cent tax contract. The facts leading up to this asserted succession are as follows: The old company, though fully organized, wholly failed to construct its railroad within the time prescribed by its charter, and did nothing in that direction until some time in 1884, thirty years after its

organization, and twenty-four years after the time limited for the completion of the road. By this failure the company forfeited all its rights under the charter, and all grants thereby conferred 'ceased and were void.' But by chap. 83, p. 221, Special Laws 1883, the legislature of the state recognized the existence of the corporation, and in effect waived the default in the construction of 'the road by authorizing the consolidation of 'its stocks, franchises, rights, and property with that of any other railroad company which will undertake the construction and operation of the railroad which the said Minnesota & Northwestern Railroad Company is authorized to construct and operate.' See. 2 of that act amended § 7 of the original charter by authorizing the construction of a line of road differing somewhat from that authorized by the old charter. The company was thus revived from its extended slumbers and proceeded to construct its road, and completed it sometime in the year 1885. It thereafter operated the same until December of 1887, when it conveyed all its property, 'contracts, rights, privileges, and immunities,' to the Chicago, St. Paul, & Kansas City Railroad Company, a corporation created, organized, and existing under the laws of the state of Iowa. Counsel for defendant treat this transfer as a consolidation of the two companies, authorized by the act of 1883. But, as we read the documents by which the transfer was effected, the transaction took the form of an absolute and unconditional sale by the Northwestern Company. The Kansas City Company took possession of the road, and thereafter continued its operation until June, 1892, when it leased the line and 'all property connected therewith to the Chicago Great Western Railway Company, defendant herein, a corporation organized and existing under the laws of the state of Illinois. Subsequently, in September, 1893, the Kansas City Company conveyed the property so leased, and all contracts, franchises, and immunities, to its lessee, the Great Western Company, since which time the latter has continued in the operation of the road. Again, counsel claims that the conveyance by the Kansas City Company to defendant was a consolidation and authorized by law. This, however, is not important. The fact remains that the transaction resulted in an absolute transfer of the railroad property to defendant, and inasmuch as both those companies were foreign corporations, the laws of this state would not control their dealings, and this state could neither authorize nor prohibit [238] their consolidation. *But that question in no way controls the result in this case. The old Northwestern Company, after the com-

pletion of its road in 1885, commuted its taxes by the payment of the 2 per cent rate imposed by the amendment of its charter in 1856, and the succeeding roads, including defendant, have paid the same rate.

"Defendant having refused to pay the rate prescribed by the statute under consideration, this action was brought to recover the amount of the increased rate. It is the contention of defendant that the terms of the old Northwestern charter, fixing a 2 per cent rate, constituted a contract between the company and the territory or future state, irrevocable and irrevocable, to which defendant has succeeded, and that to enforce the new rate would impair the terms of the contract, in violation of both the state and the Federal Constitutions. Defendant does not contend that the new rate is unreasonable or unfair, or at all disproportionate to the rate paid by other taxpayers, but stands squarely upon its asserted legal right to a perpetual 2 per cent rate. The trial court sustained this view, ordered judgment for defendant, and the state appealed.

"The charter of this road has never heretofore been before the court for construction. No question has ever been raised relative to the rights of defendant or its predecessors upon the subject of taxation; and the construction of the old charter and amendatory acts, and right of the state to change the rate of taxation thereby imposed, are before us for the first time. Most of the questions involved were presented in the Great Northern Case, where they were fully considered, and disposed of adversely to the contentions of defendant. We there held, among other things, that the charter provisions of the old Minnesota & Pacific Company, upon which the Great Northern Company relied, did not constitute an irrevocable contract which passed unimpaired to the successors of that company; and further, that the gross earnings tax system first came into the legal existence in this state by force of the constitutional *amend- [239] ment of 1871 (Laws 1871, chap. 18, p. 41), and that it then became subject to the reserved right of the state to amend or repeal the same, as public interests might justify or require. The language of the charter under consideration, in so far as it imposes this form of taxation, is, for all practical purposes, the same as that construed in the Great Northern Case, and the conclusions there reached fully apply at bar, and we adopt and follow them."

Messrs. Frank B. Kellogg, Cordenio A. Severance, and A. G. Briggs submitted the cause for plaintiff in error. Messrs.

Robert E. Olds and John Barton Payne were on the brief:

The failure on the part of the company to build the line within the period provided by the charter did not *ipso facto* work a forfeiture of the company's charter rights and powers.

Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Farnsworth v. Minnesota & P. R. Co. 92 U. S. 49, 23 L. ed. 530; Minneapolis & St. C. R. Co. v. Duluth & W. R. Co. 45 Minn. 104, 47 N. W. 464; United States v. Minnesota & N. W. R. Co. 1 Minn. 127, Gil. 103; Minnesota & N. W. R. Co. v. Rice, 1 Minn. 358, Gil. 267; Re Brooklyn Elev. R. Co. 125 N. Y. 434, 26 N. E. 474; Foster v. Fitch, 36 Conn. 236; Farnsworth v. Lime Rock R. Co. 83 Me. 440, 22 Atl. 373; People ex rel. Platt v. Oakland County Bank, 1 Dougl. (Mich.) 283; Baltimore & O. R. Co. v. Marshall County, 3 W. Va. 319; Briggs v. Cape Cod Ship Canal Co. 137 Mass. 71; Re New York Elev. R. Co. 70 N. Y. 327; Chesapeake, & O. Canal Co. v. Baltimore & O. R. Co. 4 Gill & J. 127; People ex rel. Caton v. Ottawa Hydraulic Co. 115 Ill. 281, 3 N. E. 413.

Any default on the part of the railway company which may have existed as a ground of forfeiture was waived by the state.

Foster v. Fitch; Farnsworth v. Lime Rock R. Co.; and Re New York Elev. R. Co.,—supra; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. 4 Gill & J. 1.

The contract for a commuted system of taxation was appurtenant to the line of road eventually constructed, and duly passed to the plaintiff in error as the successor of the Minnesota & Northwestern Railroad Company.

State ex rel. Marr v. Luther, 56 Minn. 156, 57 N. W. 464; First Div. St. Paul & P. R. Co. v. Parcher, 14 Minn. 297, Gil. 224; Stevens County v. St. Paul, M. & M. R. Co. 36 Minn. 467, 31 N. W. 242; State v. Winona & St. P. R. Co. 21 Minn. 315; Chicago, M. & St. P. R. Co. v. Pfaender, 23 Minn. 217; St. Paul v. St. Paul & S. C. R. Co. 23 Minn. 469; Nobles County v. Sioux City & St. P. R. Co. 26 Minn. 294, 3 N. W. 701; State v. Northern P. R. Co. 32 Minn. 294, 20 N. W. 234; Traverse County v. St. Paul, M. & M. R. Co. 73 Minn. 417, 76 N. W. 217; Powers v. Detroit, G. H. & M. R. Co. 201 U. S. 543, 50 L. ed. 860, 26 Sup. Ct. Rep. 556; Piqua Branch of State Bank v. Knoop, 16 How. 369, 14 L. ed. 977; Tennessee v. Whitworth, 117 U. S. 140, 29 L. ed. 834, 6 Sup. Ct. Rep. 649; Tomlinson v. Branch, 15 Wall. 460, 21 L. ed. 189; Humphrey v. Pegues, 16 Wall. 244, 21 L. ed. 326; Central R. & Bkg. Co. 54 L. ed.

v. Georgia, 92 U. S. 665, 23 L. ed. 757; Philadelphia, W. & B. R. Co. v. Maryland, 10 How. 376, 13 L. ed. 461.

Mr. George W. Peterson argued the cause, and, with Mr. George T. Simpson, filed a brief for defendant in error:

By reason of failure to build the road or any part of it until 1884-5, the charter of the Minnesota & Northwestern Company was forfeited, and not earned, and did not become a contract until that year; and in so far as it then took on a contractual character, it was subject to the Constitution as amended in 1871. The 2 per cent gross earnings tax provision, therefore, was subject to amendment or repeal.

Oakland R. Co. v. Oakland B. & F. V. R. Co. 45 Cal. 365, 13 Am. Rep. 181; Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 529; State ex rel. Hahn v. St. Paul & S. C. R. Co. 35 Minn. 222, 28 N. W. 245; Bywaters v. Paris & G. N. R. Co. 73 Tex. 624, 11 S. W. 856; Farnsworth v. Minnesota & P. R. Co. 92 U. S. 66, 23 L. ed. 535; Re Brooklyn, W. & N. R. Co. 81 N. Y. 71; Arcata v. Arcata & M. River R. Co. 92 Cal. 639, 28 Pac. 676; United States v. Grundy, 3 Cranch, 337, 2 L. ed. 459; Re Brooklyn, W. & N. R. Co. 72 N. Y. 245, 19 Hun, 314, 55 How. Pr. 14; Sulphur Springs & Mt. P. R. Co. v. St. Louis, A. & T. R. Co. 2 Tex. Civ. App. 650, 22 S. W. 107, 23 S. W. 1012; Re Brooklyn, W. & N. R. Co. 75 N. Y. 335.

The 2 per cent gross earnings tax provision was personal to the Minnesota & Northwestern Railroad Company, and could not be transferred to any other company.

Adams v. Yazoo & M. Valley R. Co. 60 L.R.A. 33, note; Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; Wilson v. Gaines, 103 U. S. 417, 21 L. ed. 401; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; Lake Drummond Canal & Water Co. v. Com. 103 Va. 337, 68 L.R.A. 92, 49 S. E. 506; Rochester v. Rochester R. Co. 182 N. Y. 99, 70 L.R.A. 773, 74 N. E. 953; Norfolk & W. R. Co. v. Pendleton, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. Rep. 413; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Phoenix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471.

In so far as chapter 83, Special Laws 1883, was an attempt to consent to, or provide for, the transfer of the 2 per cent gross earnings tax as an irrepealable contract right, it was unconstitutional.

Trask v. Maguire, 18 Wall. 391, 21 L. ed. 938; Louisville & N. R. Co. v. Palmes,

109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

Even though the 2 per cent tax was a contract right as to the Minnesota & Northwestern Railroad Company, it did not survive the consolidations. The plaintiff in error, a foreign corporation, cannot claim any contract right, for it was subject to the Constitution and other laws of Minnesota in force at the time of its organization and entry into the state. It was therefore incapable of taking or holding any irrepealable contract right to a special or limited form of taxation.

Keokuk & W. R. Co. v. Missouri; *Yazoo & M. Valley R. Co. v. Adams*; *Trask v. Maguire*; *Louisville & N. R. Co. v. Palmes*; and *Gulf & S. I. R. Co. v. Hewes*,—*supra*; *Northern C. R. Co. v. Maryland*, 187 U. S. 258, 47 L. ed. 167, 23 Sup. Ct. Rep. 62; *Bloxham v. Florida C. & P. R. Co.* 35 Fla. 625, 17 So. 902; *Mercantile Bank v. Tennessee*, 161 U. S. 161, 40 L. ed. 656, 16 Sup. Ct. Rep. 461; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Wellman v. Chicago & G. T. R. Co.* 83 Mich. 592, 47 N. W. 489; *Memphis & L. R. R. Co. v. Railroad Comrs. (Memphis & L. R. R. Co. v. Berry)* 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299; *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; *Yazoo & M. Valley R. Co. v. Vicksburg*, 209 U. S. 358, 52 L. ed. 833, 28 Sup. Ct. Rep. 510; *Rochester R. Co. v. Rochester*, 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469.

Mr. Justice Harlan delivered the opinion of the court:

The rights of the plaintiff in error depend primarily upon the construction of the act incorporating the Minnesota & Northwestern Railroad Company (Territorial Laws 1854, chap. 47, the amendatory act of 1855, chap. 58, the amendatory act of 1856, chap. 47, and the act of 1883, Special Laws, chap. 83). That act of 1856 imposed a 2 per cent gross earnings tax in lieu of all other taxes. The supreme court of the state observed that until the present case arose it had never had occasion to construe the charter of the original company, and the acts amendatory thereof, nor determine whether the state could change the rate of taxation thereby imposed. It was of opinion that the question of taxation here involved was substantially the same as the one involved in *Great Northern R. Co. v. Minnesota* [216 U. S. 206, ante, 446, 30

Sup. Ct. Rep. 344]. That court consequently adjudged, upon the authority of that case, that the defendant, as a successor in interest of the Minnesota & Northwestern Railroad Company, could not claim the [240 benefit of an irrepealable, unchangeable contract relating to taxation that passed or could, under the state Constitution, have passed, unimpaired from the old company to a successor in interest, or that prevented the state from enacting the statute of 1903, chapter 253, General Laws of 1903. Without repeating what was said in the former case, we hold, upon the grounds set forth in the opinion in that case, that the state court rightly held that the state was not prevented by contract from passing the gross earnings tax law of 1903, and it properly reversed the judgment of the court of original jurisdiction, with directions to enter judgment in favor of the state for the amount claimed in its complaint. The judgment herein must be affirmed.

It is so ordered.

RICHARD A. BALLINGER, Secretary of the Interior, Plff. in Err.,

v.

UNITED STATES EX RELATIONE
BELLE FROST.

(See S. C. Reporter's ed. 240-251.)

Mandamus — to Secretary of Interior — ministerial duty.

Mandamus will lie to compel the Secretary of the Interior to perform the purely ministerial duty to see that a patent is duly executed and delivered to an enrolled member of the Choctaw Nation, entitled to share in the allotment of tribal lands, who selected as her allotment a 40-acre lot on which were her buildings and improvements, and received a certificate of allotment from the tribal commission, after the expiration of the time prescribed for contest, no contest having been made, and afterwards received a patent therefor from the chief authorities of the Choctaw and Chickasaw Nations, since, under such circumstances, her right to a patent became vested, and the Secretary of the Interior could not thereafter, as he attempted to do, segregate the land for town-site purposes, as having been under urban occupancy, and cancel her al-

NOTE.—As to when mandamus is the proper remedy—see notes to *United States ex rel. International Contracting Co. v. Lamont*, 39 L. ed. U. S. 160; *McCluny v. Silliman*, 4 L. ed. U. S. 263; *Fleming v. Gnthrie*, 3 L.R.A. 54; *Burnsville Turnp. Co. v. State*, 3 L.R.A. 265; *State ex rel. Charleston, C. & C. R. Co. v. Whitesides*, 3 L.R.A. 777; and *Ex parte Hurn*, 13 L.R.A. 120.

lotment, with leave to select other lands in lieu thereof.

[For other cases, see *Mandamus*, II. d, 2, in *Digest Sup. Ct.* 1908.]

[No. 54.]

Argued December 8, 1909. Decided February 21, 1910.

IN ERROR to the Court of Appeals for the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, granting a mandamus to compel the Secretary of the Interior to deliver, or cause to be delivered, a patent to an Indian allottee. Affirmed. See same case below, 30 App. D. C. 165. The facts are stated in the opinion.

Assistant Attorney General **Harr** argued the cause, and, with Assistant Attorney General Lawler, filed a brief for plaintiff in error:

Mandamus will issue against an executive officer to do a purely ministerial act in which he has no discretion or quasi judicial function.

Roberts v. United States, 176 U. S. 221, 230, 231, 44 L. ed. 443, 446, 447, 20 Sup. Ct. Rep. 376; *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 48, 32 L. ed. 354, 357, 9 Sup. Ct. Rep. 12; *Marbury v. Madison*, 1 *Cranch*, 137, 173, 2 L. ed. 60, 72.

The writ will not issue against executive officers in the exercise of official duties involving discretion, even when those duties require interpretation of law, the courts having no power to control, review, or revise acts of the executive department while jurisdiction continues.

United States ex rel. Dunlap v. Black, supra; *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 325, 47 L. ed. 1074, 1078, 23 Sup. Ct. Rep. 698.

The supervisory power of the Secretary of the Interior arises from the Revised Statutes and the express terms and necessary implication of the allotment acts.

United States ex rel. West v. Hitchcock, 205 U. S. 85, 51 L. ed. 721, 27 Sup. Ct. Rep. 423; 25 Ops. Atty. Gen. 464.

A settled construction by the departments will not be overturned by the courts, unless clearly wrong.

United States v. Healey, 160 U. S. 139, 145, 40 L. ed. 370, 372, 16 Sup. Ct. Rep. 247; *Hewitt v. Schultz*, 180 U. S. 139, 157, 45 L. ed. 463, 472, 21 Sup. Ct. Rep. 309; *United States v. Finnell*, 185 U. S. 236, 244, 46 L. ed. 890, 893, 22 Sup. Ct. Rep. 633.

The supervisory power of the Secretary of the Interior continues until ultimate final action whereby the title passes; that is, until his approval of the patent and authorization of its delivery.

Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 48 L. ed. 1039, 24 Sup. Ct. Rep. 676; *United States ex rel. West v. Hitchcock*, 205 U. S. 80, 84, 85, 51 L. ed. 718, 721, 27 Sup. Ct. Rep. 423; *Knight v. United Land Asso.* 142 U. S. 161, 177, 35 L. ed. 974, 979, 12 Sup. Ct. Rep. 258; *Orchard v. Alexander*, 157 U. S. 372, 381, 39 L. ed. 737, 740, 15 Sup. Ct. Rep. 635; *Stoneroad v. Stoneroad*, 158 U. S. 240, 249, 39 L. ed. 966, 969, 15 Sup. Ct. Rep. 822; *Williams v. United States*, 138 U. S. 514, 523, 524, 34 L. ed. 1026, 1030, 1031, 11 Sup. Ct. Rep. 457; *Germania Iron Co. v. United States*, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337.

The allotment certificate no more passes title than does the final certificate upon a public land entry. Until patent issues and title passes, the right to the title is subject to investigation. Equitable rights come within the cognizance of the Secretary, and the final receipt, or its analogue, the allotment certificate, may, for good cause, be annulled.

Guaranty Sav. Bank v. Bladow, 176 U. S. 448, 453, 44 L. ed. 540, 542, 20 Sup. Ct. Rep. 425; *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 592, 593, 42 L. ed. 591-593, 18 Sup. Ct. Rep. 208; *Barden v. Northern P. R. Co.* 154 U. S. 288, 326, 327, 38 L. ed. 992, 1001, 1002, 14 Sup. Ct. Rep. 1030.

Mr. **Charles H. Merillat** argued the cause, and, with Messrs. Charles J. Kappler, H. C. Potter, and E. A. Walker, filed a brief for defendant in error:

The Secretary of the Interior having decided that the land in controversy should not be reserved from allotment for town-site addition purposes, and that it should be thrown open to allotment, and the law having created him a special tribunal for the determination of this matter, his decision was unassailable, and made an end of all controversy as to this matter.

Belcher v. Linn, 24 *How.* 526, 16 L. ed. 758; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 450, 27 L. ed. 228, 1 Sup. Ct. Rep. 389; *Johnson v. Towsley*, 13 *Wall.* 83, 20 L. ed. 486; *Noble v. Union River Logging R. Co.* 147 U. S. 177, 37 L. ed. 127, 13 Sup. Ct. Rep. 271.

The land having been thrown open to allotment, and petitioner having lawfully allotted the same, and, in due and orderly course of administration, the special tribunal charged with allotment of the tribal lands in severalty having declared defendant in error entitled to the same, and issued an allotment certificate to her as conclusive evidence of her private and personal right to the land, she acquired a vested interest therein, of which she cannot be deprived by the Secretary of the Interior, or any other tribunal, save a court of equity, for good

cause and in accordance with settled procedure in equity.

United States v. Schurz, 102 U. S. 378, 26 L. ed. 167; *Noble v. Union River Logging R. Co.* supra; *Wallace v. Adams*, 74 C. C. A. 540, 143 Fed. 716; *Cornelius v. Kessel*, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122.

Executive officers derive their powers from the statutes. Not only must an officer have jurisdiction of the subject-matter, but he must also keep within the limits of the power conferred on him by statute. Where the statute defines, he cannot, under the name of administration, make law.

United States v. Thurber, 28 Fed. 56; *United States v. Macdaniel*, 7 Pet. 1-14, 8 L. ed. 587-592.

After issuance of the allotment certificate, the issuance of a patent as a more formal muniment or evidence of title was but a ministerial act, performance of which will be coerced.

United States v. Stone, 2 Wall. 535, 17 L. ed. 767; *Flournoy v. Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468; *Crane v. Camp*, 12 Conn. 464; *Roberts v. United States*, 176 U. S. 221, 44 L. ed. 443, 20 Sup. Ct. Rep. 376; *United States ex rel. West v. Hitchcock*, 19 App. D. C. 333; *Barney v. Dolph*, 97 U. S. 652, 24 L. ed. 1063; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925; *Frasher v. O'Connor*, 115 U. S. 112, 29 L. ed. 315, 5 Sup. Ct. Rep. 1141; *State v. Staub*, 61 Conn. 567, 23 Atl. 924; *Butterworth v. United States*, 112 U. S. 50, 28 L. ed. 656, 5 Sup. Ct. Rep. 25; *United States v. Schurz*, supra; *Lytle v. Arkansas*, 9 How. 314, 13 L. ed. 153; *Orchard v. Alexander*, 157 U. S. 372, 39 L. ed. 737, 15 Sup. Ct. Rep. 635.

The allotment certificate is declared by statute to be conclusive evidence of the holder's right to the land. It comprises an adjudication and conveyance of the allottee's right to the land.

Wallace v. Adams, 74 C. C. A. 540, 143 Fed. 720, affirmed in 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363; *Stark v. Starr*, supra.

The Secretary's refusal to reserve the lands necessarily made them allotable. Only before allotment could town-site reservations be made.

Dubuque & P. R. Co. v. Litchfield, 23 How. 66, 16 L. ed. 500; *Noble v. Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271.

There is a plain distinction between an Indian allotment certificate, and a public land receiver's certificate.

Guaranty Sav. Bank v. Bladow, 176 U. S. 448, 44 L. ed. 540, 20 Sup. Ct. Rep. 425.

The rights consequent upon having an allotment certificate, and a comparison of the

acts of 1898 and 1902, show the intent of Congress.

Godfrey v. Iowa Land & T. Co. 21 Okla. 293, 95 Pac. 792; *McWilliams Invest Co. v. Livingston* (Okla.) 98 Pac. 914.

Mr. Justice **Brewer** delivered the opinion of the court:

The defendant in error, a citizen and resident of the Choctaw Nation in the Indian territory, whose enrolment had been approved by the Secretary of the Interior, and who was entitled to an allotment under the acts of Congress, on December 20, 1906, filed her petition in the supreme court of the District of Columbia for a mandamus compelling the Secretary of the Interior to deliver, or cause to be delivered, to her a patent to a tract of land consisting of 40 acres, located in the Choctaw Nation in the Indian territory, and which she had selected in accordance with law. The then Secretary of the Interior, Ethan A. Hitchcock, filed an answer, giving his reasons for declining to issue the patent. Subsequently, James R. Garfield, becoming Secretary of the Interior, was substituted as defendant, and filed an amended answer. A demurrer to the amended answer having been sustained, judgment was entered as [245] prayed for, which was affirmed by the court of appeals of the District, and thereupon the case was brought to this court. After the record had been filed in this court, and during the present term, Richard A. Ballinger, the successor of Secretary Garfield, was substituted for him as plaintiff in error.

The facts essential to a decision are briefly these: By treaty between the Choctaw Nation and the United States, dated September 27, 1830 (7 Stat. at L. 333), and the proclamation of the President of the United States of February 24, 1831, the United States caused "to be conveyed to the Choctaw Nation a tract of country west of the Mississippi river, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it." By subsequent treaties and agreements the Choctaw and Chickasaw Nations were consolidated. The nations have not become extinct, and are still resident on the lands. The act of June 28, 1898 (30 Stat. at L. 495, chap. 517), authorized the allotment of the land to the Choctaws and Chickasaws in fair and equal proportions, and provided that this should be done under the direction of the Secretary of the Interior; also, that as soon as practicable after the completion of the said allotment, the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation should jointly execute, under their hands

and the seals of their respective nations, and deliver to their allottees, patents conveying to them all the right, title, and interest of the Indians in and to the lands allotted. The act of May 31, 1900 (31 Stat. at L. 221, chap. 598), also authorized the Secretary of the Interior to lay out, survey, and plat the sites of such towns as then had a population of two hundred or more, and that he might, upon the recommendation of the Commission to the Five Civilized Tribes, at any time before the allotment, set aside and reserve, not exceeding 160 acres in any one tract, at such stations as were or should be established on the line of any railway which should be constructed or be in process of construction in or through either of said [246] nations *prior to the allotment of the lands therein. These town-site provisions were incorporated into the act of March 1, 1901 (31 Stat. at L. 848, 851, chap. 675).

On October 26, 1900, the town site of Mill Creek, containing 155.45 acres, on which there was a railway station, was designated and laid out. The land in controversy is adjacent to that town site. Section 45 of the act of July 1, 1902 (32 Stat. at L. 641, chap. 1362), authorized an addition to such town sites on the recommendation of the Commission to the Five Civilized Tribes, not exceeding 640 acres, and the appropriation act of March 3, 1903 (32 Stat. at L. 982, 996, chap. 994), appropriated \$25,000 to pay the town-site expenses, with this proviso:

"That the money hereby appropriated shall be applied only to the expenses incident to the survey, platting, and appraisal of town sites heretofore set aside and reserved from allotment: And provided further, That nothing herein contained shall prevent the survey and platting at their own expense of town sites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior."

On February 17, 1903, the Commission to the Five Civilized Tribes made recommendation that this adjacent land be segregated as an addition to Mill Creek, under the provisions of the act of July 1, 1902, supra. This recommendation, having been approved by the Commissioner of Indian Affairs, was by him transmitted to the Secretary of the Interior, who, on March 18, 1903, addressed a letter to the Commission, reciting the segregation of Mill Creek town site on October 26, 1900, and the recommendation of the Commission, approved by the Commissioner of Indian Affairs, and said: "The Department does not

deem it advisable to make the recommendation, in view of the act of March 3, 1903." On July 23, 1903, the relator selected as her allotment the land in controversy, upon which *were her buildings and im-[247]provements. This was received by the Commission, and nine months thereafter, the time prescribed by statute for contest (act of July 1, 1902, supra) having elapsed, and no contest of her right to the designated allotment having been made, a certificate of allotment was issued and delivered to her. Thereafter the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation jointly executed a patent under the seals of their respective nations, conveying to her the title of said nations in and to said 40 acres of land. Sections 23 and 24 of the act of July 1, 1902, supra, read as follows:

"Sec. 23. Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

"Sec. 24. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land."

The Secretary alleged in his answer that after the issue of the allotment to relator, and on or about March 11, 1905, his predecessor in office was advised that the land had then, and prior to its selection by petitioner, been under urban occupancy, and on June 19, 1905, he ordered an investigation, and finding such to be the fact, and that the inhabitants had expended large sums in building upon and improving their tracts, and were entitled to be protected, he did, on October 23, 1905, by virtue of the powers in him vested, segregate the lands for town-site purposes, and cancel petitioner's allotment thereof, with leave to select other lands to fill her right to tribal lands in severalty. The patent that had previously been *executed for delivery to her was [248] returned, and remained on file in the office of the Commissioner of Indian Affairs, to be canceled.

The Interior Department has general control over the affairs of the Indians,—wards of the government. In addition, the Secretary of the Interior was by these several acts specially charged with the duty of supervising the action of the Commission

to the Five Civilized Tribes in making the allotments authorized by those acts. On both of these grounds he claims authority to have done what he did, and that his acts in that respect are not subject to review by the courts. We have no disposition to minimize the authority or control of the Secretary of the Interior, and the court should be reluctant to interfere with his action. But, as said by Mr. Justice Field in *Cornelius v. Kessel*, 128 U. S. 456, 461, 32 L. ed. 482, 483, 9 Sup. Ct. Rep. 122, 124:

"The power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

See also *Orchard v. Alexander*, 157 U. S. 372, 383, 39 L. ed. 737, 741, 15 Sup. Ct. Rep. 635, 639, in which it was declared:

"Of course, this power of reviewing and setting aside the action of the local land officers is, as was decided in *Cornelius v. Kessel*, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122, not arbitrary and unlimited. It does not prevent judicial inquiry. *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485. The party who makes proofs which are accepted by the local land officers, and pays 249] his money for the land, has *acquired an interest of which he cannot be arbitrarily dispossessed."

Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of congressional legislation. It must be borne in mind that this allotment provided by Congress contemplated a distribution among the Choctaw and Chickasaw Indians of the lands that belonged to them in common. They were the principal beneficiaries, and their titles to the lands they selected should be protected against the efforts of outsiders to secure them. White men settling on town sites were not the principal beneficiaries. Congress, it is true, authorized town sites, and the town of Mill Creek was established in compliance

with the statute. It further provided for an enlargement of any town site upon the recommendation of the Commission to the Five Civilized Tribes. That recommendation was made in respect to the town of Mill Creek, but disapproved by the Secretary of the Interior. Thereafter the relator selected the land in controversy, a tract of 40 acres, on which were her improvements. Notice was given, as required, and the time in which contest could be made—nine months—elapsed. Thereupon, as provided by the statute, the title of the allottee to the land selected became fixed and absolute, and the chief authorities of the Choctaw and Chickasaw Nations executed to her a patent, as required, of the land selected. The fact that there may have been persons on the land is immaterial. They were given nine months to contest the right of the applicant. They failed to make contest, and her rights became fixed. Thereafter the Secretary of the Interior had nothing but the ministerial duty of seeing that a patent was duly executed and delivered.

That the performance of a ministerial duty can be compelled *by mandamus [250 has been often adjudged. As said by Mr. Justice Peckham, in *Roberts v. United States*, 176 U. S. 221, 229, 44 L. ed. 443, 446, 20 Sup. Ct. Rep. 376, 379:

"The law relating to mandamus against a public officer is well settled in the abstract, the only doubt which arises being whether the facts regarding any particular case bring it within the law which permits the writ to issue where a mere ministerial duty is imposed upon an executive officer, which duty he is bound to perform without any further question. If he refuse under such circumstances, mandamus will lie to compel him to perform his duty."

See also *Noble v. Union River Logging Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271, in which Mr. Justice Brown cites many cases and draws distinctions between them.

But the authorities come more closely to the facts in this case. In *Barney v. Dolph*, 97 U. S. 652, 656, 24 L. ed. 1063, 1064, Mr. Chief Justice Waite said:

"The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty."

In *Simmons v. Wagner*, 101 U. S. 260, 261, 25 L. ed. 910, 911, the same chief justice repeated the proposition in these words:

"Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the

patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty. *Barney v. Dolph*, 97 U. S. 652, 24 L. ed. 1063; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925."

In *United States v. Schurz*, 102 U. S. 378, 403, 26 L. ed. 167, 174, Mr. Justice Miller, delivering the opinion of the court, said:

"No further authority to consider the patentee's case remains in the land office. No right to consider whether he ought, in equity or on new information, to have the title or receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner,—a duty which, [251] *within all the definitions, can be enforced by the writ of mandamus."

We think the judgment of the Court of Appeals of the District of Columbia, affirming the judgment of the Supreme Court of the District, was right, and it is affirmed.

CENTRAL TRUST COMPANY, Appt.,
v.

CENTRAL TRUST COMPANY OF ILLINOIS, William R. Dawes, and Fred A. Busse.

(See S. C. Reporter's ed. 251-262.)

Courts — Interference with Postoffice Department.

The courts will not interfere, where no palpable error appears, with the ruling of the Postoffice Department, that mail addressed, "Central Trust Co., Chicago, Ill.," with no further designation of the party for whom it is intended, be delivered to the "Central Trust Company of Illinois," an Illinois banking corporation, and not to a foreign corporation, engaged in the mining, promoting, real estate, and trust business, in the city of Chicago, under the name of the "Central Trust Company."

[For other cases, see *Courts*, I. e. 4, in *Digest Sup. Ct.* 1908.]

[No. 86.] //

Argued January 17, 18, 1910. Decided
February 21, 1910.

APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of Illinois, dismissing the bill in a suit to compel the Postmaster to deliver to a certain corporation mail matter which it claims it is entitled to receive. Affirmed.

See same case below, 81 C. C. A. 569, 152 Fed. 427.

NOTE:—On interference by courts with rulings of Postoffice Department—see note to *National L. Ins. Co. v. National L. Ins. Co.* 52 L. ed. U. S. 808.
54 L. ed.

Statement by Mr. Justice Brewer:

On June 22, 1906, the Central Trust Company, a corporation *engaged in [252 the mining, promoting, real estate, and trust business, filed its bill in the circuit court of the United States for the northern district of Illinois to compel the defendant Frederick A. Busse, postmaster at Chicago, to deliver to it certain mail matter which it claims it was entitled to receive, and which he wrongfully delivered to the defendant the Central Trust Company of Illinois. Demurrers to the bill were filed, which were sustained, and the bill dismissed. On appeal to the United States circuit court of appeals for the seventh circuit, the decree of dismissal was affirmed, and thereupon the case was brought here on appeal.

The allegations in the bill are that on or about April 17, 1897, the complainant was created a corporation by the state of South Dakota under the name and title of "Central Trust Company," and was authorized by said state to establish an office and hold directors' meetings in Chicago; that on or about that date it established an office in Chicago on the corner of Monroe and La Salle streets, and began to carry on its business, though without any express authority from the state of Illinois, and continued to do so up to and including February 7, 1903; that in August, 1902, it applied to the secretary of state of Illinois for a license to do business within that state, and complied with all the statutory requirements for foreign corporations desiring to do business within the state; that owing to a contest made before the secretary of state by the Central Trust Company of Illinois, the granting of said license was delayed until February 7, 1903, at which time it was granted, and that from that date complainant has continuously conducted its business in Chicago at the office and under the above-stated name; that ever since its coming to Chicago it has received through the postoffice a large amount of mail matter addressed to it by simply its name.

The bill further alleges that the defendant the Central Trust Company of Illinois is a corporation chartered by the state of Illinois on or about July, 1902, and engaged in a general banking and trust business at No. 142 Monroe street in *Chi- [253 cago; that its first place of business was at the corner of Dearborn and Monroe streets, but, about the beginning of the year 1906, it removed to No. 142 Monroe street, where it has ever since remained.

The bill still further alleges that from 1897 to 1901 the name of complainant appeared in the Lakeside directory, a directory of general circulation in Chicago, and recognized as a reliable and authoritative publi-

cation; that while its name was omitted from the directory for 1902, the omission was due to a mere error by the publishers of the directory, and was through no fault of the complainant; that said directory for 1902 was not published and issued until after defendant the Central Trust Company of Illinois had filed its articles of incorporation.

It also appears that complaint having been made to the Postmaster General of the action of the postmaster at Chicago in reference to the delivery of the mail received at Chicago, an order was made by the First Assistant Postmaster General in these words:

January 10, 1903.

The Postmaster,
Chicago, Ill.

Sir:—

I am in receipt of information to the effect that a letter was delivered to Mr. Pfau, a representative of the Central Trust Company of South Dakota, which contained remittances intended to protect checks drawn on the Central Trust Company of Illinois; that Mr. Pfau, instead of returning the letter promptly to the postoffice for delivery to the trust company for which it was intended, returned it to the sender, thereby jeopardizing his credit. Mr. Pfau well knew that the deposit was intended for the Central Trust Company of Illinois.

You are hereby directed to deliver mail addressed "Central Trust Co., Chicago, Ill.," without the addition of the street, box, or other designation to indicate that it is intended for the South Dakota Company, to the Central Trust Company of Illinois, and request that company to return to you promptly for delivery to the Central Trust 254] Company of South Dakota all letters falling into their hands intended for the company represented by Mr. Pfau.

Very respectfully,
(Signed) R. J. Wynne,
First Assistant Postmaster General.

The prayer of the bill is that the defendant Busse be restrained "from delivering mail addressed 'Central Trust Company' without the street address of this complainant thereon, or some other mark thereon indicating for whom the same is intended, or with the street address 'corner of La Salle and Monroe streets,' to the defendant Central Trust Company of Illinois," and restraining the Central Trust Company of Illinois and its cashier, the defendant William R. Dawes, from receiving and opening said mail so described.

Mr. W. H. Sears argued the cause, and, with Messrs. Daniel McCaskill and O. L. McCaskill, filed a brief for appellant:

The decision of the Postmaster General, giving the mail in controversy to the Central Trust Company of Illinois, is reviewable by this court (a) because his act was ministerial in character.

Kendall v. United States, 12 Pet. 524, 614, 9 L. ed. 1181, 1216; New Orleans Nat. Bank v. Merchant, 18 Fed. 850; Teal v. Felton, 12 How. 284, 291, 13 L. ed. 990, 992; Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; National L. Ins. Co. v. National L. Ins. Co. 209 U. S. 317, 52 L. ed. 808, 28 Sup. Ct. Rep. 541; Ex parte Jackson, 96 U. S. 727, 733, 24 L. ed. 877, 879; United States v. Mathias, 36 Fed. 896; United States v. Eddy, 1 Biss. 227, Fed. Cas. No. 15,024; United States v. Barlow, 132 U. S. 280, 33 L. ed. 351, 10 Sup. Ct. Rep. 77; American School v. McAnnulty, 187 U. S. 94, 107-109, 47 L. ed. 90, 95, 96, 23 Sup. Ct. Rep. 33.

(b) Because he acted beyond the scope of his authority.

Noble v. Union River Logging R. Co. 147 U. S. 165, 171, 172, 37 L. ed. 123, 125, 126, 13 Sup. Ct. Rep. 271; Board of Liquidation v. McComb, 92 U. S. 531, 541, 23 L. ed. 623, 628; Public Clearing House v. Coyne, 194 U. S. 497, 509, 48 L. ed. 1092, 1098, 24 Sup. Ct. Rep. 789; Bates & G. Co. v. Payne, 194 U. S. 106, 108, 48 L. ed. 894, 895, 24 Sup. Ct. Rep. 595; Brown v. United States, 9 How. 487, 13 L. ed. 228; Payne v. United States, 20 App. D. C. 581; American School v. McAnnulty, 187 U. S. 94, 109, 47 L. ed. 90, 96, 23 Sup. Ct. Rep. 33.

Mr. Max Pam argued the cause, and, with Mr. Stephen A. Day and Messrs. Pam & Hurd, filed a brief for appellees:

The name "Central Trust Company" so designates appellee as to justify the postmaster in making delivery to appellee of mail so addressed.

Chadsey v. McCreery, 27 Ill. 253; Board of Education v. Greenebaum, 39 Ill. 609; Clement v. Lathrop, 18 Fed. 885; 7 Am. & Eng. Enc. Law, 2d ed. p. 687.

The Postoffice Department has decided the question in controversy, and the court will neither overturn such decision nor interfere with the discretion of the Department.

Appleby v. Cluss, 160 Fed. 984; National L. Ins. Co. v. National L. Ins. Co. 209 U. S. 317, 52 L. ed. 808, 28 Sup. Ct. Rep. 541; Bates & G. Co. v. Payne, 194 U. S. 106, 48 L. ed. 894, 24 Sup. Ct. Rep. 595; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 47 L. ed. 1074, 23 Sup. Ct.

216 U. S.

Rep. 698; United States ex rel. Parish v. MacVeagh, 214 U. S. 124, 53 L. ed. 936, 29 Sup. Ct. Rep. 557.

Mr. Justice Brewer delivered the opinion of the court:

The management of the great postoffice business of the country is placed in the hands of the Postmaster General and assistants. Rev. Stat. §§ 388, 389, 396, U. S. Comp. Stat. 1901, pp. 218, 224. In the discharge of his duties as Postmaster General, he has assigned to the First Assistant Postmaster General "the preparation of decisions as to delivery of ordinary mail, the ownership of which is in dispute." Postal Laws and Regulations, 1902, § 17, ¶ 9. The question here presented is whether, the First Assistant Postmaster General having directed the postmaster at Chicago to deliver to the "Central Trust Company of Illinois," defendant herein, mail matter addressed "Central Trust Company, Chicago, Ill.," without any further designation of the party for whom it was intended, the courts are, upon the facts as presented, justified in setting aside that order and directing the delivery of such mail to the complainant. It is not always easy to determine for whom a letter is intended. In furtherance of the effort to secure delivery of mail matter to the proper party, ¶¶ 3 and 4, § 634, and ¶¶ 4 and 5, § 645, of Postal Laws and Regulations, provide:

"Sec. 634, par. 3. When a postmaster is in doubt as to the identity of the addressee, he may require proof, and should exercise great care, especially where mail matter appears to be of value, to make proper delivery.

"Par. 4. Where two or more persons of the same name receive mail at the same office, the postmaster should advise them to adopt some address or means by which their mail may be distinguished. Postmasters will deliver such matter according to their best judgment, and will not return it to the mailing office for better description of the addressee until, after inquiry, they are unable to determine to whom it should be delivered."

260] "Sec. 645, par 4. Attempts to secure the mail of an established house, firm, or corporation through the adoption of a similar name should not be recognized. Where disputes arise between individuals, firms, or corporations as to the use of a name or designation, matter addressed to a street, number, or building should be delivered according to such address. When not so addressed, the mail will be delivered to the firm or corporation which first adopted the name of the address at that place.

"Par. 5. When in doubt as to the firm or
54 L. ed.

corporation for which any mail matter is intended, and claim therefor is disputed, postmasters will withhold delivery, and report the facts and any statements made by either claimant to the First Assistant Postmaster General, for advice."

Appellant contends that its legal name is "Central Trust Company" while the legal name of defendant is "Central Trust Company of Illinois;" that therefore it has a right to have mail directed to "Central Trust Company, Chicago," without further designation, delivered to it rather than to defendant. The argument primarily is that every corporation is entitled to the legal benefit of its own name; that when that name appears on mail matter as the party addressed, and nothing else is shown, the postmaster has simply the ministerial duty of making a delivery to that corporation, and that a failure to discharge this ministerial duty can be corrected by the courts.

While in a certain sense it is true that the benefit of one's legal name belongs to every party, individual or corporation, yet that may not be the name by which it is customarily known or addressed, and of course the object is and must be to deliver the mail matter to the party for whom it is intended. In the determination of this, it may often be necessary to look beyond the exact legal name. Many things may have to be considered, and the action of an officer charged with that duty should not lightly be disturbed by the courts, and only when it is clear that a mistake has been made or a wrong *done. Initials are of- [261 ten used, abbreviations made, words left out, The number of letters delivered to the respective parties and the disposition made by each of those received may cast some light upon the question, for while a party for whom a single letter is intended has a right to receive it, yet the number of letters, taken in connection with the amount of business apparently done by the recipient, may well suggest for whom any given letter was intended, and the action taken by the recipient, when, as here, each knows of the existence of the other, may show its good or bad faith in dealing with the post-office. So, also, the character of the business done may be considered. Where a corporation is engaged in the banking business, letters from other banks will point to it as the intended recipient, while, if it is a real estate corporation, letters from real estate firms will indicate differently. And so we might go on and mention other things which, while by no means conclusive, tend to throw light on the matter.

We have had occasion to consider the effect of findings of fact by officers in charge

of the several departments of government, and the accepted rule is that those findings are conclusive unless palpable error appears. *Bates & G. Co. v. Payne*, 194 U. S. 106, 48 L. ed. 894, 24 Sup. Ct. Rep. 595, and cases cited in the opinion; *United States ex rel. Parish v. MacVeagh*, 214 U. S. 124-131, 53 L. ed. 936-938, 29 Sup. Ct. Rep. 556. In *National L. Ins. Co. v. National L. Ins. Co.* 209 U. S. 317, 52 L. ed. 808, 28 Sup. Ct. Rep. 541, it appeared that the Postoffice Department had made a special order in reference to the delivery of mail, and the court was asked to correct that order. In denying this application, the court, by Mr. Justice Peckham, said (p. 325):

"The appeal made by the complainant to the Department was really nothing but an appeal to its discretion. . . . Assuming that the court in some cases has the power to, in effect, review the determination of the Department, we do not think this is an occasion for its exercise. The complainant is really appealing from the discretion of the Department to the discretion of the court, and the complainant has no clear 262] *legal right to obtain the order sought. See *Bates & G. Co. v. Payne*, 194 U. S. 106-108, 48 L. ed. 894, 895, 24 Sup. Ct. Rep. 595.

"A court in such case ought not to interfere in the administration of a great department like that of the Postoffice by an injunction, which directs the Department how to conduct the business thereof, where the party asking for the injunction has no clear right to it."

We do not deem it necessary to consider other questions discussed by counsel, for, upon the facts presented and for the reasons stated, we are of opinion that there is not enough to show such clear right in the complainant as justifies the setting aside of the order of the First Assistant Postmaster General.

The decree is therefore affirmed.

MISSOURI PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.

STATE OF KANSAS EX REL. CARR W. TAYLOR, Attorney for the Board of Railroad Commissioners, and C. C. Coleman, Attorney General of the State of Kansas.

(See S. C. Reporter's ed. 262-284.)

Constitutional law — impairing contract obligations — reserved right to amend, alter, or repeal.

1. A charter right held subject to the power of the state to repeal, alter, or amend 472

is not protected by the contract clause of the Federal Constitution against subsequent impairment.

[For other cases, see Constitutional Law, 1177-1197, in Digest Sup. Ct. 1908.]

Carriers — state regulation — passenger service.

2. A state may direct a railway company operating a branch line which, so far as it lies within the state, was built under the authority of a charter from that state, to afford passenger train service between the terminus of such line within the state and the state line, provided that such requirement does not amount to such an arbitrary and unreasonable exercise of power as to cause it to be, in fact, not a regulation, but an infringement upon the right of ownership; or, considering the surrounding circumstances, operate as a direct burden upon interstate commerce.

[For other cases, see Carriers, III., in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — regulating carriers — passenger service.

3. The duty of a railway company under its charter to furnish passenger service is not completely discharged by running a mixed train, so that an order of the Kansas railroad commission, compelling passenger train service at a pecuniary loss, is so arbitrary and unreasonable as to take property without due process of law, although Kan. Laws 1907, chap. 274, as amended by Laws 1909, chap. 190, gives the public the right to travel in the caboose of a freight train, since even this statute recognizes that persons availing themselves of such right are not entitled to ordinary passenger facilities, or to the legal protection ordinarily surrounding passenger traffic.

[For other cases, see Constitutional Law, 516-518, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — regulating carriers — passenger service.

4. An order of a state railroad commission directing a railroad company to discharge its corporate duty by operating a passenger train over a branch line between its terminus within the state and the state line is not so arbitrary or unreasonable as

NOTE. — As to reserved power to alter, amend, or repeal corporate charters—see notes to *Greenwood v. Union Freight R. Co.* 26 L. ed. U. S. 961, and *Omaha Water Co. v. Omaha*, 77 C. C. A. 281.

As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* 13 L.R.A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; and *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158.

to deprive the company of its property without due process of law, because there are no facilities at the state line, and no occasion for the termination of the transit at that point.

[For other cases, see Constitutional Law, 516-518, in Digest Sup. Ct. 1908.]

Interstate commerce — state regulation — compelling passenger service.

5. Interstate commerce is not directly burdened, in violation of the Federal Constitution, by an order of a state railroad commission, directing an interstate railway company to discharge its corporate duty by affording passenger train service between the terminus of a branch line within the state and the point of intersection with the state line, although, to avoid the useless expense of establishing terminal facilities at that point, the passenger service directed by the order must be operated not only to the state line, but some 20 miles beyond, where such facilities do exist.

[For other cases, see Commerce, III., in Digest Sup. Ct. 1908.]

[No. 38.]

Argued and submitted November 30, 1909.
Decided February 21, 1910.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment ordering a peremptory mandamus to compel a railroad company to obey an order of the state railroad commission, requiring passenger train service between the terminus of a branch line within the state and its point of intersection with the state line. Affirmed.

See same case below, 76 Kan. 467, 92 Pac. 606.

The facts are stated in the opinion.

Mr. **Balie P. Waggener** argued the cause and filed a brief for plaintiff in error:

The order of the board and the mandate of the state court were, in substance and effect, a regulation of commerce among the states, and the court was without power or jurisdiction in the premises.

Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; Hall v. DeCuir, 95 U. S. 485-489, 24 L. ed. 547, 548.

It is not the wording of the regulation, but the necessary effect thereof, which determines its invalidity.

Henderson v. New York, 92 U. S. 259, 23 L. ed. 543; State Freight Tax Case, 15 Wall. 276, 21 L. ed. 162.

The order of the board on its face is manifestly unreasonable, and in the light of the findings of fact, arbitrary, and without the first element of due process of law, and a denial of the equal protection of the law guaranteed by the Federal Constitution.

Welch v. Swasey, 214 U. S. 105, 53 L. ed. 929, 29 Sup. Ct. Rep. 567; Chicago, B. & 54 L. ed.

Q. R. Co. v. Chicago, 166 U. S. 241, 41 L. ed. 986, 17 Sup. Ct. Rep. 581; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; Railroad Commission Cases, 116 U. S. 307, 331, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191; Smyth v. Ames, 169 U. S. 466, 546, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 179, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Covington & L. Turnp. Road Co. v. Sanford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

The enforcement of the order here complained of, under the circumstances disclosed by the record, would not be regulation, but confiscation.

Reagan v. Farmers' Loan & T. Co.; Budd v. New York; and Chicago, B. & Q. R. Co. v. Chicago,—supra; McNeill v. Southern R. Co. 202 U. S. 543, 559, 50 L. ed. 1142, 1147, 26 Sup. Ct. Rep. 722; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 144, 145, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246.

The order of the board of railroad commissioners was a usurpation of power by the board, and the construction placed upon the law by the state court impaired the obligation of the contract between the state and the railway company.

Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Piqua Branch of State Bank v. Knoop, 16 How. 391, 14 L. ed. 986; Bridge Proprs. v. Hoboken Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571; Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173; Northwestern University v. Illinois, 99 U. S. 321, 25 L. ed. 389; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 36, 31 L. ed. 614, 8 Sup. Ct. Rep. 741; Louisville & N. R. Co. v. Palmes, 109 U. S. 256, 257, 27 L. ed. 926, 927, 3 Sup. Ct. Rep. 193; Georgia R. & Bkg. Co. v. Smith and Reagan v. Farmers' Loan & T. Co. supra; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 161, 24 L. ed. 94, 95; Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97; Ruggles v. Illinois, 108 U. S. 526, 27 L. ed. 812, 2 Sup.

Ct. Rep. 832; *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 378, 20 L. ed. 614; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 206, 48 L. ed. 406, 410, 24 Sup. Ct. Rep. 241.

The object of the reservation in the Constitution to amend or repeal, as said by this court in *Tomlinson v. Jessup*, 15 Wall. 458, 21 L. ed. 205, is to prevent a grant of corporate rights and privileges in a form which would preclude legislative interference with their exercise, if the public should at any time require such interference.

The supreme court of Kansas holds (76 Kan. 494, 92 Pac. 606) that the legislature has not, expressly or by implication, amended or repealed § 1316, which gives to railroad companies the power to regulate the time and manner in which the passengers and property shall be transported, and that they still possess the power conferred by that section. By this construction of the statute this court is concluded.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 456, 33 L. ed. 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Missouri P. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 619, 53 L. ed. 359, 29 Sup. Ct. Rep. 214.

Mr. Fred S. Jackson submitted the cause for defendant in error. Mr. G. F. Grattan was on the brief:

All questions arising under the Constitution and laws of the state of Kansas are settled adversely to the plaintiff in error by the decisions of the supreme court of the state.

Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Missouri P. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 619, 53 L. ed. 359, 29 Sup. Ct. Rep. 214.

The case at bar does not involve the regulation of commerce among the states, within the meaning of the Federal Constitution.

Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 344, 51 L. ed. 214, 27 Sup. Ct. Rep. 90; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

The order requiring the railroad to abide by its charter and to discharge its duty to operate an ordinary passenger train is a question for the state courts, and it is not reviewable in this court.

Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; *Hale v. Lewis*, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677; *Schaefer v. Werling*, 188 U. S. 516, 47 L.

ed. 570, 23 Sup. Ct. Rep. 449; *Mobile, J. & K. C. R. Co. v. Mississippi*, 210 U. S. 204, 52 L. ed. 1024, 28 Sup. Ct. Rep. 650.

The taking of property only incidental to the legitimate exercise of governmental powers for the public good is not a taking of property for public use, and a right to compensation on account of such supposed injury does not attach under the Constitution.

Union Bridge Co. v. United States, 204 U. S. 397, 51 L. ed. 538, 27 Sup. Ct. Rep. 367; *Northern P. R. Co. v. Minnesota*, 208 U. S. 593, 52 L. ed. 634, 28 Sup. Ct. Rep. 341.

Mr. Justice White delivered the opinion of the court:

This is a writ of error to a judgment of the supreme court of Kansas ordering a peremptory mandamus commanding the Missouri Pacific Railway Company to obey an order of the state board of railroad commissioners. The order directed the putting in operation of a passenger train service between Madison, Kansas, and the Missouri-Kansas state line, on what is known as the Madison branch of the Missouri Pacific Railway Company.

The branch road in question lies between Madison, Kansas, and Monteith Junction, Missouri. From Madison to the state line is 89 miles, and from the state line to Monteith Junction is 19 miles, the total distance between the two terminal points being 108 miles. At Monteith Junction the Madison branch intersects with the Joplin line of the Missouri Pacific, by means of which connection is made with Kansas City and other points. There being no terminal facilities at Monteith Junction, the trains operated on the Madison branch do not remain over at the junction, but run as far as Butler station, 3 miles distant on the Joplin line, where terminal facilities exist.

There are no large towns on the Madison branch, either in Kansas or Missouri, and the country which that branch serves is largely agricultural, Kansas City being the nearest and *most natural market for [267 the products of the territory. The greater volume of the passenger travel, however, originating on the Madison branch, does not move to Kansas City by going to Monteith Junction, but leaves the branch at various points between Madison and the state line, at which points the branch crosses various roads, which, generally speaking, run in a northerly or northeasterly direction, affording a means of reaching Kansas City more directly than by going to Monteith and thence *via* the Joplin line to that city. Three of these intersecting roads are operated by the Atchison & Topeka, two by the Missouri, Kansas &

Texas, one by the St. Louis & San Francisco, one by the Kansas & Colorado Pacific, and one by the Missouri Pacific. Pleasanton is the last station on the branch in Kansas, and is six miles distant from the state line.

Without clearing up some confusion in the record upon the subject, we take the fact to be as stated by the court below, that the branch between Madison and Monteith Junction, at least, so far as it was constructed within the state of Kansas, was built by a Kansas corporation chartered in 1885, known as the Interstate Railroad Company, and that to aid in the building of the road within the state of Kansas about \$200,000 was contributed by counties through which the road passed. A construction company did the work, at the contract cost of \$1,095,000, and this sum was paid by the railway company by delivering to the contractors an issue of \$1,622,000 of 6 per cent mortgage bonds. The Interstate Railroad Company, in July, 1890, consolidated with another Kansas corporation known as the St. Louis & Emporia Railroad Company, the consolidated company being designated as the Interstate Railway Company. Subsequently, in December, 1890, by authority of a statute of Kansas, the Interstate Railway Company and eleven other Kansas railway corporations were consolidated, the consolidated company being designated as the Kansas & Colorado Pacific Railway Company.

268] *The Missouri Pacific Railway Company is a corporation chartered in Missouri, Kansas, and Nebraska. It owns virtually all the mortgage bonds issued by the Interstate Railroad Company for the construction of the Madison branch and a majority of the stock of that company. Indeed, it is the owner of a majority of the stock and mortgage bonds of all the constituent companies which united in forming the consolidated company known as the Kansas & Colorado Pacific Railway Company, and, as the lessee of the latter company, operates its lines of road, including, of course, the Madison branch. It is not questioned that substantially all the equipment used in operating the roads covered by the leases is owned by the Missouri Pacific Railway Company.

In September, 1905, residents along the Madison branch within the state of Kansas filed a petition with the board of railroad commissioners, alleging, in substance, that only a mixed train was furnished for passenger service on the branch, that such service subjected the public to great inconvenience, prevented anything like a regular and timely passenger service, and, besides, was dangerous to those traveling over the road. An order was prayed requiring the

Missouri Pacific to operate a regular passenger train over the branch road between Madison and the state line. The evidence introduced before the board is not in the record. After a hearing, the following finding and order were made:

"Now, on this 7th day of December, 1905, after hearing the evidence and argument of counsel, in the above-entitled action, the board finds that during the years 1902 and 1903, when the respondent railway company operated a passenger train on the Madison branch of its line, that the said passenger train was operated at a loss, and there was no testimony introduced at this hearing that the train, if put on as asked for by the petitioners, could be operated at a profit to the respondent company. The board believes that the people along the line of the Madison branch of said company are entitled to better passenger train service than they are *now receiving, and it [269 has been represented to the board of officers of said company that the respondent is constructing motor cars for establishment on its branch lines, that can be operated at a much less expense than steam service.

"It is therefore ordered by the board that on or before the first day of May, 1906, a motor passenger car service be put on and operated on said Madison branch, from Madison, Kansas, to the Kansas and Missouri state line, and in the event said railroad company is unable at that time to put on a motor car passenger service, a regular steam passenger train service be forthwith put on and operated."

The road not having obeyed, this proceeding by mandamus was commenced to compel compliance.

Three special defenses were set up in the return to the alternative writ. In the first it was insisted that the branch road was an interstate road and could only be operated as such, and therefore was not subject to the jurisdiction of the railroad commission or the courts of the state of Kansas, and in the second it was claimed that the burden which would be occasioned by compelling the operation of a passenger train service would be confiscatory and in violation of rights protected by the 14th Amendment. The court below, in its opinion, thus, we think, accurately summarized the elaborate averments relating to the two defenses just referred to:

"To the alternative writ an answer was filed which denies that the company operated the Madison branch as a line of road wholly within the state of Kansas, and alleges that said branch is a part of the Missouri Pacific general system; that defendant maintains terminal facilities for the branch at Butler, Missouri, 20 miles east

of the Kansas state line, where the branch connects with the main line of defendant's railroad; that the company has no terminal facilities near the state line within the state of Kansas, and that the branch road cannot be operated as a road within the state of Kansas without such terminal facilities, **270]** ties, to maintain which would involve the company in ruinous expense. It also alleges that the order is unreasonable and confiscatory, and that the company cannot comply with it without great financial loss; that the entire revenue of the road within the state of Kansas, including passenger and freight business, is insufficient to meet the expense and cost of operating the road within the state; that from July 1, 1903, to April, 30, 1905, it maintained separate passenger train service upon this branch, but was obliged to abandon the same and return to the mixed passenger and freight service because the total receipts of passenger and freight business during that period proved wholly insufficient to meet the expenses of operation. It further alleges that compliance with the order of the board would compel defendant to divert its revenues from other lines and parts of its system outside the state of Kansas to the maintenance of separate passenger train service in the state, and that the extent of such additional cost would amount to a confiscation of its property."

The third defense set up that the company was diligently endeavoring to perfect a motor car for experimental purposes, that the practical utility of such service on railway tracks was problematical, and that it was the design of the company "to test the practicability of said character of service on its said Madison branch line as soon as the same can be done, and is also its design to furnish said motor car service for separate passenger traffic if the cost of said service can be brought within the passenger service cost of the mixed train service, which it now furnishes, and if said motor car service can be successfully operated from the standpoints of utility and safety and other considerations necessary to be taken into account."

By stipulation a referee was appointed to take evidence and report findings of fact and conclusions of law. The referee transmitted the evidence taken and made lengthy findings of fact, upon which his conclusions of law were stated. Those conclusions briefly were that although it might be **un-271]** reasonable "to order a separate passenger train service to be operated on the branch line, viewed as an absolutely independent line, it was not unreasonable to compel the furnishing of such service, viewing the line as a part of the system of the Missouri

Pacific road, and taking into account the possible benefits which might arise to that system. It was, however, concluded that as the branch road was an interstate road, and could only be operated as such, the state was without power to compel the putting in operation of the passenger train service between Madison and the state line, and that the relief prayed for should therefore be refused.

It was recognized by the supreme court of Kansas when it came to consider the report of the referee that the authority which the commission had exerted in making the order took its source in a section of the act of the legislature of Kansas enacted in 1901, and now found in § 5970, General Statutes of Kansas of 1901, the section being as follows:

"Whenever, in the judgment of the railroad commissioners, it shall appear that any railroad corporation or other transportation company fails in any respect or particular to comply with the terms of its charter or the laws of the state, or whenever in their judgment any repairs are necessary upon its road, or any addition to its rolling stock, or any addition to or change of its stations or station houses, or any change in its rates for transporting freight, or any change in the mode of operating its road and conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, said commissioners shall inform such corporation of the improvement and changes which they adjudge to be proper, by a notice thereof in writing, to be served by leaving a copy thereof, certified by the commissioner's secretary, with any station agent, clerk, treasurer, or any director of said corporation; and if such orders are not complied with, the said commissioners, upon complaint, shall proceed to enforce the same in accordance with the provisions of this act, as in other cases."

*Reviewing the findings and conclusions of the referee, the court held that the referee was wrong in holding that there was a want of power in the commission to make the order, and it was therefore decided that the order was valid and that the duty of the railroad company was to obey it. 76 Kan. 467, 92 Pac. 606.

A brief summary of the questions passed on by the court will serve to an understanding of the assignments of error which we are called upon to consider:

a. The court disposed of certain contentions which would seem to have been raised at the argument concerning the repugnancy to the state Constitution of the law creating the commission and conferring authority upon that body, and held the objections

untenable. As these involved matters of purely state concern, we shall not further refer to them.

b. The court also adversely disposed of a contention based upon the assumption that the railway company had, by its charter, a contract right to regulate the time and manner of operating its trains, and hence was not subject to the order which the commission had made. Although such contention did not deny that the charter right relied on was subject to repeal or amendment by the legislature, it was urged that, as the legislature had not expressly amended or repealed the right, such a result should not be made to flow from the section conferring powers upon the commission, as repeals by implication were not favored.

Having thus cleared the way for the graver questions which the case involved, the court came to consider, first, the reasonableness on its face of the order of the commission, viewed in the light of the findings of that body; second, the reasonableness of the order, tested by the findings of the referee and the evidence upon which such findings were based; and third, the validity of the order in view of the power of Congress to regulate interstate commerce, as applied to the nature and character of the road to which the order of the commission was made applicable.

273] *As to the first, although the duty of the company under its charter was referred to and authorities were cited, with evident approval, holding that the obligation to operate a separate passenger train service rested upon a railroad company in the fulfillment of the law of its being, the court did not expressly pass upon that aspect of the case, but held that, as it did not plainly and obviously result upon the face of the findings and order made by the commission, that the service required would be rendered at a pecuniary loss, it could not, in any event, be said that the order was unreasonable on its face. As to the second, considering the inherent and prima facie reasonable nature of the service, the performance of which the order commanded, along with the findings of the referee and the evidence, it was held that the unreasonableness of the order had not been established, since, taking all the foregoing into account, it had not been affirmatively proven that any material pecuniary loss would be sustained from rendering the service in question. In reaching this conclusion it was pointed out that, as a result of the state statute, a prima facie presumption of reasonableness attached to the order of the commission, and therefore the burden was on the railroad company to overcome this presumption. As to the

third contention, it was held that the exertion by the state of its authority to regulate the operation within the state of the road chartered by the state was but the exercise of a lawful state police power which did not impose any direct burden upon interstate commerce, and hence did not conflict with the Constitution of the United States.

The grievances which the railroad company deems it may endure by the enforcement of the order of the commission as commanded by the court are expressed in many assignments of error. To consider them in detail is not essential, as all the complaints which they embrace were embodied in the argument at bar by the counsel for the railway company in the following propositions:

"First. The order of the board and the mandate of the *state court were, in [274 substance and effect, a regulation of commerce among the states, and the court was without power or jurisdiction in the premises.

"Second. The order of the board, on its face, is manifestly unreasonable, and, in the light of the findings of fact, arbitrary, and without the first element of due process of law, and a denial of the equal protection of the law, guaranteed by the Federal Constitution.

"Third. The order and judgment of the state court, on the evidence and facts found, deprived the railroad company of its property without due process of law, and without compensation, and denied to it the equal protection of the law.

"Fourth. The order of the board of railroad commissioners was an usurpation of power by the board, and the construction placed upon the law by the state court impaired the obligation of the contract between the state and the railway company, in violation of the Constitution of the United States, and deprived it of its property without due process of law and without compensation, and denied to it the equal protection of the law."

While it may be that, in some of their aspects, each of the first three propositions involve considerations apparently distinct from the others, as, in substance, the ultimate reasons by which all three are controlled are identical, we consider them together. Before doing so, however, we dispose of the question concerning the alleged impairment of a contract right, protected by the Constitution of the United States, which is formulated in the fourth proposition, by pointing out the twofold contradiction upon which the proposition is based. As it is not denied that the asserted charter right was held subject to the power of the

state to repeal, alter, or amend, it follows that the proposition amounts simply to saying that an irrepealable contract right arose from a contract which was repealable. *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 345, 53 L. ed. 530, 542, 29 Sup. Ct. Rep. 370. Stating the contention in a different form, the same contradiction becomes 275] apparent. As *the argument concedes the existence of the legislative power to repeal, alter, or amend, and as it is impossible to assume that a legislative act has impaired a contract without, by the same token, declaring that such act has either repealed, altered, or amended, hence the proposition relied upon really contends that the contract has been unlawfully impaired by the exercise of a power which it is conceded could lawfully repeal the contract. And, of course, this reason is controlling, irrespective of the scope of the alleged charter right, since, whatever be the extent of the right conferred, it was subject to the reserve power.

The court in *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398, reiterating a doctrine expounded in preceding cases, said (p. 19):

"The elementary proposition that railroads, from the public nature of the business by them carried on, and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly, by the legislative authority, or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine."

Also in the same case, restating a principle previously often announced, it was held (p. 20) that railway property was susceptible of private ownership, and that rights in and to such property securely rested under the constitutional guaranties by which all private property was protected. Pointing out that there was no incompatibility between the two, the truism was re-announced that the right of private ownership was not abridged by subjecting the enjoyment of that right to the power of reasonable regulation, and that such governmental power could not in truth be said to be curtailed because it could not be exerted arbitrarily and unreasonably without impinging on the enduring guaranties by which the Constitution protected property rights.

The *Coast Line Case* was concerned with 276] the exertion of *state power over a matter of state concern. But the same doctrines

had been often previously expounded in reference to the power of the United States in dealing with a matter subject to the control of that government. Moreover, in the cases referred to, as the power of the two governments operated in different orbits, it was always recognized that there was no conflict between them, although it was constantly to be observed that, resulting from the paramount operation of the Constitution of the United States, even the lawful powers of a state could not be exerted so as to directly burden interstate commerce.

Coming to apply the principles just stated to the order in question, and considering it generically, it is obvious that it exerted a lawful state power. Its commands were directed to a railroad corporation which, although chartered by other states, was also chartered by Kansas, and concerned the movement of a train on a branch road wholly within the state, which had been built under the authority of a Kansas charter, although the road was being operated by the *Missouri Pacific* under lease. The act commanded to be done was simply that a passenger train service be operated over the branch line within the state of Kansas. Unless, then, for some reason, not manifested in the order, intrinsically considered, it must be treated as such an arbitrary and unreasonable exercise of power as to cause it to be, in effect, not a regulation, but an infringement upon the right of ownership, or, considering the surrounding circumstances, as operating a direct burden upon interstate commerce, it is clear that, within the doctrine previously stated, no error was committed in directing compliance with the order. And this brings us to consider the several reasons relied upon to establish, first, that the order made by the railroad commission was so arbitrary and unreasonable as to cause it to be void for want of power; or, second, that the order was void because its necessary operation was to place a direct burden upon interstate commerce.

*1. *The alleged arbitrary and un- [277 reasonable character of the order.*

In its principal aspect, this contention is based on the insistence that the order and findings of the commission and the findings of the referee, when elucidated by the proper inferences of fact to be drawn from the evidence, show the service which the order commanded could not be rendered without a pecuniary loss. And this, it is insisted, is the case, not only because of the proof that pecuniary loss would be occasioned by performing the particular service ordered, considering alone the cost

of that service and the return from its performance, but also because it is asserted the proof establishes that the earnings from all sources, not only of the branch road, but of all the roads operated by the Missouri Pacific in Kansas, produced no net revenue and left a deficit. It is at once evident that this contention challenges the correctness of the inferences of fact drawn by the court below. They therefore assume that we are not bound by the facts as found by the court below, but must give to the evidence an independent examination for the purpose of passing on the constitutional question presented for decision. But we do not think that the case here presented requires us to consider the issues of fact relied upon, even if it be conceded, for the sake of argument only, that, on a writ of error to a state court, where a particular exertion of state power is assailed as confiscatory, because ordering a service to be rendered for an inadequate return, the proof upon which the claim of confiscation depends would be open for our original consideration, as the essential and only means for properly performing our duty of independently ascertaining whether there had been, as alleged, a violation of the Constitution. We say this because, when the controversy here presented is properly analyzed, the first and pivotal question arising is whether the order complained of did anything more than command the railroad company to perform a service which it was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers, and which it could not refuse to perform as long as the charter powers remained and the obligation which arose from their enjoyment continued to exist. The difference between the exertion of the legislative power to establish rates in such a manner as to confiscate the property of the corporation by fixing them below a proper remunerative standard, and an order compelling a corporation to render a service which it was essentially its duty to perform, was pointed out in *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, *supra*. In that case the order to operate a train for the purpose of making a local connection necessary for the public convenience was upheld, despite the fact that it was conceded that the return from the operation of such train would not be remunerative. Speaking of the distinction between the two, it was said (p. 26):

"This is so [the distinction] because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so, as an incident, some pecuniary loss from rendering such service may result. It follows,

therefore, that the mere incurring of a loss from the performance of such a duty does not, in and of itself, necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable under the doctrine of *Smyth v. Ames*, 169 U. S. 526, 42 L. ed. 842, 18 Sup. Ct. Rep. 418.

"Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance."

Indeed, the principle which was thus applied in the *Atlantic Coast Line Case* [279 had previously, as pointed out in that case, been made the basis of the ruling in *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115. The fact that the performance of the duty commanded by the order which is here in question may, as we have conceded for the purpose of the argument, entail a pecuniary loss, is, of course, as declared in the *Atlantic Coast Line Case*, as a general rule, a circumstance to be considered in determining its reasonableness, as are the other criteria indicated in the opinion in that case. But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral; that is, was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred. Was the duty which the order here commanded one which the corporation was under the absolute obligation to perform as the result of the acceptance of the charter to operate the road is then the question to be considered.

It may not be doubted that the road, by virtue of the charter under which the branch was built, was obliged to carry passengers and freight, and therefore, as long

as it enjoyed its charter rights, was under the inherent obligation to afford a service for the carrying of passengers. In substance, this was all the order commanded, since it was confined to directing that the road put on a train for passenger service. True it is that the road was carrying passengers in a mixed train, that is, by attaching a passenger coach to one of its freight trains. Testing the alleged unreasonableness of the order in the light of the inherent duty resting upon the corporation, it follows 280]*that the contention must rest upon the assumption that the discharge of the corporate duty to carry passengers was so completely performed by carrying them on a mixed train as to cause an order directing the running of a passenger train to be so arbitrary and unreasonable as to deprive of rights protected by the Constitution of the United States. But when the necessary result of the contention is thus defined, its want of merit is, we think, self-evident, unless it can be said as a matter of law that there is such an identity as to public convenience, comfort, and safety between travel on a passenger service train and travel on a mixed train,—that is, a train composed of freight cars with a passenger car attached,—as to cause any exertion of legislative authority for the public welfare, based on a distinction between the two, to be repugnant to the Constitution of the United States. The demonstration as to the want of foundation for such a contention might well be left to the consensus of opinion of mankind to the contrary. The unsoundness of the proposition was clearly pointed out by the supreme court of Illinois in *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.* 176 Ill. 512, 35 L. R. A. 656, 52 N. E. 292, where it was said:

"Independently of the provisions of the lease, which was a contract between the lessor and the lessee companies, the right of the people to insist upon the running of a separate passenger train is implied from the charter obligation to equip and operate the road. Inasmuch as a railroad company is bound to carry both passengers and freight, the obligation of the appellee required it to furnish all necessary rolling stock and equipment for the suitable and proper operation of the railroad as a carrier of passengers, no less than as a carrier of freight. It cannot be said that the carrier of passengers in a car attached to a freight train is a suitable and proper operation of a railroad, so far as the carriage of passengers is concerned. The transportation of passengers on a freight train, or on a mixed train, is subordinate to the transportation of freight,—a mere incident to the business 281] of carrying *freight. To furnish such 480

cars as are necessary for the suitable and proper carriage of passengers involves the necessity of adopting that mode of carrying passengers which is best adapted to secure their safety and convenience. This can be accomplished better by operating a separate passenger train than by operating a mixed train; that is to say, the duty of furnishing all necessary rolling stock and equipment for the suitable and proper operation of a railroad carrying passengers involves and implies the duty of furnishing a train which shall be run for the purpose of transporting passengers only, and not freight and passengers together."

Even, however, if it be conceded that the reasoning of the case just cited may not be universally applicable, because conditions might exist which, in some cases, might cause a different rule to apply, there is no room for such view in this case. This is so because, as was pointed out by the court below, the statutes of Kansas in force at the time the branch road was incorporated lend cogency to the conclusion that the effect of the acceptance of the charter was to bring the road under the obligation of furnishing passenger service,—a duty which could not be escaped by giving the service only on a mixed train, and thus subjecting passengers to the resulting dangers and inconveniences. Nor do we think there is any force in the argument elaborately pressed, that chapter 274, Kansas Laws of 1907, as amended by chapter 190, Laws of 1909 (which is in the margin),† shows that the law *of Kansas proceeds on the [282 conception that there is no distinction between a passenger train service and the carriage of passengers on a mixed or freight train. On the contrary, we think the statute referred to sustains the opposite inference, since it recognizes that persons who avail of the right conferred to travel in the caboose of a freight train are not entitled to ordinary passenger facilities or to the legal protection ordinarily surrounding passenger traffic. The first, because the statute provides that persons must get on or off the caboose where the company finds it convenient to place that car, and second, be-

†Part of Chapter 274, Kansas Laws of 1907, as Amended by Chapter 190, Laws of 1909.

That all freight trains to which caboose is attached shall be obliged to transport, upon the same terms and conditions as passenger trains, all passengers who desire to travel thereon, and who are above the age of fifteen years, and who, if under fifteen years, are accompanied by a parent or guardian, or other competent person, but no freight train shall be required to stop to receive or discharge any passenger at any other point other than where such freight train

cause persons riding in the caboose are afforded redress for injury only where the company is guilty of gross negligence.

The contention that the order is unreasonable in and of itself, irrespective of whether there is profit in the operation of the train service which the order commands to be operated, because it directs the movement of the passenger train directed to be run to the state line, where, it is said, there are no terminal facilities, and no occasion for the termination of the transit, is disposed of by the considerations previously stated. We say this because its unsoundness is demonstrated by the reasoning which has led us to conclude that there was no merit in the contention that the fact of pecuniary loss was of itself alone adequate to show the unreasonableness of the order. This follows from the principle which we have previously expounded, to the effect that the criterion to apply in a case like this is the nature and character of the duty ordered, **283** *and not the mere burden which may result from its performance.

2. *That the order was void because it operates a direct burden upon interstate commerce.*

To support this proposition it is urged that the charter of the Interstate Railroad Company, the builder of the branch, provided for a road not only in Kansas, but to extend into Texas and Missouri, and therefore for an interstate railroad. This being its character, the argument proceeds to assert that the regulation of traffic on the road, whatever be the nature of the traffic, was interstate commerce, and beyond the control of the state of Kansas. But this simply confounds the distinction between state control over local traffic and Federal control over interstate traffic. To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation, unless, at the same time, it were held that the incorporation of the road had operated to extend the powers of the government of the United States to subjects which could not come within the authority of that government consistently with the Constitution of the United States. Manifestly, the mere fact that the charter of the road contemplated that it should be projected into several states did not change the nature and

character of our constitutional system, and therefore did not destroy the power of Kansas over its domestic commerce, or operate to bring under the sway of the United States matters of local concern, and of course could not project the authority of Kansas beyond its own jurisdiction. The charter therefore left the road for which it provided subject, as to its purely local or state business, to the authority of the respective states into which it was contemplated the road should go, and submitted the road as an entirety, so far as its interstate commerce business was concerned, to the controlling power conferred by the Constitution upon the government of the United States.

The contention that a burden was imposed upon interstate *commerce by **[284** causing the train to stop at the state line, where there were no terminal facilities, but in a disguised form reiterates the complaint which we have already disposed of, that the order, because of the direction to stop at the state line, was so arbitrary and unreasonable as to be void. The order cannot be said to be an unreasonable exertion of authority, because the power manifested was made operative to the limit of the right to do so. Besides, the proposition erroneously assumes that the effect of the order is to direct the stoppage at the state line of an interstate train, when, in fact, the order does not deal with an interstate train, or put any burden upon such train, but simply requires the operating within the state of a local train, the duty to operate which arises from a charter obligation. It is said that, as the state line may be but a mere cornfield, and great expense must result to the railway from establishing necessary terminal facilities in such a place, it must follow that the road, in order to avoid the useless expense, must operate the passenger service directed by the order, not only to the state line, but 20 miles beyond, to Butler, on the Joplin line, where terminal facilities exist. From these assumptions, it is insisted, that the order must be construed according to its necessary effect, and therefore must be treated as imposing a direct burden upon interstate commerce by compelling the operation of the passenger train, not only within the state of Kansas, but beyond its borders. * But under the hypothesis

may stop; nor shall it be necessary to stop the caboose of such trains at the depot to receive and discharge passengers; provided, that on such trains the railroad companies shall only be liable for their gross negligence; and provided further, that this act shall not be construed to apply to freight trains on main lines, the most of which trains shall be composed of ears loaded with live stock.

54 L. ed.

Any officer or employee of such railroad company, who shall violate any of the provisions or conditions of § 1 of this act, shall, upon conviction, be deemed guilty of a misdemeanor, and shall be fined in any sum not less than ten nor more than one hundred dollars, or by imprisonment in the county jail for not less than five nor more than thirty days, or by both such fine and imprisonment.

upon which the contention rests, the operation of the train to Butler would be at the mere election of the corporation, and, besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed. *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121.

Affirmed.

285] *HANNIS DISTILLING COMPANY,
Plff. in Err.,
v.
MAYOR AND CITY COUNCIL OF BAL-
TIMORE.

(See S. C. Reporter's ed. 285-295.)

Error to circuit court—frivolousness of Federal question.

The contention that due process of law is denied by a tax imposed under the authority of Maryland Code Pub. Gen. Laws 1904, art. 81, §§ 214, 215, upon a custodian of distilled spirits, which rests upon the theory that the taxing power of the state is, by its Constitution, confined exclusively to the levy of taxes *in personam* upon the owners of property, is too devoid of merit to present a substantial Federal question which will sustain a direct writ of error from the Federal Supreme Court to a circuit court, where the highest state court has upheld the statute in controversy as an exercise of the taxing power of the state, and, in so doing, declared that it but reiterated and re-expounded the rulings by it previously made.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

[No. 75.]

Argued January 12, 1910. Decided February 21, 1910.

IN ERROR to the Circuit Court of the United States for the District of Mary-

NOTE.—On due process of law in revenue proceedings—see note to *Read v. Dingess*, 8 C. C. A. 398.

On what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On direct review in Federal Supreme Court of judgments of district and circuit courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

land to review a judgment for the recovery of taxes assessed on distilled spirits in a bonded warehouse in a suit which had been removed from the Court of Common Pleas of the City of Baltimore in that state. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. Shirley Carter argued the cause and filed a brief for plaintiff in error.

Messrs. Sylvan Hayes Lanchheimer and Edgar Ellen Poe argued the cause, and, with Mr. Oscar Leser, filed a brief for defendant in error.

Mr. Justice White delivered the opinion of the court:

The city of Baltimore sued to recover from the Hannis Distilling Company, a West Virginia corporation, \$18,218.77, of which \$9,259.28 was the amount of state and city taxes for 1902 on an assessment of 50,996 barrels of distilled spirits, and \$8,959.49 was the sum of state and city taxes for 1903 on an assessment of 54,514 [286 barrels of distilled spirits. It was alleged that the spirits assessed were "in the ownership and possession or custody of said defendant in the city of Baltimore, state of Maryland . . . at the time each assessment was made." The declaration, as amended, alleged that the taxes sued for had been levied by virtue of "chapter 704 of the acts of general assembly of Maryland, passed at the January session of 1892, as amended by chapter 320 of the acts of the general assembly of Maryland, passed at the January session of 1900." The provisions thus referred to are embraced in §§ 214 to 224, inclusive, of article 81 of the Code of Public General Laws of Maryland of 1904. Their purpose is indicated by §§ 214 and 215, which are as follows:

"Sec. 214. There shall be levied and collected upon all distilled spirits in this state, as personal property, the same rate of taxation which is imposed by the laws of the state on other property for state and county purposes.

"Sec. 215. For the purpose of such assessment and collection, it is hereby made the duty of each distiller, and of every owner or proprietor of a bonded or other warehouse in which distilled spirits are stored, and of every person or corporation having custody of such spirits, to make report to the state tax commissioner, on the 1st day of January in each and every year, of all the distilled spirits on hand at such date, and the tax for the ensuing year from the said 1st of January shall be levied and paid on the amount of distilled spirits so in hand, as representing the taxable distilled spirits for such year; provided, however, that the same

distilled spirits shall not be taxed twice for the same year."

By the remaining provisions of the act, the machinery for levying and collecting the taxes for which the act provided was created. Such regulations afforded those interested an opportunity to be heard as to the amount of any assessment, made it the duty of the person having the possession, control, or custody of the spirits assessed to pay the taxes levied thereon, and gave to the persons thus made liable to make *payment a lien upon the spirits to secure the reimbursement of the taxes paid.

Because of diversity of citizenship, the defendant removed the case to the circuit court of the United States for the district of Maryland. In that court two pleas to the declaration were filed. By the first, it was alleged that the corporation was not only incorporated under the laws of West Virginia, but had always been exclusively a citizen and resident of that state, and of no other. The corporation, it was averred, was not, at the time when the taxes sued for were levied, the owner of the distilled spirits upon which the levy was made, or any portion thereof, and, indeed, had never at any time since the assessment and levy had any interest, direct or indirect, in the distilled spirits in question. Under these circumstances it was charged "that under the provisions of article 15 of the Bill of Rights of the Constitution of Maryland, as the same has been construed by the court of appeals of Maryland . . . the respective taxes levied on the assessed value of all of the said barrels of distilled spirits . . . were levied on the owners of said barrels of distilled spirits, who were and are persons other than this defendant, and the said taxes were not and could not have been levied on this defendant." The plea then proceeded to aver that at all times prior to the day when the assessment had been made, and since, the spirits assessed had been stored in the defendant's bonded warehouse, subject to the acts of Congress applicable to bonded warehouses, and that the defendant had at no time "any further custody or control of the spirits than is by the acts of Congress applicable to the subject." The plea further charged that the corporation had no funds in its possession or under its control, belonging to the owners of the spirits, with which to pay the taxes; that the corporation had not agreed to pay them, that it had never borne any other relation to the owners than that of creditor, and therefore there was no right to recover the taxes from the corporation or to compel it to pay them. It [288] *was specially averred that to compel the corporation to pay the taxes would be to deprive it of its property

without due process of law, in violation of the 14th Amendment to the Constitution of the United States. The second plea substantially reiterated the averments of the first, and, in addition, specially alleged that all the persons who owned the distilled spirits resided outside of the state of Maryland, and could not be taxed *in personam*, and that, by the construction given to the Constitution of the state by the highest court of the state, the property, although situated in the state, was not susceptible of being taxed, and, therefore, the taxes were void, and there was no power to cast upon the corporation the duty of paying them, and to compel the corporation to pay the taxes would be a violation of the due-process clause of the 14th Amendment.

A demurrer filed by the city to both pleas, on the ground that they stated no defense, was sustained without an opinion. The distilling company electing to stand upon its pleas, judgment was entered against it for the amount of the taxes. Thereupon a writ of error directly from this court was prosecuted upon the assumption that questions under the Constitution of the United States were involved which gave a right to an immediate resort to this court for their solution. Upon the correctness of such assumption our jurisdiction depends. The assumption, however, may not be indulged in simply because it appears from the record that a Federal question was averred, if such question be obviously frivolous or plainly unsubstantial, either because it is manifestly devoid of merit, or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy. *Leonard v. Vicksburg*, S. & P. R. Co. 198 U. S. 416, 421, 49 L. ed. 1108, 1110, 25 Sup. Ct. Rep. 750, and cases cited; *Delmar Jockey Club v. Missouri*, 210 U. S. 324, 335, 52 L. ed. 1080, 1084, 28 Sup. Ct. Rep. 702; *McGilvra v. Ross*, 215 U. S. 70, ante, 27, 30 Sup. Ct. Rep. 27.

The assignments merely charge that error was committed *in sustaining the [289] demurrer to the pleas, and consequently in refusing to give effect to the alleged rights under the Constitution which the pleas asserted. But the pleas based the claim of Federal right, not merely upon the inherent operation of the law under which the taxes were levied, abstractly considered, but upon limitations which it was assumed were to be treated as embodied in the law in consequence of restrictions on the general power of the state to tax, based upon the construction which it was asserted had been given to a provi-

sion in the Bill of Rights in the state Constitution by the court of last resort of the state. And the argument elaborately pressed at bar concerning the assumed Federal question accords with this conception of the pleas, since it does not deny that the act under which the taxes were levied would not be wanting in due process if it had been enacted by a state government possessing normal powers of local taxation, but contends that the act under consideration must be held to be wanting in due process, because its provisions should be construed with reference to the assumed abnormal limitations upon the taxing power of the state of Maryland, above referred to. By the limitation which the argument thus assumes to exist it is urged the government of the state of Maryland, in the exertion of its taxing power, is confined exclusively to the levy of taxes *in personam* upon the owners of property. Being thus limited by the state Constitution, the argument proceeds to insist that there was no taxing power in the state of Maryland adequate to embrace an assessment of taxes upon a mere custodian of distilled spirits, and consequently that the compelling of a custodian to pay such an imposition, not being within the taxing power, was virtually an exercise of the power of eminent domain, and hence there was such a proposed taking of the money or property of the custodian, without full and adequate compensation, as would constitute a denial of due process of law. In addition, it is elaborately insisted that as by the Constitution of the United States a state may not extend its 290] taxing authority *over nonresidents, it must follow, from the limitations on the taxing power of the state of Maryland, above asserted, that that state, not having the power to tax a nonresident owner of distilled spirits, could not, without a violation of the 14th Amendment of the Constitution of the United States, by indirection accomplish the same result by imposing the obligation to pay upon the custodian. But back of the abstract theories as to the scope of the state taxing power, upon which these propositions necessarily depend, lies the inquiry whether, for the purposes of this case, in view of the previous decisions of the court of last resort of the state of Maryland, and of this court, dealing with such decisions, it is open to press such theories, and to attempt to make them the basis of the assumed existence of rights under the Constitution of the United States.

In *Carstairs v. Cochran*, 95 Md. 495, 52 Atl. 601, suit was brought by Cochran, as treasurer and tax collector, to recover from Carstairs and another the amount of taxes assessed and levied in respect of distilled spirits in a warehouse of the defendants, the

assessment and levy having been made under the identical law by virtue of which the assessment and levy here in controversy were made. The court of appeals of Maryland upheld the statute, and consequently sustained the validity of the tax. In opening its opinion, the court said:

"This appeal constitutes the third attack upon the validity of the act of 1892, chap. 704, as now amended by the act of 1900, chap. 320, being §§ 204 to 213, inclusive [of article 81] of the Supplement to the Public General Code of Maryland, providing for the collection of taxes upon distilled spirits in this state. The appellants admit that all the features of the law which are here assailed upon constitutional grounds were considered by the court in *Monticello Distilling Co. v. Baltimore*, 90 Md. 416, 45 Atl. 210; and that while the act was there held invalid, as it then stood, because of the failure to provide for a hearing in respect to the valuation to be placed on the *spirits for [291 the purposes of taxation, it was declared to be 'in other respects free from constitutional objections.'"

After then stating that it was contended that, as the *Monticello Case* had been decided on the ground that the statute did not provide adequate notice, the declarations of the court in that case, upholding the constitutionality of the law in other respects, were *obiter*, the court proceeded to consider that contention and hold that it was not well founded, because the reasoning in the *Monticello Case* concerning the constitutionality of the statute was directly responsive to the contentions made, and therefore involved in the case as presented. Although reaching this conclusion, in view of the court's estimate of the importance of the subject, it nevertheless proceeded to reconsider all the contentions concerning the constitutionality of the statute. As a prelude to the reinvestigation, the court said:

"The provisions of the act of 1892, chap. 704, were sufficiently detailed in the opinion rendered in *Monticello Distilling Co. v. Baltimore*, *supra*, and that statement will be adopted for this case without repeating it here. That act is assailed here as it was there, as fundamentally vicious, and upon precisely the same grounds, with the exception of the want of notice of assessment, which has been cured by the act of 1900, chap. 320. These grounds are twofold: First, that it lays a tax upon property, and not upon the owner of the property; and, second, that it compels one not the owner of the spirits to pay the tax due by the owner, who is usually unknown to the party compelled to pay."

And after an elaborate consideration of all the contentions, the conclusions reached

in the Monticello Case were adhered to and the constitutionality of the statute imposing the tax was reaffirmed. The case was brought to this court (*Carstairs v. Cochran*, 193 U. S. 10, 48 L. ed. 596, 24 Sup. Ct. Rep. 318), and the repugnancy of the statute to the Constitution of the United States was elaborately pressed. Preliminarily to a consideration of the Federal questions which were presented for decision, the court at the 292] *outset declared (p. 16) "that the statutes in question do not conflict with the Constitution of Maryland is settled by the decisions of its highest court." In considering the Federal question, it was held that the state of Maryland could, as an exertion of its taxing power, without denial of due process of law, tax tangible property having a situs within its borders, irrespective of the residence of the owner, and could impose, if necessary, the obligation to pay such tax upon the custodian or possessor of such property, giving a lien thereon to secure the reimbursement of the tax so paid. It was moreover expressly held that neither the regulations contained in the laws of the United States concerning bonded warehouses for the storage of distilled spirits, or the fact that the custodian in whose warehouse such spirits were stored had issued negotiable receipts for the same, operated to prevent the assessment of the spirits for state taxation, and the imposing of the duty to make payment of the tax upon the warehouseman. Since the decision in the *Carstairs* Case, the right of a state, consistently with the Constitution of the United States, to tax tangible property having a situs within its borders, irrespective of the residence of the owner, and to impose the duty on a warehouseman to pay a tax upon distilled spirits in his custody, even although the warehouse in which they were stored was bonded under the laws of the United States, has been again upheld in *Thompson v. Kentucky*, 209 U. S. 340, 52 L. ed. 822, 28 Sup. Ct. Rep. 533.

It follows that at the time the writ of error directly from this court was sued out, upon the assumed theory that the Maryland act imposing the taxes sued for was repugnant to the due-process clause of the Constitution of the United States, such contention had been expressly decided to be without foundation by this court, and therefore the proposition of Federal right upon which alone the jurisdiction of this court depended was foreclosed and not open to controversy, and afforded no substantial ba-

sis for the writ of error, unless, for some of the reasons alleged by counsel, the case is taken out of this general principle.

*To accomplish such result, the [293 argument is that, in *Carstairs v. Cochran*, this court erroneously, although unwittingly, assumed that the law of the state of Maryland levying the tax which was in question in that case, and which is the same law and character of tax involved in this case, had been upheld by the Maryland court of last resort as a valid exercise of the state taxing power. This alleged oversight, it is suggested, arose from the fact that the court overlooked the "singular limitations" on the taxing power of the state of Maryland, which, as we have previously seen, it is asserted, results from a provision in the Bill of Rights of the Constitution of that state, by which it insisted the state is bereft of general powers of taxation, and is limited strictly to taxing the owners of property *in personam*. Before further noticing this theory, we briefly advert to an attempt to support the suggestion of oversight alleged to have occurred in the decision in the *Carstairs* Case by reference to the subsequent case of *Corry v. Baltimore*, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297. The *Corry* Case did not concern the Maryland law here in question, but involved the constitutionality of a tax imposed by the state of Maryland upon the shares of stock in a domestic corporation held by a nonresident of the state, which were assessed at the domicile of the corporation, accompanied with the obligation upon the corporation to pay the tax. The principal contention was that the tax was repugnant to the due-process clause of the 14th Amendment, because, as the complainant stockholder was a nonresident of Maryland, the tax was an attempt to extend the taxing power of the state over a person not subject to its jurisdiction. The court, while recognizing that the Maryland court had decided that the tax in question was not upon the stock *in rem* or upon the corporation, but was upon the owner, nevertheless decided that the tax was not wanting in due process, because the situs of the stock for the purpose of taxation was in effect fixed by the act of incorporation by which the stockholder was bound, and that the right thus to tax at the domicile of the corporation carried with it *as an inci- [294 dent the regulating power to compel the corporation to pay. Because it was recognized that the court below had decided that the tax there in question was *in personam*, and, ac-

cepting the complexion given to the tax by the court of last resort of Maryland, it was held not to be repugnant to the Constitution of the United States, lends even no semblance of support to the proposition that thereby it was in the remotest degree intimated that the Carstairs Case was mistakenly decided, or that, in disregard of the ruling made by the Maryland court in the Carstairs Case, it was intended to intimate that the burden which the court in that case had sustained as an exercise of the taxing power of the state of Maryland was not the exertion of such authority. And this serves to demonstrate the unsubstantial character of the contention concerning the limitation of the state taxing power, as applied to the case before us, by which alone the semblance of support for the existence of a Federal question necessary to confer jurisdiction upon this court can be evolved. Beyond dispute, in the Carstairs Case the court of last resort of Maryland upheld the act here in controversy as an exertion of the taxing power of the state, and in so doing declared that it but reiterated and re-expounded rulings by it previously made. It follows that, as for the purposes of a review by this court of alleged questions concerning the repugnancy of the taxing act to the Constitution of the United States, the decision of the state court, maintaining, under the state Constitution, the validity of the taxing power which the act exerted, was binding upon this court, it must result that contentions to the contrary are so devoid of merit as to present no substantial Federal question. *Castillo v. McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229. Indeed, considered in its ultimate aspect, the entire argument by which it is sought to evolve a supposed Federal question, and thus to escape the controlling effect of the decision of this court in the Carstairs Case, rests upon the assumption that the conclusion of the state court in that case as to the validity of the taxing act under the state Constitution was not 295] sustained *by the reasoning which the court gave for its conclusion, or that the reasoning was inherently unsound because it proceeded upon a misconception of the state Constitution. In other words, the only possible foundation for the asserted Federal question is the conception that this court would usurp the functions of a state court of last resort in order to distort, if not to destroy, for infirmity of state power, a state law expressly upheld as valid by the state court of last resort.

Dismissed for want of jurisdiction.

VICTOR FRAENKL and John H. Luis, Copartners under the Firm Name of Jaffe Brothers & Company, and Jobst Hinne and Herman Volfram, Copartners under the Firm Name of Hinne & Company, Appts.,

v.

MANUEL CERECEDO, Enrique Cerecedo, José Cerecedo, and Francisco Cerecedo, Composing the Copartnership of Cerecedo Hermanos.

(See S. C. Reporter's ed. 295-304.)

Bill of review — time for filing.

1. The time which elapsed between the tendering of a bill of review to the Federal district court for Porto Rico for filing, and the permission given to file, should not be counted in applying the 'two years' limitation for filing such bill, fixed by analogy to the time allowed by law for an appeal to the Federal Supreme Court.

[For other cases, see Review, 40-47, in Digest Sup. Ct. 1908.]

Bill of review — leave of court — discretion.

2. Permitting a bill of review to be filed without a previous payment of the moneys awarded by the decree sought to be reviewed is not an abuse of discretion, where leave to file was conditional upon the furnishing of an indemnity bond, which was thereafter executed.

[For other cases, see Review, 48-51, in Digest Sup. Ct. 1908.]

Courts — jurisdiction — acquiring by consent — estoppel.

3. The objection to the want of jurisdiction of the Federal district court for Porto Rico of a suit in which all the parties plaintiff were foreign subjects, and all the parties defendant citizens of Porto Rico, is available to defendants although the final decree was entered *pro confesso* after the jurisdiction of the court was extended by the act of March 2, 1901 (31 Stat. at L. 953, chap. 812), § 3, to embrace such a case, where the last appearance of the defendants in the case was before such statute was enacted, when a stipulation was made in respect to an extension of the time to plead to the bill.

[For other cases, see Courts, 1156-1161; Estoppel, 287-289, in Digest Sup. Ct. 1908.]

Courts — jurisdiction of district court for Porto Rico — Federal question.

4. A mere reference in a bill in equity to the provisions of an order of the military governor of Porto Rico does not present a controversy arising under the laws of the United States, of which the Federal district court for Porto Rico would have jurisdiction without regard to the citizenship of the parties, even if such order be treated as a law of the United States, where the bill does not call the attention of the court to a

NOTE.—On bills of review—see notes to *Bank of United States v. Ritchie*, 8 L. ed. U. S. 890; *Shevon v. Van Kleeck*, 27 L. ed. U. S. 269; and *Franklin Sav. Bank v. Taylor*, 4 C. C. A. 72.

controversy arising under such order, in such a way as to invoke the court's action thereon.

[Jurisdiction of Insular Courts, see Courts, III. c, in Digest Sup. Ct. 1908.]

[No. 411.]

Submitted January 10, 1910. Decided February 21, 1910.

APPEAL from the District Court of the United States for Porto Rico to review a decree upon a bill of review, setting aside a decree of that court in an equity case, and dismissing the bill of complaint in such case without prejudice. Affirmed.

See same case below, 4 Porto Rico Fed. Rep. 454.

Statement by Mr. Justice White:

This is an appeal from a decree of the district court of the United States for Porto Rico, upon a bill of review, vacating and annulling a decree entered by that court in an equity cause, and dismissing the bill of complaint in said cause without prejudice.

226] *The bill in the equity cause referred to was filed in December, 1900. The present appellants were complainants. Some of them were alleged in the bill to be copartners, doing business in Dundee, Scotland, as Jaffe Brothers & Company, and to be subjects of the Queen of Great Britain and Ireland. The others were averred to be copartners doing business in Berlin, Germany, as Hinne & Company, and to be subjects of the Emperor of Germany. The defendants to the bill were Demetria Bolta and Alfredo Arnaldo y Sevilla, and various other individuals alleged to be the general and special partners of a firm styled J. Fernandez & Company. Among such were Manuel, Enrique, José, and Francisco Cerecedo, all of whom were members of a firm styled Cerecedo Hermanos, which firm, it was charged, was a special partner in J. Fernandez & Company. All the defendants were averred to be citizens and residents of Porto Rico.

The allegations of the bill were thus summarized in an opinion rendered in the court below:

"It avers, in substance, that Fernandez & Company, of which firm Cerecedo Brothers were special partners up to the time when Fernandez & Company suspended payment, were indebted to the complainants in certain sums set forth in the bill; that fraudulently and to obtain time the last-named firm agreed with Jaffe Brothers & Company to transfer to them certain securities upon third parties for their debt, but thereafter proposed to turn them over

in actual payment *pro tanto*; but when the agent of Jaffe Brothers & Company obtained authority to agree to this, said firm applied for suspension of payments; that to get this, they issued false evidences of indebtedness to Cerecedo Brothers and others; that after the suspension of payments, Fernandez, as liquidator, fraudulently transferred the securities complainant Jaffe Brothers & Company were to have to a third party, without consideration, and for half their value, Cerecedo Brothers being in fact the real purchasers; that Fernandez, after the suspension of payments, turned over to Cerecedo Brothers a large amount *of property, the amount being [297 unknown to complainants, and disposed of a large part of the assets fraudulently. Interrogatories were propounded in the bill to Fernandez. The relief sought was a specific performance of the agreement with Fernandez as to the securities; that a receiver be appointed, and the assets of Fernandez & Company be marshaled; that Fernandez & Company be enjoined from collecting said securities or interfering with the company's assets; that they be delivered to the receiver, the liens be ascertained, the property sold and distributed among the creditors, Jaffe Brothers & Company being allowed to participate in the distribution, said securities being first applied on their debt." [1 Porto Rico Fed. Rep. 54.]

After the return of service of summons upon the firm, Herbert E. Smith, signing himself "Solicitor for defendants," filed a "special appearance" in the case, "for the purpose of moving the court for the compliance on the part of the plaintiffs with the rule of court relative to non-residents giving security for costs, and for the purpose of opposing the motion for an injunction and receiver." On January 14, 1901, a receiver was appointed, who, however, never qualified. It was recited in the order appointing the receiver that after due notice had been given of an application for temporary injunction, the cause had been fully argued by counsel for the respective parties. Subsequently, on January 31, 1901, by written stipulation between counsel for the plaintiffs and defendants, it was agreed "that the defendants herein may and shall have until the 20th day of February, 1901, for the purpose of demurring to, pleading to, or answering the bill of complaint of said complainants herein." Thereafter, on February 23, 1901, a decree *pro confesso* was entered against all the defendants, and complainants were given leave to proceed *ex parte*. On June 8 following, a final decree was entered, adjudging the general and special partners in the firm of J. Fernandez & Company to be indebted to

the complainants in specified amounts, canceling and annulling, as against the right of complainant, because fraudulent and 298] fictitious, the *alleged indebtedness of the firm of J. Fernandez & Company to the special partners, canceling and setting aside as fraudulent the transfers made to the defendant Bolta, and adjudging that the defendants composing the firm of J. Fernandez & Company pay the amounts found due to the complainants, and that, in default of so doing, execution should issue. On January 31, 1902, an execution was issued, which was levied upon the property of the firm of Cerecedo Hermanos. Thereupon, on February 6, 1902, there was filed in the court from which the execution issued, on behalf of the members of that firm, a petition praying for leave to file a bill to review and set aside the decree theretofore entered *pro confesso* against them. The petition recited the presentation of the bill of review, and that document was marked as "Tendered February 6, 1902."

Both in the petition and bill of review various errors asserted to be apparent on the face of the record were set out, which, from the view we take of the case, need not be here detailed.

While, as stated, the petition for leave was filed on February 6, 1902, leave to file was not granted until June 22, 1903, on which date the court filed an opinion. 1 Porto Rico Fed. Rep. 53. The opening paragraph of the opinion is as follows:

"This is a petition for leave to file a bill of review, which is also tendered. The decree asked to be set aside was entered June 8, 1901. This petition was presented February 6, 1902. Objection is made that it comes too late. It is claimed that the act of Congress of March 3, 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488], relative to the United States circuit court of appeals, applies to it. The limitation for appeal, and which, by analogy, has been applied in equity to the time for filing bills of review, applicable, however, is the two years provided in § 1008 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 715). *Clark v. Killian*, 103 U. S. 766, 26 L. ed. 607; *Allen v. Southern P. R. Co.* 173 U. S. 479, 43 L. ed. 775, 19 Sup. Ct. Rep. 518.

The court considered two of the grounds assigned in support of the petition for leave to file. One related to the jurisdiction of the court to render the decree, and was 299] disposed *of by the statement that all the complainants were aliens. Upon the ground, however, that the averments of the bill in the main cause did not authorize the money decree which had been rendered, it was held that, in order to prevent injustice,

the "petitioners should be allowed to file their bill of review, appear, open the decree, and make defense," upon payment of costs to date, and the execution of a bond in the sum of \$15,000, conditioned to perform any judgment that might finally be rendered against them. On June 19, 1903, an order was entered permitting the filing of the bill of review, opening the decree in the original cause, and permitting the Cerecedos to appear therein and make defense, and ordering the return of the execution upon the giving of bond. The condition as to payment of costs and giving bond having been complied with, thereafter, on October 13, 1903, a demurrer was filed to the bill of review, and at the same time in the main cause a plea to the jurisdiction of the court was filed.

On October 14, 1903, an amended bill of review was filed. Nearly four years afterwards, on June 1, 1907, an opinion was filed, holding that the demurrer to the bill of review and also the plea to the jurisdiction in the main case should be overruled. On the 22d of the same month an answer was filed to the bill of review, to which a reply was filed in the following month. On the same day the Cerecedos also demurred to the bill of complaint in the main cause. On April 3, 1908, the court vacated, as improvidently made, the order opening the final decree in the main cause, and suspended further proceeding therein until the determination of the questions raised by the bill of review. On October 30 following, however, the court consented to a reargument of the plea to the jurisdiction in the main cause, which had been theretofore adversely ruled upon, with the result that, on February 1, 1909, the plea to the jurisdiction was sustained. A final decree was thereupon entered upon the issues made upon the bill of review, and after reciting that it appeared upon the *face of the [300 record in the original cause that the court was without jurisdiction to entertain the same, it was decreed as follows:

"It is therefore hereby ordered, adjudged, and decreed that this bill to review the proceedings of this court in said original cause be, and the same hereby is, sustained for the reason aforesaid; that the decree entered by this court on the 8th day of June, A. D. 1901, in the city of Mayaguez, in favor of complainants in said original suit, the same being as aforesaid No. 6 on the equity docket at Mayaguez, entitled *Jaffe Bros. & Co. and Hinne & Co. v. J. Fernandez & Co. and Cerecedo Bros.* be, and the same hereby is, vacated and annulled; and that said original bill of complaint be, and the same hereby is, dismissed without prejudice, with costs of this bill

of review in favor of the complainants herein."

The cause was then appealed to this court.

Messrs. N. B. K. Pettingill and George H. Lamar submitted the cause for appellants:

A bill of review must generally be filed within the time fixed by law for the taking of an appeal or writ of error.

Thomas v. Brockenbrough, 10 Wheat. 146, 6 L. ed. 287; Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 34 L. ed. 97, 10 Sup. Ct. Rep. 736.

The time for taking such appeal or writ from the district court of the United States for Porto Rico to this court is two years.

Allen v. Southern P. R. Co. 173 U. S. 479, 43 L. ed. 775, 19 Sup. Ct. Rep. 518; Royal Ins. Co. v. Martin, 192 U. S. 149, 48 L. ed. 385, 24 Sup. Ct. Rep. 247.

If based solely upon errors apparent on the record, the bill of review could have been filed within two years as a matter of right, and without any permission asked of the court.

Ricker v. Powell, 100 U. S. 104, 25 L. ed. 527; Webb v. Pell, 1 Paige, 564; Hoffman v. Knox, 1 C. C. A. 535, 8 U. S. App. 19, 50 Fed. 484.

As Cerecedo Brothers did not see fit to file their bill as a matter of right, solely for errors apparent, but inserted certain other grounds, and waited the permission of the court for its filing, that choice of courses constituted a waiver of any right to file without leave of court, even as to alleged errors on the face of the record.

Ricker v. Powell, 100 U. S. 104, 110, 25 L. ed. 527, 529.

This proposition is made still clearer by applying the analogy between bills of review and appeals or writs of error. The power in the one seems to be no greater than in the other, and it has been repeatedly held that after the sixty days provided by statute for supersedeas have elapsed, there is no power in the court to grant it, even by a *nunc pro tunc* order, and that, after the last day of the two years limited for appeal or writ of error, the right thereto has elapsed, even if the petition therefor has been filed and any part of the proceedings less than the whole has taken place.

Credit Co. v. Arkansas C. R. Co. 128 U. S. 258, 32 L. ed. 448, 9 Sup. Ct. Rep. 107; Fowler v. Hamill, 139 U. S. 549, 35 L. ed. 266, 11 Sup. Ct. Rep. 663; Sage v. Central R. Co. 93 U. S. 416, 23 L. ed. 934; Kitchen v. Randolph, 93 U. S. 86, 23 L. ed. 810; Copeland v. Bruning, 204 Fed. 169.

The allegations made in the bill of review touching matters not apparent on the record 54 L. ed.

did not add anything to the power of the court.

Rector v. Fitzgerald, 8 C. C. A. 277, 19 U. S. App. 423, 59 Fed. 812; Story, Eq. Pl. 10th ed. § 414; Providence Rubber Co. v. Goodyear, 9 Wall. 805, 19 L. ed. 828; Traphagen v. Voorhees, 45 N. J. Eq. 49, 16 Atl. 198; Long v. Granberry, 2 Tenn. Ch. 85; Priestley's Appeal, 127 Pa. 420, 4 L.R.A. 503, 17 Atl. 1084; Camp Mfg. Co. v. Parker, 121 Fed. 195.

The court below should have required performance of the decree before permission to file the bill was granted.

Davis v. Speiden, 104 U. S. 84, 26 L. ed. 660; Wiser v. Blachly, 2 John. Ch. 488; Story, Eq. Pl. § 406; Ricker v. Powell, 100 U. S. 104, 25 L. ed. 527.

The jurisdiction of the court below was not seasonably and properly questioned.

Kennedy v. Bank of Georgia, 8 How. 586, 12 L. ed. 1209; Ex parte Watkins, 3 Pet. 193, 7 L. ed. 650; Dowell v. Applegate, 152 U. S. 327, 340, 38 L. ed. 463, 468, 14 Sup. Ct. Rep. 611.

The court clearly had jurisdiction under the act of March 2, 1901 (31 Stat. at L. 953, chap. 812), when it passed its final decree of June 8, 1901, and any possible lack of jurisdiction was cured by said act of Congress, the question of jurisdiction not having theretofore been raised.

Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; First Nat. Bank v. Radford Trust Co. 26 C. C. A. 1, 47 U. S. App. 692, 80 Fed. 569; Hoffman v. Knox, supra; Masterson v. Howard, 18 Wall. 99, 21 L. ed. 764; Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 421, 15 L. ed. 435.

The original bill also involved a Federal question.

Cohen v. Virginia, 6 Wheat. 264, 379, 5 L. ed. 257, 260; Osborn v. Bank of United States, 9 Wheat. 738, 822-824, 6 L. ed. 204, 224; Wyman v. Wallace, 201 U. S. 230, 50 L. ed. 738, 26 Sup. Ct. Rep. 495.

Mr. Francis H. Dexter submitted the cause for appellees:

In a case where the jurisdiction of the circuit court depended entirely upon diverse citizenship when the suit was commenced, the inquiry into its jurisdiction is limited to that time; and want of jurisdiction at the commencement of the suit is not cured by an answer or plea which suggests a Federal question.

Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35. See also Borgmeyer v. Idler, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34.

The original bill did not involve a Federal question.

Ortega v. Lara, 202 U. S. 339, 50 L. ed. 1055, 26 Sup. Ct. Rep. 707.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

The assignments of error which require consideration assail the power of the court below to permit the filing of the bill of review, and also question the validity of its action in vacating the decree entered in the main cause and dismissing the bill filed therein.

Respecting the first, the proposition is that the limit of time within which a bill of review might be filed had expired when leave was given, and that the court should have required payment of the money judgment decreed in the main cause before granting permission to file the bill of review. These contentions are untenable. True it is that, in analogy to the time allowed by law for an appeal to this court from a final decree of the district court of Porto Rico, the bill of review should have been filed in two years from June 8, 1901, the date when the final decree sought to be reviewed was entered, and the bill of review was not actually filed until June 22, 1903. But the bill was presented for filing on February 6, 1902, and it is plain that the failure of the complainants in the bill of review to actually file the same until June 22, 1903, was occasioned by the action of the court in not sooner passing upon the application for leave to file. Under such circumstances, we think the time which 302] elapsed between the *tendering of the bill for filing and the permission given to file should not be counted in applying the two years' limitation. *Ensminger v. Powers*, 108 U. S. 292, 27 L. ed. 732, 2 Sup. Ct. Rep. 643. As respects the granting of permission to file the bill of review, the court was vested with a judicial discretion to permit such filing without a previous payment of the moneys awarded by the decree sought to be reviewed, and there was no abuse of such discretion in giving leave to file, conditioned upon the furnishing of the indemnity bond which was thereafter executed.

As to the alleged error in vacating the decree entered in, and dismissing, the original cause.—In the court below, the allegation attacking the jurisdiction of the court over the original cause was as follows:

"That this court did not have jurisdiction of the original cause and bill of complaint, for the reason that, according to the allegations of said bill, all the parties plaintiff were foreign subjects, and all the parties defendant were citizens of Porto Rico, there being no citizen of the United States or of a state of the United States a party defendant, and no other or sufficient

ground or reason for the jurisdiction of this court is in the said original bill set forth sufficient to give this court jurisdiction of the said cause."

The bill in the main cause was filed in December, 1900. At that time the jurisdiction of the court below was fixed and limited by § 34 of the act of Congress of April 12, 1900 [31 Stat. at L. 84, chap. 191], commonly known as the Foraker act, which established civil government in Porto Rico. It was provided in the section that the district court of the United States for Porto Rico "shall have, in addition to the ordinary jurisdiction of the district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court." That, in view of the parties to the controversy, the case would not have been cognizable in a circuit court of the United States, is obvious, and hence, manifestly, the court below was without jurisdiction under the act of 1900. It is urged, however, *that, as [303 the final decree in the main cause was entered in June, 1901, although the court was clearly without jurisdiction to entertain the cause when the bill was filed, as no question as to jurisdiction had been raised, the court had power to enter the decree by virtue of the 3d section of the act of March 2, 1901 (31 Stat. at L. 953, chap. 812), reading as follows:

"That the jurisdiction of the district court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign state or states, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932, is cited as authority for the proposition. In that case, however, not only was no objection made by the parties in the progress of the cause to the right of the court to proceed, but the decree when rendered was consented to, and the ruling was that although "consent cannot give the courts of the United States jurisdiction, it may bind the parties and waive previous errors, if, when the court acts, jurisdiction has been obtained." A brief consideration, however, of the circumstances in this case, demonstrates that the *Ketchum* Case is not in point. The last appearance of the defendants in the litigation in the main cause was on January 31, 1901, when a stipulation was made in respect to the time for pleading to the bill, and, of course, an ex-

ertion of jurisdiction by the court was neither invoked by the defendants nor consented to by them after the enactment of the amendatory statute of 1901. Under such circumstances it cannot be held that the defendants were estopped from availing of the objection of want of jurisdiction.

The additional contention is made that the case presented by the bill in the main cause was one arising under the laws of the United States, and that because there-
304] of jurisdiction *existed, irrespective of the want of citizenship of the parties. The argument is that the complainants, in their bill, made reference to the provisions of an order of the military governor of Porto Rico concerning "suspension of payments," which, if given proper effect, would have prevented the accomplishment of the fraud which it was the object of the bill to prevent. This order, thus referred to, it is said, was, in legal effect, a law of the United States, and the reference to and reliance upon its provisions was an invoking of the jurisdiction of the court on the Federal ground that the case was one arising under the laws of the United States. In our opinion, however, there is not even color for the proposition that the bill presented a controversy arising under a law of the United States, even if the military order referred to be treated as a law of the United States. To sustain such a contention it must appear that a controversy of that nature was called to the attention of the lower court in such a way as to invoke its action thereon. In other words, after a case has been decided below, parties may not, for the purpose of a review by this court, attempt to inject a Federal question into the cause by suggesting that it would have been possible by a latitudinarian construction of the pleadings to suggest that a right under the Constitution or a law of the United States was relied upon. And of course, in saying this, we must not be understood as intimating that the assumed Federal question, even if it had been called to the attention of the court below, would have had sufficient substantiality to have been the basis for jurisdiction.

Affirmed.

305] *C. M. PENDLETON, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 305-311.)

Criminal law — self-extermination.

1. The accused cannot claim to have been compelled to be a witness against himself, in violation of the Philippine Islands civil
54 L. ed.

government act of July 1, 1902 (32 Stat. at L. 692, chap. 1369), § 5, because of the denial of a motion to compel the provincial fiscal to return a statement made by accused in ignorance of his rights, and to prohibit the fiscal from using the statement, where such statement was not afterwards used in any way.

[For other cases, see Criminal Law, III. b, 2, in Digest Sup. Ct. 1908.]

Appeal — error cured in intermediate appellate court.

2. The error, if any, committed by the court of first instance, when determining the guilt or innocence of accused, in considering the latter's failure to testify in his own behalf, is not available on a writ of error from the Federal Supreme Court to the supreme court of the Philippine Islands, where the latter court, in denying a motion for new trial after its decision reducing the sentence on the accused's appeal, stated that it did not, as the trial court did, take the accused's failure to testify into consideration. [Errors cured below, generally, see Appeal and Error, VIII. k, in Digest Sup. Ct. 1908.]

Appeal — review in criminal case — power of supreme court of Philippine Islands.

3. The supreme court of the Philippine Islands, in reviewing the judgment of the court of first instance, in a criminal case, may determine for itself the guilt or innocence of the defendant, upon the proofs presented at the trial.

[No. 53.]

Argued January 21, 1910. Decided February 21, 1910.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which reduced a sentence imposed by the Court of First Instance of the Province of Cebu, upon a conviction for murder. Affirmed.

See same case below, 7 Philippine, 457.

The facts are stated in the opinion.

Messrs. James H. Blount and Henry E. Davis argued the cause and filed a brief for plaintiff in error.

Assistant Attorney General Russell argued the cause and filed a brief for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

Plaintiff in error was convicted of the crime of murder in the court of first instance of the province of Cebu, Philippine Islands, and sentenced to twenty years' imprisonment, which was reduced to seventeen years by the supreme court.

The assignments of error are as follows:

"1. The accused has been compelled to be a witness against himself, in violation of

article 5 of the law of Congress of July 1, 1902. [32 Stat. at L. 692, chap. 1369.]

"2. The fact that the accused did not offer himself as a witness in his own favor has been used to his prejudice, in violation of his right to remain silent until his guilt be established by the evidence beyond a reasonable doubt.

307] *"3. The evidence does not show the guilt of accused of the crime imputed to him beyond a reasonable doubt."

The argument to support the first assignment of error is not very tangible. It is based upon an affidavit of defendant that he was subpoenaed as a witness, and obeyed by going to the fiscal's, where he answered questions put to him without knowing that he had a right to refuse, or being notified that he had such right, and not knowing that "the object of securing his statement was in order to search for proof against him." The affidavit also states that he was not represented by counsel, and did not know that he had a right to consult a lawyer. Motion was made, presumably based on the affidavit, for an order to the fiscal to return to the defendant the statement, together with all copies of the same, and that the fiscal be prohibited from using the statement in any manner whatever. Nothing seems to have been done with that motion, and subsequently it was repeated and denied on the ground "that it was not a proper time to make such motion, as the court could not then decide on the admissibility of proofs which had not yet been offered in the cause." An exception was entered.

It is not contended that the statement was afterwards used in any way, but the action of the court is urged nevertheless as an error "so grave and so material," to use counsel's words, "as to call for a new trial."

The argument to support it is based on suppositions of what might have been done, and the potency of the statement in the hands of the prosecuting officer. "It left the defendant open, it is said, to the fire of a masked battery." But the law has no measure to apply to such a situation. Defendant was certainly not disabled from telling the truth in other statements if he wished to make them, and to be able not to tell the truth can hardly be urged as a legal and constitutional right. The assignment of error, therefore, is not well taken.

The second assignment of error is that the 308] fact that the *defendant did not offer himself as a witness was used against him. To support this contention, certain remarks of the judge of the trial court in delivering sentence upon the defendant are quoted. The court said:

"The prosecution has presented an abund-

ance of proof which, in case the court should give it full credence, would establish the guilt of the accused beyond all reasonable doubt. On the other hand, the defense has presented very little direct proof; the accused did not use his right to testify in his own favor, and no eyewitness has testified favorably to him. The defense has practically limited itself to insisting on: (1) Alleged contradictions between the various witnesses of the prosecution relating to the details of identical facts or happenings related by them. (2) Mistakes which they claim to be essential, in the testimony of the witnesses for the prosecution with respect to distances and relative positions of persons and objects connected with the case. (3) The expert testimony of two physicians that the deceased could not have died as the result of a wound received in the manner stated by the witnesses for the prosecution."

An analysis of this language is made by counsel, and its relation to the general character of the evidence is discussed, and the conclusion deduced that the trial court urged three arguments to sustain its judgment: "First, paucity of proof in behalf of the defendant. Second, his failure to testify in his own favor. Third, his failure to get any eyewitness to the shooting, to rebut evidence of the Filipinos who claim to have been eyewitnesses." And to this summary, which, it is urged, demonstrates that the trial court considered in determining the guilt of defendant, that he failed to take the stand in his own behalf, there is added the comment of the supreme court of the Islands in its review of the case, or rather, in denying a motion for a new trial, after its decision of the case. Upon the first consideration of the case in the supreme court, no assignment of error based on the point was made. It was raised for the first time in what is styled, "Exception to the *Judgment, and Motion for a [309 New Trial," in which he excepted to the judgment rendered by the supreme court, and prayed that it be set aside and a new trial granted him. The reasons given were as follows:

"I. The defendant has been compelled to testify against himself, in violation of art. 5 of the law of Congress of July 1, 1902, in the following manner:

"The accused, taking advantage of the right conceded him in the third paragraph of article 15 of the general orders, No. 58, did not testify in the court of first instance, and said court, in its judgment, considered this circumstance as prejudicial to the defendant; and the attorney general ad-

duced the same circumstance in his brief in this court in the following words:

"No direct proof was presented by the defense to contradict the facts stated by the witnesses for the prosecution; nor did the defendant himself testify in his own favor to deny the grave crime with which he is charged."

"And to overcome, as far as possible, the effect of this illegal procedure so prejudicial to the accused, his counsel in this court, speaking in his name, felt himself obliged to state to the court that the defendant did not go on the witness stand because he did not remember anything about the occurrence; which circumstance was considered by the court as a fact prejudicial to the defendant and appellant in the following words:

"The defendant, a lieutenant of constabulary, in command at the Parian barracks at Cebu, being intoxicated, borrowed a carromata, which was without lights, from a friend, and was found wandering about the streets therein by a municipal policeman named Almonte, who, at his request, drove him to the barracks. As to subsequent occurrences, we have not the benefit of his recollection, and must rely on the testimony of the witnesses for the prosecution and the circumstances of the case."

To which it was replied:

310] "The court having heard the petition of Attorney Kincaid, praying for a new trial of case No. 3176, the United States v. Pendleton, in which a decision was rendered by this court on the 9th of the present month of February, 1907, said that although the fact that the defendant declined or failed to testify as a witness was taken into consideration by the court of first instance, this court, in deciding the cause, did not take said fact into consideration, but rendered the decision in accordance with the proofs presented at the trial, and therefore the new trial solicited is denied."

Defendant puts aside the disclaimer of the supreme court as unimportant in an argument which is certainly difficult to represent if not to follow. He appealed to the supreme court to review the judgment of the lower court. He made a motion for a new trial in the supreme court, and that being denied, he now urges, not error committed in the supreme court, but error committed in the trial court. This is worked out and attempted to be justified by an argument that, it may be, we do not understand. It is said that the supreme court misapprehended the "function conferred upon it by Congress and the Philippine Commission in relation to reviewing the decisions of courts of first instance." That it

seemed to be of opinion that it had "the same authority in this regard as was possessed by its Spanish predecessor, the *audiencia*," and "passed on the decision of the court below about as a reviewing court would pass on an equity proceeding upon written testimony submitted by affidavits and interrogatory depositions." And by doing so, counsel further urge that the supreme court did not have before it what they describe as "the supremely human element,—the appearance of the witnesses and their manner on the stand, etc.," and, not having such element, could not judge of the effect of the evidence independently of the silence of the defendant, and could not determine, therefore, how much the error of the trial court, in considering such silence, controlled its judgment. The answer is that the supreme court had the power *to [311 review the case and consider all that was necessary to the exercise of such power. That power was invoked by defendant, and he secured from its exercise a reduction of three years in his sentence. And *Trono v. United States*, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121, 4 A. & E. Ann. Cas. 773, may be cited as an answer to the contention. In that case the power of review which the supreme court possessed over the judgment of the trial court was exerted to the extent of reversing a judgment and sentence for assault, and rendering a judgment for homicide. *Trono v. United States* needs very little comment. It declares the relation of the courts and the scheme of procedure existing in the Philippine Islands, and brings the case at bar to the simple proposition, when stripped of ingenious suggestions, that an error which was made (if error was made, of which we express no opinion) at the trial in the court of first instance, and which was not repeated in the supreme court, is not a ground of legal complaint.

The third assignment of error is not discussed by counsel. It is, however, manifestly without merit.

Judgment affirmed.

Mr. Justice Harlan dissents.

MRS. ANNIE E. PENMAN, Petitioner,
v.
ST. PAUL FIRE & MARINE INSURANCE
COMPANY.

(See S. C. Reporter's ed. 311-322.)

Fire insurance — condition against keeping explosives — blasting powder — ejusdem generis.

1. Blasting powder, although it may be a less dangerous explosive than dynamite or

gunpowder, is none the less included in the words, "or other explosives," as used in a condition avoiding a policy of fire insurance if there be kept, used, or allowed on the premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, naphtha, nitroglycerin, or other explosives. [For other cases, see Insurance, 281-284, in Digest Sup. Ct. 1908.]

Insurance — waiver of condition — knowledge or acts of agent.

2. A condition avoiding a policy of fire insurance if blasting powder be kept on the premises is not waived because the insurer's agent knew that the building insured was to be occupied by miners, whose custom it was to keep blasting powder in their homes, and for that reason charged more than the usual rate, where the policy guards against any acts of waiver or change of its conditions by providing that such waiver or change, to be effective, shall be written upon, or attached to, the policy. [For other cases, see Insurance, VII. a, in Digest Sup. Ct. 1908.]

[No. 67.]

Argued January 7 and 10, 1910. Decided February 21, 1910.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit, to review a judgment which reversed a judgment of the Circuit Court for the Western District of Pennsylvania, in favor of plaintiff in an action on a policy of fire insurance. Affirmed.

See same case below, 81 C. C. A. 151, 151 Fed. 961.

The facts are stated in the opinion.

Mr. A. J. Truitt argued the cause, and, with Messrs. Frederic D. McKenney and B. M. Clark, filed a brief for petitioner:

This action is governed by the law of Pennsylvania.

22 Am. & Eng. Enc. Law, pp. 1349, 1350; Mann v. Salsberg, 17 Pa. Super. Ct. 280; Musser v. Stauffer, 192 Pa. 398, 43 Atl. 1018.

The knowledge and act of an insurance company's local agent, connected with the placing of a risk, is the knowledge and act of the company itself.

NOTE.—As to liability of insurer for loss caused by explosion—see note to Heuer v. Northwestern Nat. Ins. Co. 19 L.R.A. 594.

On the power of agents to bind insurer by oral waiver or estoppel *in pais* as to forfeiture occurring after issuance of policy and before loss, under policies of insurance requiring consent or waiver to be in writing—see note to Industrial Mut. Indemnity Co. v. Thompson, 10 L.R.A. (N.S.) 1064.

On the effect of a nonwaiver agreement on conditions existing at inception of insurance policy—see note to Gish v. Insurance Co. of N. A. 13 L.R.A. (N.S.) 826.

Caldwell v. Fire Asso. of Philadelphia, 177 Pa. 492, 35 Atl. 612; Davis v. Fireman's Fund Ins. Co. 5 Pa. Super. Ct. 512; Philadelphia Tool Co. v. British American Assur. Co. 132 Pa. 236, 19 Am. St. Rep. 596, 19 Atl. 77; People's Ins. Co. v. Spencer, 53 Pa. 353, 91 Am. Dec. 217; Humphreys v. National Ben. Asso. 139 Pa. 264, 11 L.R.A. 564, 20 Atl. 1047.

Evidence is admissible to show the understanding and intentions of the parties, and the customs connected therewith at the time the insurance was contracted.

Graybill v. Penn Twp. Mut. F. Ins. Asso. 170 Pa. 75, 29 L.R.A. 55, 50 Am. St. Rep. 747, 32 Atl. 632; Lancaster Silver Plate Co. v. National F. Ins. Co. 170 Pa. 151, 32 Atl. 613; Western & A. Pipe Lines v. Home Ins. Co. 145 Pa. 346, 27 Am. St. Rep. 703, 22 Atl. 665; Helme v. Philadelphia L. Ins. Co. 61 Pa. 107, 100 Am. Dec. 621; Pittsburgh Ins. Co. v. Frazee, 107 Pa. 521; Lutz v. Royal Ins. Co. 205 Pa. 162, 54 Atl. 721; McKeesport Mach. Co. v. Ben Franklin Ins. Co. 173 Pa. 53, 34 Atl. 16; Bentley v. Lumbermen's Ins. Co. 191 Pa. 280, 43 Atl. 209; McCaffrey v. Knights & Ladies of Columbia, 213 Pa. 613, 63 Atl. 189.

Where a policy of insurance is susceptible, without violence, of two interpretations, that which is most favorable to the insured should be adopted.

Teutonia F. Ins. Co. v. Mund, 102 Pa. 95; 16 Am. & Eng. Enc. Law, pp. 862, 863; 17 Am. & Eng. Enc. Law, p. 25; Higgins v. Eagleton, 13 Misc. 223, 34 N. Y. Supp. 225; O'Neil v. Van Tassel, 137 N. Y. 297, 33 N. E. 314; Cree v. Bristol, 12 Misc. 1, 66 N. Y. S. R. 518, 33 N. Y. Supp. 19; Hammerquist v. Swensson, 44 Ill. App. 627.

Facts of public notoriety relating to the subject of a contract must be presumed to have been known to the parties at the time of making the contract, and the language used must be construed with reference to such facts.

Woodruff v. Woodruff, 52 N. Y. 53; McMillin v. Titus, 222 Pa. 500, 72 Atl. 240.

The burden is on the insurance company to prove the existence of the condition and its violation.

16 Am. & Eng. Enc. Law, p. 955; Dougherty v. Pacific Mut. L. Ins. Co. 154 Pa. 386, 25 Atl. 739.

A parol waiver by an agent of the insurer of a condition of the policy is binding on the insurer.

Coursin v. Pennsylvania Ins. Co. 46 Pa. 323; McFarland v. Kittanning Ins. Co. 134 Pa. 590, 19 Am. St. Rep. 723, 19 Atl. 796.

The burden was on the insurance company to show that blasting powder, which was not among the prohibited articles named in the condition, was of the same nature, as

dangerous and inflammable, as dynamite and gunpowder; and, if the same as gunpowder, that a quantity in excess of 25 pounds was kept on the premises.

Mears v. Humboldt Ins. Co. 92 Pa. 19, 37 Am. Rep. 647; Wood v. North Western Ins. Co. 46 N. Y. 421.

General words following an enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration, and to be construed as including only all other articles of the like nature and quality.

Sandiman v. Breach, 7 Barn. & C. 100; Rooke v. Kensington, 2 Kay & J. 753, 14 Eng. Rul. Cas. 723; Alabama v. Montague, 117 U. S. 602, 29 L. ed. 1000, 6 Sup. Ct. Rep. 911; United States v. 1150½ Pounds of Celluloid, 27 C. C. A. 231, 54 U. S. App. 273, 82 Fed. 627; Newport News & M. Valley Co. v. United States, 9 C. C. A. 579, 22 U. S. App. 145, 61 Fed. 488; Crystal Spring Distillery Co. v. Cox, 1 C. C. A. 365, 6 U. S. App. 42, 49 Fed. 555; Erwin v. Jersey City, 60 N. J. L. 145, 64 Am. St. Rep. 584, 37 Atl. 732; Livermore v. Camden County, 29 N. J. L. 247; King v. Thompson, 87 Pa. 369, 30 Am. Rep. 364; Renick v. Boyd, 99 Pa. 555, 44 Am. Rep. 124; Pardee's Appeal, 100 Pa. 412; Bucher v. Com. 103 Pa. 528.

Mr. William D. Mitchell argued the cause, and, with Messrs. W. K. Jennings, Jared How, Pierce Butler, and George Hoke, filed a brief for respondent:

The only interpretation of which this policy is susceptible is that blasting powder was an article included within the words "other explosives," and was intended to be prohibited unless a permit to use or keep it was indorsed on or added to the written contract.

Renick v. Boyd, 99 Pa. 555, 44 Am. Rep. 124; Century Dict. Explosive; Lutz v. Royal Ins. Co. 205 Pa. 159, 54 Atl. 721; United Life, F. & M. Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735; Heron v. Phoenix Mut. F. Ins. Co. 180 Pa. 257, 36 L.R.A. 517, 57 Am. St. Rep. 638, 36 Atl. 740.

Extrinsic or parol evidence was not admissible to alter the meaning of the contract as written.

Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133.

If this contract did not express the real intention of the parties as it was written, the remedy of the petitioner was to seek its reformation in equity.

Northern Assur. Co. v. Grand View Bldg. Asso. 203 U. S. 106, 51 L. ed. 109, 27 Sup. Ct. Rep. 27.

54 L. ed.

Mr. Justice McKenna delivered the opinion of the court:

This is an action to recover the sum of \$2,600, with interest, upon a fire insurance policy for the value of a building destroyed by fire. The action was brought in [315] the court of common pleas of Jefferson county, Pennsylvania, and by the insurance company, the respondent herein, removed to the United States court for the western district of Pennsylvania.

Plaintiff's statement, to use the local name for her pleading, alleged a contract of insurance whereby the insurance company insured, for the term of three years, against direct loss by fire, "a two-story shingle-roofed building, 28 x 96, and additions," etc., to be occupied by tenants as dwellings, and situated in Punxsutawney, Jefferson county, Pennsylvania. Payment of the premium and charges was alleged, also the total loss of the building by fire. A copy of the policy was attached to the statement and made a part of it. The policy contained the following covenant:

"This entire policy, unless otherwise provided by agreement indorsed thereon or added hereto, shall be void . . . if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzin, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, exceeding 25 lbs. in quantity, naphtha, nitroglycerin, or other explosives."

The policy also contained the following covenant:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as, by the terms of this policy, may be the subject of agreement, indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

*The case was tried to a jury and [316] resulted in the verdict for the plaintiff, upon which judgment was duly entered. A motion for a new trial was denied. The judgment was reversed by the circuit court of appeals. 81 C. C. A. 151, 151 Fed. 961.

This writ of certiorari was then allowed.

The question in the case is the effect of the covenants which we have quoted. It was raised in the circuit court by objection to certain testimony, which was admitted, and the denial of certain instructions which were requested.

The property is situated in the coal mining regions of Pennsylvania, and the testimony shows that an explosion preceded or was coincident with the fire as its cause or effect. Indeed, it seems to be clear that the explosion was caused by one of the tenants throwing lighted "squibs" in the air "for fun." And there was testimony that it was the custom of miners to keep more or less blasting powder in their dwellings. The custom seems to have arisen on account of a law of Pennsylvania which provides that "no powder or high explosive shall be stored in any mine, and no more of either article shall be taken into the mine at any one time than is required in any one shift unless the quantity be less than 5 pounds." [3 Purdon's Dig. 13th ed. p. 2592.]

In supplement to this testimony the circuit court admitted, over the objection of the company, the testimony of the agent who placed the insurance upon the property, to the effect that he had taken considerable risks as agent for defendant company on miners' dwellings; that he knew of the custom of miners to keep blasting powder in their dwellings; that he knew that the building insured was in seven compartments, "seven miners' dwellings," to be occupied by seven different families, and that he "increased the rate by reason of the fact that this building was to be occupied by miners, and having knowledge that they kept more or less blasting powder about their dwellings." And he also testified that, after he had placed the risk, the special agent of the company went with him, looked at the risk, and said it was satisfactory, after 317] *having made inquiry as to the rate. He expressed the increase in percentage as "one and a quarter for one year, or two and a half for two years." He also charged an extra premium for finishing.

He increased the premium, he further testified, because he "thought it was going to be occupied by coal miners," and "because there was seven of them." The increase was from $1\frac{1}{4}$ per cent to $2\frac{1}{2}$ per cent, but he did not know what he would have charged if the building had not been for coal miners. And further, that he was not told that the building was to be occupied by coal miners, he knew that from his experience in the business. Mrs. Penman did not tell him, nor did he tell her that he had increased the rate because she might possibly have it occupied by miners, but he told the special agent of the company "that that entered in-

to the calculations." He did not report it on the form, because it was not his custom to do so. To the question whether it was special business he was "performing, rather than acting for the company," he answered, "Yes."

The policy recited that the building insured was "in process of erection, with privilege to finish and to be occupied by tenants as dwellings," and that "in consideration of the extra premium of three and 90-100 dollars (\$3.90) thirty days' permission is hereby granted to finish the building." There was evidence showing that blasting powder is a lower degree of explosive than gunpowder or dynamite, and that the latter is a higher degree than gunpowder.

In view of this testimony, the circuit court decided, as it said; that though ordinarily it was "the duty of a court to construe a written instrument, and instruct the jury what its terms meant," he would leave to the jury "as a question of fact" for it "to determine, whether, under the evidence and the facts proven here, blasting powder" was "included in the term 'other explosives.'" Entertaining that view, the court refused to instruct the jury, as requested by the company, "that, under the evidence, the verdict should be for the *defendant." The court refused other [318 requests which were based on the controlling effect of the policy.

In passing upon the motion for a new trial, the circuit court reasserted the view that it was for the jury to "determine whether blasting powder was one of the prohibited articles which were to invalidate the policy." The court observed: "It was contended by one side that it was embraced under the term 'other explosives;' by the other, that it was not." The court further said: "While, of course, blasting powder is an explosive, and is therefore covered by the generic term 'other explosives,' yet the fact that other explosives of the general character of blasting powder, and those of a much more dangerous character than blasting powder, to wit, dynamite and gunpowder, of which 20 and 5 pounds were permitted, were specified, it was contended that the expressed mention of these more dangerous powders evidenced an intent not to cover the less dangerous article of blasting powder under the general term 'other explosives.'" To the last contention, the court, as we have seen, yielded, and rejected the case of *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, as not decisive, by saying that "in that case there was no question as to what the policy provided; in the present, the crucial question was as to what the

policy in question covered by the term 'other explosives.' "

The majority of the circuit court of appeals took another view. It found nothing obscure in the language of the policy, and nothing, therefore, to excuse the circuit court from exercising the duty of construing it. Answering the contention that the words "or other explosives" should not be held to include explosives of lower power than gunpowder or dynamite, it was said: "Such an application of the maxim *noscitur a sociis* is too narrow."

It was pointed out that the enumeration of explosives included other explosives than gunpowder and blasting powder, and that there was nothing in the record to show their relative degrees of power, nor whether [319] they or any of them were *of less explosive power than gunpowder or dynamite. Their relative power, it was said, was not a matter of common knowledge, and if the general words "or other explosives" were to be or could be limited by such relation or their relation to blasting powder, the burden was upon the plaintiff to show it, as those words, "in their literal and natural meaning, included blasting powder." It was hence concluded that "to hold, under the present proofs, that the general words 'or other explosives' do not include blasting powder, merely because it is a less dangerous explosive than dynamite or gunpowder, when it may be more dangerous than Greek fire, benzin, benzole, ether, gasoline, or naphtha, is virtually to decide arbitrarily that no meaning or effect shall be given to the general words. We are satisfied that this cannot be done, and that, as the proofs stand, the general words include blasting powder."

The court, thus deciding that the words of the policy included blasting powder, further decided that the circuit court erred in admitting parol testimony to vary its terms, and also erred in not directing a verdict for the company. //

A member of the court dissented from both propositions. His argument was elaborate and would not be adequately represented by condensation. It asserted the view of the circuit court and the contention of the plaintiff. It considered that, by the rule of *ejusdem generis*, blasting powder was not covered by the words "other explosives," and by them were meant explosives of the same power as those enumerated, which it seems to have been assumed blasting powder was not. It was considered, besides, that the words could be given a meaning by the custom of miners and the industrial conditions which existed in the neighborhood, and also from the knowledge and conduct of the company's agent when the in-

surance was placed. Cases from Pennsylvania were cited to support that proposition, of which we may select as representative, *McKeesport Mach. Co. v. Ben Franklin Ins. Co.* 173 Pa. 53, 34 Atl. 16, where the policy of insurance on two buildings, one a *foundry and machine shop, and [320] the other a pattern shop, was considered. The policy covered the patterns in the pattern shop by these words, "on patterns therein, \$1,000." The pattern shop was from 15 to 20 feet from the foundry in which the fire occurred, and in which the patterns were destroyed, where they were taken the evening before the fire for actual use next day, in accordance with the orders and customs in that and other shops in the use of patterns. It was found by a jury returning a special verdict that such use was a reasonable one and answered the convenient operation of such plants, and that the agent of the defendant company examined the shops and patterns and buildings before taking the insurance. The court said:

"The policy sued on in this case was issued to a manufacturing company, and covered the buildings, machinery, fixtures, and appliances in daily use in the business of the company. The rules of construction applicable to such a contract of insurance are well settled. The object of the contract is indemnity against the loss by fire of the business plant, or any portion of it, while used and occupied by the owners in the manner and for the purposes for which it was designed. If its provisions are susceptible of two or more interpretations, that one should be adopted that will make the contract effective for the protection of the insured. In other words, the contract should be liberally construed in aid of the indemnity which was in contemplation of the parties who made it. *Western & A. Pipe Lines v. Home Ins. Co.* 145 Pa. 346, 27 Am. St. Rep. 703, 22 Atl. 665.

"Again, an insurance company issuing a policy upon a business plant, or any portion of it, is chargeable with knowledge of the customary methods of conducting the business in which the property insured is used. *Ibid.* This rule is not limited to insurance upon property in use for manufacturing or other business purposes. It was applied in the construction of a policy issued upon a dwelling house in *Doud v. Citizens' Ins. Co.* 141 Pa. 47, 23 Am. St. Rep. 263, 21 Atl. 505, and in *Roe v. Dwelling House Ins. Co.* 149 Pa. 94, 34 Am. St. Rep. 595, 23 Atl. 718. *It was applied to a policy [321] of insurance upon a horse in *Haws v. Fire Asso. of Philadelphia*, 114 Pa. 431, 7 Atl. 159. Still another rule of construction is that the circumstances sur-

rounding the making of the contract, and affecting the subject to which it relates, form a sort of context that may properly be resorted to for aid in determining the meaning of the words and provisions of the contract. *Bole v. New Hampshire F. Ins. Co.* 159 Pa. 53, 28 Atl. 205; *Graybill v. Penn Twp. Mut. F. Ins. Asso.* 170 Pa. 75, 29 L.R.A. 55, 50 Am. St. Rep. 747, 32 Atl. 632."

We have stated the rulings of the courts below, because they accurately exhibit the contentions of the parties and the questions for decision, and with such fullness of argument that there is not much more for this court to do than to select and concur. The court of appeals decided, as we have seen, that, under the terms of the policy, blasting powder could not be "kept, used, or allowed" on the insured property, and that such prohibition was not waived by the knowledge and acts of the company's agent. We concur in this, and we think the reasoning by which it was supported is conclusive. The rule of *ejusdem generis* is a rule of interpretation; and granting, *arguendo*, it should be applied more liberally to contracts of insurance than to contracts of other kinds, yet we think it would be giving it too much force to yield to the contention of petitioner. Blasting powder is an explosive, and one of power; it is therefore capable of producing the result that the provision of the policy was intended to guard against. We are given no tests, as the court of appeals said, and we certainly may not assume them, of a comparison of it with the explosives which are enumerated, except dynamite and gunpowder. The law of Pennsylvania, as we have seen, has given it character and has guarded against its destructive force.

We think also that the policy furnishes the only way by which its terms can be waived. It provides against modifications by the usage or custom of trade or manufacture. It guards against any acts of waiver of its conditions or a change of them by agents. It provides that such waiver or [322] change "shall be written upon or attached" to the policy. The company could have used no words which would have been more explicit. There is no ambiguity about them. Parol testimony was not needed nor admissible to interpret them. They constituted the contract between the company and the insured. No agent had power to change or modify that contract except in the manner provided. This was decided in *Northern Assur. Co. v. Grand View Bldg. Asso.* supra. Any other ruling would take from contracts the certain evidence of their written words,

and turn them over for meaning to the disputes of parol testimony.

The Pennsylvania cases cited by the petitioner do not militate with the rule there announced. If they did, it might be open to controversy how far they were binding on this court. *Kuhn v. Fairmount Coal Co.* 215 U. S. 349, ante, 228, 30 Sup. Ct. Rep. 140.

Judgment affirmed.

DANIEL F. BLAKE, Trustee in Bankruptcy of Walkeen-Lewis Millinery Company, Appt.,

v.

WILLIAM OPENHOF & SONS.

(See S. C. Reporter's ed. 322-330.)

Appeal — from circuit court of appeals — bankruptcy case.

A decision of a circuit court of appeals that certain creditors from whom a bankrupt obtained goods by fraud were entitled to preferential payment of their claim, presented by an intervening petition after their further prosecution of an action of replevin against a receiver appointed by a state court had been enjoined by the bankruptcy court, is not reviewable in the Federal Supreme Court, as involving a question which would sustain a writ of error to a state court, because the replevin suit in the state court was considered by the circuit court of appeals as showing the purpose of the creditors to rescind the sale of the goods replevied, and as a means of identifying what part of the goods sued for was in the possession of the state court, and, afterwards, what proceeds of sales went into the possession of the bankruptcy court under an order of the state court for the delivery of the property to the receiver in bankruptcy, upon the condition that the latter should assume and pay the liabilities incurred in the state court.

[For other cases, see Appeal and Error, 804, 805, in Digest Sup. Ct. 1908.]

[No. 71.]

Submitted January 12, 1910. Decided February 21, 1910.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit, to review a decree which reversed a decree of the District Court for the Western District of Missouri, sustaining exceptions to an allowance by a referee in bankruptcy

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to *Bagley v. General Fire Extinguisher Co.* 53 L. ed. U. S. 605.

On appeal and review in bankruptcy cases—see note to *Re Eggert*, 43 C. C. A. 9.

of a certain claim as entitled to be preferred. Dismissed for want of jurisdiction.

See same case below, 87 C. C. A. 122, 157 Fed. 536.

The facts are stated in the opinion.

Messrs. Edwin A. Krauthoff and Alexander New submitted the cause for appellant. Messrs. Samuel Feller, Arthur Miller, and J. V. C. Karnes were on the brief:

A Federal question was involved.

Rector v. City Deposit Bank Co. 200 U. S. 405, 411, 50 L. ed. 527, 529, 26 Sup. Ct. Rep. 289; Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 531, 532, 51 L. ed. 596, 603, 604, 27 Sup. Ct. Rep. 391.

Under the bankruptcy law of 1867, this court assumed jurisdiction *inter alia* of the following cases on writs of error to state courts:

Forsyth v. Vehmeyer, 177 U. S. 177, 44 L. ed. 723, 20 Sup. Ct. Rep. 623; Sharpe v. Doyle, 102 U. S. 686, 26 L. ed. 277; Factors' & T. Ins. Co. v. Murphy, 111 U. S. 738, 741, 28 L. ed. 582, 583, 4 Sup. Ct. Rep. 679; Mays v. Fritton, 131 U. S. cxiv., and 21 L. ed. 127; Dushane v. Beall, 161 U. S. 513, 518, 40 L. ed. 791, 793, 16 Sup. Ct. Rep. 637; Williams v. Heard, 140 U. S. 529, 35 L. ed. 550, 11 Sup. Ct. Rep. 885; Traer v. Clews, 115 U. S. 528, 533, 534, 22 L. ed. 467-469, 6 Sup. Ct. Rep. 155; New Orleans, S. F. & L. R. Co. v. Delamore, 114 U. S. 501, 506, 29 L. ed. 244, 246, 5 Sup. Ct. Rep. 1009; Palmer v. Hussey, 119 U. S. 96, 30 L. ed. 362, 7 Sup. Ct. Rep. 158; Hennequin v. Clews, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576.

Under the bankruptcy law of 1898, this court has assumed jurisdiction in the following cases, coming to this court under the provision of § 25b, from the circuit court of appeals:

Pirie v. Chicago Title & T. Co. 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906; Pickens v. Roy, 187 U. S. 177, 47 L. ed. 128, 23 Sup. Ct. Rep. 78; Page v. Edmunds, 187 U. S. 596, 47 L. ed. 318, 23 Sup. Ct. Rep. 200; Jaquith v. Alden, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. Rep. 649; New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. ed. 571, 25 Sup. Ct. Rep. 339; Whitney v. Dresser, 200 U. S. 532, 50 L. ed. 584, 26 Sup. Ct. Rep. 316; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Conboy v. First Nat. Bank, 203 U. S. 141, 51 L. ed. 128, 27 Sup. Ct. Rep. 50; New Jersey v. Anderson, 203 U. S. 483, 51 L. ed. 284, 27 Sup. Ct. Rep. 137; Hiscock v. Varick Bank, 206 U. S. 28, 51 L. ed. 945, 27 Sup. Ct. Rep. 681; Gazlay v. Williams, 54 L. ed.

210 U. S. 41, 52 L. ed. 950, 28 Sup. Ct. Rep. 687.

Under the bankruptcy law of 1898, the following cases have been reviewed by this court on writ of error to a state court:

Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757; Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651; Tinker v. Colwell, 193 U. S. 473, 48 L. ed. 754, 24 Sup. Ct. Rep. 505; Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9; Kaufman v. Tredway, 195 U. S. 271, 49 L. ed. 190, 25 Sup. Ct. Rep. 33; Birkett v. Columbia Bank, 195 U. S. 345, 49 L. ed. 231, 25 Sup. Ct. Rep. 38; Cramer v. Wilson, 195 U. S. 408, 49 L. ed. 256, 25 Sup. Ct. Rep. 94; Bullis v. O'Beirne, 195 U. S. 606, 49 L. ed. 340, 25 Sup. Ct. Rep. 118; Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. Rep. 172, 2 A. & E. Ann. Cas. 265; First Nat. Bank v. Lasater, 196 U. S. 115, 49 L. ed. 408, 25 Sup. Ct. Rep. 206; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; Hammond v. Whittredge, 204 U. S. 538, 51 L. ed. 606, 27 Sup. Ct. Rep. 396.

Mr. Benjamin N. Cardozo submitted the cause for appellees. Messrs. I. J. Ringolsky, Morris J. Hirsch, and David I. White were on the brief:

The decision of this court in Chapman v. Bowen, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32, is precisely applicable.

Appellant's contentions are that the election to rescind was not seasonably exercised, and that the proceeds of the appellees' property were not identified. Such questions do not involve the determination of any right or title created by the bankruptcy act, but are merely questions of general jurisprudence, which would be the same if no bankruptcy statute had ever been enacted.

McKenna v. Simpson, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365; Gableman v. Peoria, D. & E. R. Co. 179 U. S. 335, 340, 45 L. ed. 220, 223, 21 Sup. Ct. Rep. 171; Scott v. Kelly, 22 Wall. 57, 22 L. ed. 729.

The mere fact that a trustee is a party to a proceeding does not, in itself, create a claim of right under a Federal statute. If it did, Chapman v. Bowen, McKenna v. Simpson, Gableman v. Peoria, D. & E. R. Co., and Scott v. Kelly, *supra*, would have been decided differently.

Mr. Justice McKenna delivered the opinion of the court:

This appeal was taken to review the decree of the circuit court of appeals, reversing the disallowance of a debt due to *Openhym & Sons as a preferential [325

claim against the estate of Walkeen-Lewis Millinery Company (we shall call it the millinery company).

A motion to dismiss is made on the ground that the question involved is not one which could be brought here on writ of error from the highest court of a state, and that no justice of this court has certified that a determination of the question is essential to a uniform construction of the bankrupt act throughout the United States.

The facts, which we condense somewhat from the findings of the court of appeals, are, that the millinery company, then being in the millinery business at Kansas City, Missouri, obtained, by false representations of its liabilities, goods of the value of \$3,125.70 from Openhym & Sons, of New York city. Subsequently, a suit was brought against the millinery company by another creditor, and a receiver was appointed of all its property. The receiver of the property forthwith took possession, and, under the orders of the court, continued its sale. A few days afterwards, certain other creditors of the millinery company filed a petition in the district court of the western district of Missouri, to have the company declared a bankrupt. Four days later, the company admitted its insolvency, and consented that it be declared a bankrupt.

Openhym & Sons, the appellees, asserting that their goods had been obtained from them by the millinery company by false representations of its solvency, demanded possession of the goods from the state court's receiver. Possession was refused, and Openhym & Sons, having obtained from the state court permission to do so, brought an action of replevin against the receiver and the millinery company. "Process was duly served on both defendants. In the execution of the replevin writ but \$2,582.80 worth of the goods obtained from Openhym & Sons were found. The sheriff, in executing the writ, separated the goods so found 326] from the remainder of the *stock then in possession of the state court receiver, and took them into his own possession. The receiver thereupon gave a redelivery bond, resumed possession of the goods, put them back into the stock, and continued sales therefrom."

On September 23, 1905, the millinery company was adjudged a bankrupt. Before the date of the adjudication, no receiver had been appointed by the district court, and no order had been made affecting the property in the possession of the state court or the continuance of the sales thereof by the state court receiver. On the day of the adjudication of bankruptcy, Daniel F. Blake, appellant, was appointed receiver in bankruptcy, and was directed to apply to

the state court for an order on its receiver for the possession of the property. He was further directed that, before taking possession, to request the state court to fix and determine the liabilities which its own receiver had incurred for the benefit of the estate. "The order of direction to the receiver in bankruptcy contained this clause: 'The liabilities incurred by the said receiver appointed by the state court shall be assumed and paid by the receiver herein.'"

On September 25, 1905, the state court stated the liabilities incurred by its receiver, and, in addition thereto, recited the proceedings in the replevin action brought by Openhym & Sons, and found that whatever liability had been incurred under the redelivery bond had been incurred for the benefit of the estate. The court then ordered the delivery of the property to the receiver in bankruptcy upon the conditions that the latter should assume and pay the liabilities recited and the liability arising under the redelivery bond. It was not shown what part of the goods in controversy actually passed into the possession of the receiver in bankruptcy, but it was shown that all of the stock remaining unsold, and all of the proceeds of sales by the state court receiver, largely in the form of customers' accounts, were, less expense of conducting the business, turned over to the receiver in bankruptcy.

*October 2, 1905, the receiver in [327 bankruptcy sold all of the property of the millinery company; on the 13th, the receiver was selected as trustee; on the 27th, the district court ruled Openhym & Sons to show cause why they should not be enjoined from prosecuting the action of replevin, and temporarily enjoined them from doing so; December 1 the temporary injunction was made permanent.

On December 10, 1905, a dividend upon the claims against the estate of the millinery company was declared, but its payment left the greater portion of the estate in the hands of the trustee. Up to that time, Openhym & Sons had not intervened and presented their claim for preferential payment, but this fact had no effect upon the declaration of the dividend, and no creditor was prejudiced thereby.

December 21, 1905, Openhym & Sons intervened and presented their claim for \$2,582.80 as a preferred one. On March 24, 1906, it was found by the referee to be entitled to be allowed as such. Upon petition for review, the district court reversed the finding. Upon appeal, the circuit court of appeals substantially found the above facts, and reversed the decree of the district court. 87 C. C. A. 122, 157 Fed. 536.

The conclusions of law of the circuit court of appeals were as follows:

"1. There were sufficient grounds for a rescission of the sale by Openhym & Sons, the right of rescission was seasonably asserted, and the right was not impaired or destroyed by the commencement of bankruptcy proceedings against the vendee, who obtained the goods by fraud. The receiver and trustee in bankruptcy had no greater right or title to the goods in controversy than the bankrupt had.

"2. It was competent for the bankruptcy court to permit the prosecution of the replevin action in the state court for the recovery of the goods. The continuance of such prosecution was lawful up to the time it was forbidden by the injunction of the bankruptcy court. The commencement and prosecution of that action, though subsequently enjoined, was available *to Openhym & Sons as an act of rescission, and the proceedings therein could properly be resorted to in ascertaining what part of the goods sued for was in the possession of the state court, and afterwards, with proceeds of sales, went into the possession of the bankruptcy court.

"3. There was no such delay by Openhym & Sons in intervening in the bankruptcy proceedings as estopped them from asserting their right to a preferential claim for the value of their goods.

"4. Openhym & Sons are entitled to an order that the trustee pay their claim out of funds in his hands before making further payments to general creditors."

The contention of appellee upon the motion is that the bankrupt law limits the right of appeal to two classes of cases, in neither of which, it is further contended, the case at bar falls: (1) where the amount in controversy exceeds a thousand dollars and the question involved is one that might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States; (2) where a justice of the Supreme Court of the United States shall certify that the determination of the question involved is essential to a uniform construction of the act throughout the United States.

The consideration of the second ground we can immediately dismiss, as there is no such certificate. Of the other, or first ground, it is urged that *Chapman v. Bowen*, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32, is decisive. In that case the facts were that there was borrowed from Bowen, on two different occasions, the sum of \$5,000, for which two promissory notes were given, signed by the firm of A. McCoy & Company and by the individual names of Alfred McCoy and Thomas McCoy, the proceeds of the

transactions going into the partnership business. The firm and the individuals became bankrupt, and the notes were presented as claims against the firm, and allowed to the extent of 30 per cent. A claim was presented for the balance against the estate of Alfred McCoy, and disallowed *by [329 the referee, whose decision was affirmed by the district court. The decision was reversed by the circuit court of appeals. 80 C. C. A. 60, 150 Fed. 106. An appeal was allowed to this court by a judge of the circuit court of appeals, which, on motion, was dismissed, on the ground that a writ of error from the highest court of the state to this court could not be maintained, because no validity of a treaty or statute of, or an authority exercised under, the United States, was drawn in question; nor the validity of a statute of, or any authority exercised under, any state, on the ground of repugnancy to the Constitution, treaties, or laws of the United States; nor was any treaty, right, privilege, or immunity claimed under the Constitution or any treaty or statute or commission held or authority exercised under the United States, and decided against it. It was further said that "the decision below proceeded on well-settled principles of general law, broad enough to sustain it without reference to provisions of the bankruptcy act."

We think that case controls this, and that the cases cited by appellant, of which this court took jurisdiction, are not apposite. The determining facts in the case at bar are that the goods were obtained by the millinery company by fraud, and that the sale was seasonably rescinded on that ground. In the decision of this there was involved no provision of the bankruptcy law. Nor is any provision of the bankruptcy law involved in the consideration of the question whether the goods turned over by the state court to the receiver in bankruptcy could be identified as the goods obtained from Openhym & Sons. Surely, as decided by the court of appeals, the proceedings in the state court "could properly be resorted to in ascertaining what part of the goods sued for was in the possession of the state court, and afterwards what proceeds of sales went into possession of the bankruptcy court." To these facts must be added the important one that the goods were ordered by the state court to be delivered to the receiver in bankruptcy upon the express condition, and they were *re-[330 ceived by him subject to the condition, that he should assume and pay the liabilities incurred in that court, that court finding "that whatever liability was incurred under the redelivery bond was incurred for the benefit of the estate."

It was from these facts that the court of appeals concluded that Openhym & Sons were "entitled to an order that the trustee pay their claims out of funds in his hands before making further payments to general creditors." In this conclusion we cannot see that any provision of the bankruptcy law was involved, so that, if the decision had been made by a state court, it would have been reviewable here on writ of error.

It is the contention of appellant, however, that the writ of replevin brought by Openhym & Sons and the levy under it "were unlawful and unauthorized acts," and that Openhym & Sons "could not, and did not, conserve any rights thereby." And, further, the appellant says, "it will be observed at the outset that this question goes directly to the jurisdiction of the bankruptcy court over the res of the bankrupt after the filing of the involuntary petition in bankruptcy."

Putting it another way, appellant says that "the question in the case is as to the force and effect of a proceeding in bankruptcy followed by a subsequent petition in replevin." And it is insisted that the result reached by the court of appeals "depended upon the force and effect given to the action in replevin," and that, therefore, a Federal question is presented. This, however, proceeds from a misapprehension of the opinion of the court of appeals. The paramount jurisdiction of the bankruptcy court was conceded. The replevin suit was considered as showing the purpose of Openhym & Sons to rescind the sale of the goods and as a means of their identification, as we have already pointed out. In holding it competent for those purposes we cannot see how any provision of the bankrupt law was involved.

The motion to dismiss must therefore be granted.

So ordered.

331] *GEORGE F. ALBRIGHT, Plff. in Err.,
v.

JESUS MARIA SANDOVAL. (No. 116.)

JESUS MARIA SANDOVAL, Plff. in Err.,
v.

GEORGE F. ALBRIGHT. (No. 117.)

(See S. C. Reporter's ed. 331-341.)

Error to territorial supreme court—construction of local statute.

1. The construction given by a territorial supreme court to the statutes of that territory will ordinarily not be disturbed by the Federal Supreme Court on writ of error to the territorial court.

[For other cases, see Appeal and Error, 4994, 4995; Courts, VII. e, in Digest Sup. Ct. 1908.]

502

Officers — compensation — recovering fees from de facto officer.

2. A *de jure* officer may recover from the *de facto* incumbent, the fees and emoluments of the office, received by the latter during his incumbency.

Set-off — recovering fees from de facto officer — expenses of office.

3. The actual cost of obtaining the fees and emoluments of an office, which would have been entailed on any person who might have held the office, may be set off by an ousted *de facto* officer in an action by the *de jure* officer to recover such official earnings.

[Nos. 116, 117.]

Argued and submitted January 23, 1910.

Decided February 21, 1910.

ON WRIT AND CROSS WRIT OF ERROR to the Supreme Court of the Territory of New Mexico to review a judgment which affirmed a judgment of the District Court of Bernalillo County, in that territory, for the recovery by a *de jure* officer from a *de facto* officer, of the emoluments of the office, less the expenses incurred in earning them. Affirmed.

See same case below (N. M.) 93 Pac. 717.

The facts are stated in the opinion.

Mr. Edward L. Medler argued the cause and filed a brief for plaintiff in error in No. 116, and defendant in error in No. 117:

The entire controversy, including the status of the parties as to who was *de jure* assessor, is before this court.

United States v. Denver & R. G. R. Co. 191 U. S. 86, 48 L. ed. 107, 24 Sup. Ct. Rep. 33; Crary v. Dye, 203 U. S. 515, 52 L. ed. 595, 28 Sup. Ct. Rep. 360; Fitzpatrick v. Flannagan, 106 U. S. 648, 27 L. ed. 211, 1 Sup. Ct. Rep. 369; Mendenhall v. Hall, 134 U. S. 559, 33 L. ed. 1012, 10 Sup. Ct. Rep. 616; Galigher v. Jones, 129 U. S. 193, 32 L. ed. 658, 9 Sup. Ct. Rep. 335; Gaines v. Hennen, 24 How. 553, 16 L. ed. 770; Carey v. Roosevelt, 81 Fed. 611.

NOTE.—As to review by United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

On payment made to *de facto* officer as defense to action for salary by *de jure* officer—see notes to El Paso County v. Rhode, 16 L.R.A.(N.S.) 794, and State ex rel. Greeley County v. Milne, 19 L.R.A. 689.

Liability of de facto officer to rightful incumbent for compensation and fees.

The authorities are well nigh unanimous that the rightful incumbent of a public office may recover from the *de facto* officer the salary, fees, and emoluments of the office

216 U. S.

The acts of the legislature of New Mexico of 1903, creating the county of Sandoval, and the act amendatory thereof, were within the powers of the legislature.

People ex rel. Seearer v. Glenn County, 100 Cal. 419, 38 Am. St. Rep. 305, 35 Pac. 304; People ex rel. Graves v. McFadden, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac. 851; People ex rel. Clancy v. Westchester County, 139 N. Y. 524, 34 N. E. 1106; Mobley v. Bossier Parish, 41 La. Ann. 821, 6 So. 779; Fort v. Cummings, 90 Hun, 481, 36 N. Y. Supp. 36; State ex rel. Harvey v. Piper, 17 Neb. 614, 24 N. W. 205; Reals v. Smith, 8 Wyo. 159, 56 Pac. 690.

The act creating Sandoval county, and its amendment, is not a regulation of county affairs.

Holliday v. Sweet Grass County, 19 Mont.

received by the latter during his possession of the office. Stoddard v. Williams, 65 Cal. 472, 4 Pac. 452; Chubbuck v. Wilson, 151 Cal. 162, 90 Pac. 524, 12 A. & E. Ann. Cas. 888; Coughlin v. McElroy, 74 Conn. 397, 92 Am. St. Rep. 224, 50 Atl. 1025; Mayfield v. Moore, 53 Ill. 428, 5 Am. Rep. 52; Rice v. Tevis, 21 Ky. L. Rep. 110, 50 S. W. 1101; Petit v. Rousseau, 15 La. Ann. 239; State ex rel. Coltharp v. Holmes, 43 La. Ann. 1185, 10 So. 172; Board of Auditors v. Benoit, 20 Mich. 176, 4 Am. Rep. 382; Hunter v. Chandler, 45 Mo. 452; Mullery v. McCann, 95 Mo. 579, 8 S. W. 774; Dolan v. New York, 68 N. Y. 274, 23 Am. Rep. 168; Nichols v. MacLean, 101 N. Y. 526, 54 Am. Rep. 730, 5 N. E. 347; Platt v. Stont, 14 Abb. Pr. 178; State ex rel. Guerguin v. McAllister (Tex. Civ. App.) 31 S. W. 679; Booker v. Donohoe, 95 Va. 359, 28 S. E. 584; Bier v. Gorrell, 30 W. Va. 95, 8 Am. St. Rep. 17, 3 S. E. 30.

Statutes exist in some states permitting such recovery.

Thus, in Arkansas, if the contestant shall succeed, he may have not only judgment of ouster, but full damages, not exceeding the salary and fees of the office during the time he was excluded from it, with costs. Merritt v. Hinton, 55 Ark. 12, 17 S. W. 270.

A statute in Kansas permits a successful claimant to an office who obtains judgment of ouster to recover damages in a separate action brought within a year after judgment, provided the claimant has not laid claim to damages in the quo warranto action. Fenn v. Beeler, 64 Kan. 67, 67 Pac. 461. This statute does not affect the right of a *de jure* officer to prosecute an independent action to recover the salary of the officer from the *de facto* officer unless he has obtained a judgment of ouster and claimed damages. Hence, the rightful incumbent may, without reference to such statute, maintain such an action where the *de facto* officer has surrendered the office pending quo warranto proceedings. Ibid.

The good faith of the *de facto* officer (Constock v. Grand Rapids, 40 Mich. 397) and the possession of a certificate of elec-

364, 48 Pac. 553; Mode v. Beasley, 143 Ind. 306, 42 N. E. 730; 1 Words & Phrases, Affairs, p. 238; Business, p. 915; Tennessee v. Whitworth, 117 U. S. 146, 29 L. ed. 835, 6 Sup. Ct. Rep. 649.

The effect of the act of the legislature of New Mexico creating Sandoval county, and the act amendatory thereof, was to create a vacancy in the office of assessor of Bernalillo county, and to provide for the filling of such vacancy.

Fox v. McDonald, 101 Ala. 51, 21 L.R.A. 537, 46 Am. St. Rep. 98, 13 So. 416; State v. Douglas, 26 Wis. 428, 7 Am. Rep. 87; State ex rel. Atty. Gen. v. Davis, 44 Mo. 129; People ex rel. McMiun v. Haskell, 5 Cal. 357; People ex rel. Atty. Gen. v. Squires, 14 Cal. 17; Hoke v. Henderson, 25 Am. Dec. 703, note; Butler v. Pennsylvania,

tion constitute no defense (Kreitz v. Behrensmeyer, 149 Ill. 496, 24 L.R.A. 59, 36 N. E. 983).

The rightful incumbent may recover from the usurper the salary received by the latter while discharging the duties of the office, although he was put in possession under a judgment, where such judgment was afterwards reversed and final judgment rendered in favor of the rightful incumbent. Kessel v. Zeiser, 102 N. Y. 114, 55 Am. Rep. 769, 6 N. E. 574.

The contrary view has received the indorsement of the New Jersey court of errors and appeals, which, by a divided court, held that a *de jure* officer cannot recover from the *de facto* officer receiving a certificate of election from the proper authorities, and acting in good faith, the fees received by him while in possession of the office. Stuhr v. Curran, 44 N. J. L. 181, 43 Am. Rep. 353.

And the common-law rule is so changed by statute in California as to entitle the *de facto* incumbent who holds a certificate of election or commission of office, and discharges the duties of such office, to receive the compensation or fees of the office, pending contest, and to retain the same to his own use as against the *de jure* officer. Chubbuck v. Wilson, supra.

Where the salary has not been paid to either claimant, the rightful incumbent has no action against the *de facto* officer therefor. Whitaker v. Topeka, 9 Kan. App. 213, 59 Pac. 668; Merritt v. Hinton, supra.

But the fees earned by a *de facto* officer, and not reduced to possession, belong to the *de jure* officer. Currey v. Wright, 9 Lea, 247.

No deduction should be made on account of the *de facto* officer's services (People ex rel. Benoit v. Miller, 24 Mich. 458, 9 Am. Rep. 131; Wenner v. Smith, 4 Utah, 238, 91 Pac. 293), nor because of the *de jure* officer's outside profits and earnings (Fenn v. Beeler and People ex rel. Benoit v. Miller, supra).

But nearly all the cases recognize that the *de facto* officer, acting in apparent right, when sued by a *de jure* officer for the fees

10 How. 402, 13 L. ed. 472; *Stewart v. Jefferson Parish*, 116 U. S. 135, 29 L. ed. 588, 6 Sup. Ct. Rep. 332; *Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009; *Crenshaw v. United States*, 134 U. S. 99, 33 L. ed. 825, 10 Sup. Ct. Rep. 431; *Long v. New York*, 81 N. Y. 426; *People ex rel. LeRoy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Denver v. Hobart*, 10 Nev. 30; *People ex rel. Robertson v. Van Gaskin*, 5 Mont. 352, 6 Pac. 32; *Vincennes University v. Indiana*, 14 How. 268, 14 L. ed. 416; *Rogers v. Burlington*, 3 Wall. 654, 18 L. ed. 79; *Clinton v. Englebrecht*, 13 Wall. 446, 20 L. ed. 662; *Territory ex rel. Smith v. Scott*, 3 Dak. 357, 20 N. W. 401; *People ex rel. Waterman v. Freeman*, 80 Cal. 233, 13 Am. St. Rep. 122, 22 Pac. 173.

The appointment of Albright by the county commissioners in the manner provided by the amendatory act to the act creating Sandoval county was not void by reason of a general act of the legislature, chap. 2 of the Laws of New Mexico, 1901, pro-

viding that when a vacancy in county officers arises by reason of death, resignation, or otherwise, the vacancy shall be filled by the governor.

United States v. Bevans, 3 Wheat. 391, 4 L. ed. 417; *United States v. Chase*, 135 U. S. 255-260, 34 L. ed. 117-119, 10 Sup. Ct. Rep. 756; *Moore v. American Transp. Co.* 24 How. 41, 16 L. ed. 682; *Sedgw. Stat. & Const. Law*, 360. *Cooley, Const. Lim.* 149.

The legislation is not void because it provided for a different manner of selecting the assessor from that provided for the selection of assessors in other counties of the territory.

Guild v. First Nat. Bank, 4 S. D. 566, 57 N. W. 499; *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989.

Residence is a necessary qualification for holding office, and the question of Sandoval's disqualification to hold the office for this reason involves his right to the office and the recovery of the emoluments.

and emoluments of the office, may retain the reasonable expenses incurred in earning them. *Mayfield v. Moore*, supra; *Havird v. Boise County*, 2 Idaho, 687, 24 Pac. 542; *Rice v. Tevis*, supra; *Bier v. Gorrell*, supra; *Chowning v. Boger (Tex.)* 9 Am. & Eng. Corp. Cas. 91.

A *de facto* sheriff acting under color of title is entitled, as against the rightful incumbent, to the amount allowed by the court to reimburse her for the expense of feeding the prisoners. *Atchison v. Lucas*, 83 Ky. 451.

But, in *Douglass v. State*, 31 Ind. 429, it was held that an officer holding over must account to the rightful incumbent for the entire emoluments of the office for the time he unlawfully held possession, without any deduction for necessary clerk hire paid out by him for discharging the duties of the office during that time.

The rightful incumbent may recover from the *de facto* officer all the fees and emoluments of the office received by the latter during his entire incumbency, and not merely such fees as were received after it was judicially ascertained that he was not entitled to the office. *Mayfield v. Moore*, supra.

Where the *de facto* officer was the predecessor in office of the *de jure* officer, and under the law was to hold office until his successor should be elected and qualify, such *de facto* officer is not liable to the rightful incumbent for any part of the fees and emoluments of the office received and earned before the latter had duly qualified himself to discharge the duties of his office. *Hubbard v. Crawford*, 19 Kan. 570; *Signr v. Crenshaw*, 10 La. Ann. 297; *Bier v. Gorrell*, supra.

But failure to qualify before judgment of ouster will not defeat the right of a *de jure* officer to recover the salary from the begin-

ning of the term from the person to whom the proper authorities had given a certificate of election, since the latter, although having been in office during the preceding term, was not holding over until his successor should qualify, but rested his title upon the new election. *People ex rel. Benoit v. Miller*, supra.

So, it is unnecessary to support a recovery by the rightful incumbent from an intruder of the fees and emoluments of the office, that the former should have qualified himself to discharge the duties of the office to which he was elected by taking the oath and executing the bond prescribed by law. *Booker v. Donohoe*, supra.

So, one who usurps, and fraudulently and unlawfully undertakes to discharge the duties of, an office, is liable in an action for money had and received, in favor of the person rightfully entitled to the office, for the fees which such intruder may have received, although the rightful incumbent may not have received a certificate of election nor a commission. *Glasecock v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299.

And the fact that a commission has not been issued to a *de jure* officer will not defeat his right to recover from a *de facto* officer the fees or salary received by the latter, where the term of office has expired before the termination of the litigation as to the title to the office. *Kreitz v. Behrensmeyer*, supra.

Where, by writ of error and suspension bond, the enforcement of a judgment of ouster from office was prevented, and, until the writ was dismissed, the relator was excluded from the office, and deprived of the salary annexed to it, the amount of the salary received by the *de facto* officer during the period of such deprivation constitutes the measure of damages recoverable in an action upon the suspension bond. *United*

Mechem, Pub. Off. §§ 67, 82, 159; State ex rel. Hartshorn v. Walker, 17 Ohio, 135; Mauck v. Lock, 70 Iowa, 266, 30 N. W. 566; State v. Hixon, 27 Ark. 398; State ex rel. Richards v. McMillen, 23 Neb. 385, 36 N. W. 587.

The territorial legislature had the power to declare such a vacancy irrespective of the question of Sandoval's residence.

Mechem, Pub. Off. § 1; Campbell v. Morris, 3 Harr. & McH. 535; 14 Am. & Eng. Enc. Law, p. 4; Bank of Augusta v. Earle, 13 Pet. 595, 10 L. ed. 311; Tennessee v. Whitworth, supra; 23 Am. & Eng. Enc. Law, 2d ed. p. 322; Vincennes University v. Indiana, 14 How. 273, 14 L. ed. 418; Clinton v. Englebrecht, 13 Wall. 434, 446, 20 L. ed. 659, 662; Cooley, Const. Lim. 34, note; Guild v. First Nat. Bank, supra; Baca v. Perez, 8 N. M. 187, 42 Pac. 162.

The appointment of plaintiff in error to the office of assessor was legal, and no recovery could be had against him by Sandoval for the fees and emoluments.

States use of Crawford v. Addison, 6 Wall. 291, 18 L. ed. 919.

Where, pending an appeal from a judgment of ouster, the party successful up to that time resigned the office, and a third person was appointed to the vacancy, the latter is not liable for the emoluments of the office pending the appeal, to the person finally held entitled to the office by the appellate court, which reversed the judgment below, where he had neither made a demand for the office, nor attempted to perform its duties, until such final decision, when it was delivered up to him. Nichols v. Branham, 84 Va. 923, 6 S. E. 463.

Assumpsit is the usual form of action in these cases. Hunter v. Chandler; Dolan v. New York; Booker v. Donohoe; and Bier v. Gorrell,—supra.

But a recovery may be had as well in an action on the case. Bier v. Gorrell, supra.

A cause of action on behalf of the rightful incumbent to recover the fees of the office from an intruder is assignable. Platt v. Stout, supra.

The rightful incumbent, claiming the fees received by the *de facto* officer, must first establish his right to the office by some appropriate legal proceedings. Hunter v. Chandler, supra.

But the rule that title to an office cannot be tried in an action against an intruder for the salary has no application where, before bringing the action, the *de jure* officer had been restored to the possession from which he had been wrongfully ejected. Nichols v. MacLean, supra.

And any objection arising out of the fact that the *de jure* officer is seeking in the same action to establish his title to the office and to recover the fees from the usurper is waived by failure to demur specially for misjoinder. Wenner v. Smith, supra.

54 L. ed.

8 Am. & Eng. Enc. Law, p. 815; Hussey v. Smith, 99 U. S. 20, 25 L. ed. 314; McDowell v. United States, 159 U. S. 601, 40 L. ed. 273, 16 Sup. Ct. Rep. 111; Nofire v. United States, 164 U. S. 661, 41 L. ed. 590, 17 Sup. Ct. Rep. 212; Ball v. United States, 140 U. S. 125, 35 L. ed. 380, 11 Sup. Ct. Rep. 761; Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; Northwestern Mut. L. Ins. Co. v. Seaman, 80 Fed. 357.

The weight of authority is to the effect that a *de jure* officer may recover from the *de facto* officer the emoluments of the office, less the reasonable expenses incurred in earning such fees, when the *de facto* officer entered into the office in good faith and under color of title.

23 Am. & Eng. Enc. Law, pp. 403, 404; Mayfield v. Moore, 53 Ill. 428, 5 Am. Rep. 52; Havird v. Boise County, 2 Idaho, 687, 24 Pac. 542; Chowning v. Boger (Texas) 9 Am. & Eng. Corp. Cas. 91; Atchison v. Lucas, 83 Ky. 451; Arris v. Stukely, 2 Mod.

In Arkansas, by statute, if the contestant shall succeed, he may have not only judgment of ouster, but full damages, not exceeding the salary and fees of the office during the time he was excluded therefrom, with costs. Merritt v. Hinton, supra.

The Kansas statutes also permit damages for withholding possession of the office to be claimed in a quo warranto action. Fenn v. Beeler, supra; Rule v. Tait, 38 Kan. 765, 18 Pac. 160.

The same is true of the Wisconsin statutes. State ex rel. Hawes v. Pierce, 35 Wis. 93.

And the successful party in a contest over the right to a public office is, in Texas, entitled, if pleadings and evidence justify it, to recover the value of the office. State ex rel. Guerguin v. McAllister, supra.

But before a recovery can be had by the rightful incumbent against a *de facto* officer for fees received by him during his occupancy, the plaintiff must show a valid title to the office. Mullery v. McCann, supra.

Where a claimant of an office sues a *de facto* officer to recover the emoluments received by the latter, the plaintiff's title to the office is put in issue, and in order to recover, he must prove that he is the *de jure* officer. Richards v. McMillin, 36 Neb. 352, 54 N. W. 566.

The cause of action by a *de jure* officer against a *de facto* officer for the fees or salary received by the latter does not accrue, for the purpose of applying the statute of limitations, until the right to the office is determined, where this is in litigation. Kreitz v. Behrensmeyer, supra.

The English cases are in accord with the weight of American authority, but, because they embody a different view as to proprietary rights in a public office, they have been excluded.

260; *Bier v. Gorrell*, 30 W. Va. 95, 8 Am. St. Rep. 17, 3 S. E. 30.

There are, however, some well-considered cases holding that no recovery can be had for services not actually performed, on what seems to us to be the correct theory, that there is no property in an office.

Board of Auditors v. Benoit, 20 Mich. 176, 4 Am. Rep. 382; *Stuhr v. Curran*, 44 N. J. L. 181, 43 Am. Rep. 353.

This court has held that there is no such thing as property in a public office.

See *Taylor v. Beekham*, and *Butler v. Pennsylvania*, *supra*.

Mr. Neill B. Field submitted the cause for defendant in error in No. 116, and plaintiff in error in No. 117:

An officer *de jure* may maintain an action for the recovery of the fees and emoluments of an office against a person who has been adjudged in quo warranto to be not entitled to the office.

Stuhr v. Curran, 44 N. J. L. 181, 43 Am. Rep. 353; *United States use of Crawford v. Addison*, 6 Wall. 291, 18 L. ed. 919.

The attempt to obtain in these cases a re-examination of the questions determined in the quo warranto proceeding is clearly an attempt to attack collaterally the judgment in that proceeding.

New England Mortg. Secur. Co. v. Gay, 145 U. S. 123, 36 L. ed. 646, 12 Sup. Ct. Rep. 815; *Washington & G. R. Co. v. District of Columbia*, 146 U. S. 227, 36 L. ed. 951, 13 Sup. Ct. Rep. 64; *Kimball v. Kimball*, 174 U. S. 158, 43 L. ed. 932, 19 Sup. Ct. Rep. 639; *Albright v. New Mexico*, 200 U. S. 9, 50 L. ed. 346, 26 Sup. Ct. Rep. 210; *United States use of Crawford v. Addison*, 6 Wall. 297, 18 L. ed. 919; *Southern P. R. Co. v. United States*, 168 U. S. 48, 49, 42 L. ed. 376, 377, 18 Sup. Ct. Rep. 18.

The good faith of Albright was not a proper subject of inquiry.

United States use of Crawford v. Addison, 6 Wall. 298, 18 L. ed. 920.

Albright did not act in good faith.

Costigan v. Mohawk & H. River R. Co. 2 Denio, 609, 43 Am. Dec. 758; *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52; *Beard v. Decatur (Tex.)* 7 Am. & Eng. Corp. Cas. 145; *Chowning v. Boger (Tex.)* 9 Am. & Eng. Corp. Cas. 91; *Atchison v. Lucas*, 83 Ky. 451; *Arris v. Stukely*, 2 Mod. 260; *Bier v. Gorrell*, 30 W. Va. 95, 8 Am. St. Rep. 17, 3 S. E. 30; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, 5 N. E. 347; *Kreitz v. Behrensmeier*, 149 Ill. 496, 24 L.R.A. 59, 36 N. E. 983; 3 *Sutherland, Damages*, 3d ed. § 693; *United States use of Crawford v. Addison*, *supra*; *E. E. Bolles Woodenware Co. v. United States*, 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. Rep. 398; *Michel v. New Orleans*, 32 La. Ann. 1094.

*Mr. Justice McKenna delivered [335 the opinion of the court:

These cases involve controversies over the right of the fees of the office of assessor of Bernalillo county, New Mexico. Plaintiff in error received the fees, defendant in error claims the right to them as the duly elected officer.

There was prior litigation over the right to the office. Proceedings in the nature of quo warranto were instituted against plaintiff in error by the territory, upon the relation of defendant in error, to try the title of plaintiff in error to the office. Judgment went in favor of the latter in the trial court, which was reversed by the supreme court, and the case remanded for further proceedings. 12 N. M. 293, 78 Pac. 204.

Upon the subsequent proceedings in the trial court, judgment was entered, declaring plaintiff in error not entitled to the office. The judgment also ordered him to deliver to the relator, defendant in error here, the records and the equipments of the office, "as the lawful custodian thereof." This part of the judgment was reversed by the supreme court; the other part, as to the title of plaintiff in error to the office, was affirmed. 13 N. M. 64, 79 Pac. 719, 11 A. & E. Ann. Cas. 1165. An appeal was taken to this court and dismissed because the matter in controversy was not "measurable by some sum or value in money." As to the fees of the office, it was said: "The term of office had expired before the rendition of judgment by the territorial supreme court, and as to the effect of the judgment of ouster in a suit to recover emoluments for the past, that is collateral, even though the judgment might be conclusive in such subsequent action. *New England Mortg. Secur. Co. v. Gay*, 145 U. S. 123, 36 L. ed. 646, 12 Sup. Ct. Rep. 815; *Washington & G. R. Co. v. District of Columbia*, 146 U. S. 227, 36 L. ed. 951, 13 Sup. Ct. Rep. 64." [200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 211.]

This action was brought for the past fees and emoluments of the office, amounting, it is alleged, to the sum of six thousand, one hundred eighty-four dollars and sixteen cents (\$6,184.16).

The grounds of action are, as alleged, that Sandoval, defendant in error, was duly [336 elected to the office; that Albright, plaintiff in error, on the 27th of March, 1903, "usurped the same, and excluded the plaintiff therefrom, and received and appropriated to his own use the fees and emoluments" of the office until 19th of November, 1904, when the plaintiff (defendant in error here), by a judgment in a "certain proceeding entitled the Territory of New Mexico on the relation of Jesus Maria Sandoval against the said George F. Albright, was restored to the possession of the said of-

fee." The judgment was made part of the complaint.

A demurrer was filed to the complaint. It was overruled. An answer was then filed which practically admitted the allegations of the complaint, except the legal right of the plaintiff to the fees of the office. It admitted that, in the quo warranto proceeding, it was adjudged that Albright was not entitled to the office, and had usurped the same, and that Sandoval was entitled to it. The answer, however, set up a right to the office in Albright; that, on the 23d of March, 1903, he was appointed assessor of the county by the board of county commissioners of the county, acting under and by virtue of § 3 of an act of the legislative assembly of the territory, entitled, "An Act to Create the County of Sandoval," approved March 10, 1903, as amended March 12, 1903. That the office of assessor of the county of Bernalillo became vacant by reason of such legislation, Sandoval county having previously been a part of Bernalillo. The validity of such legislation was alleged, and that the power of appointment was vested thereby in the board of commissioners created by the amendatory act of March 12. It is alleged also that "the office was subject to the control of the legislature, and that a vacancy thereafter was created by said acts." That Sandoval, at the time Sandoval county was created, was, and had been a long time before, a resident of Bernalillo, and ceased, therefore, upon the passage of the acts creating Sandoval county, to be a resident of Bernalillo, and became disqualified from exercising the duties of the office as assessor thereof, 337] to which *he had been elected, and that, at the time of the appointment of Albright, the office was and had been vacant from the time of the creation of Sandoval county.

The answer admitted the receipt of \$6,648 on account of fees and emoluments, and alleged that Albright paid out the sum of \$2,142.25 for clerical and other expenses necessarily incurred in administering the office, which amount, he alleged, he was "entitled to receive as a set-off against any demand" against him. And he alleged that the said sum was paid in good faith. There was a demurrer to the answer filed and a replication. The latter accepted the statement of the amount received by Albright, alleged want of information as to the amount expended as expenses of the office, and denied that Albright was an incumbent of the office in good faith.

The demurrer was sustained to all parts of the answer except those alleging receipt of fees and the payment of expenses. As to them, evidence was submitted to a jury,

which, under the direction of the court, returned a verdict for the plaintiff, Sandoval, in the sum of \$5,360.53, which was the amount sued for, less the expenses which had been incurred by Albright. Both parties moved for a new trial, the plaintiff on account of the allowance of the expenses, the defendant on account of the recovery against him of the fees and emoluments received by him. Judgment was entered for the amount of the verdict in favor of the plaintiff, and affirmed by the supreme court. 93 Pac. 717. Both parties sued out writs of error. That of Albright (No. 116) is directed to the judgment against him; that of Sandoval (No. 117), to redress the error, which, he contends, was made against him in allowing as a set-off against his demand, the expenses that Albright had incurred in administering the office.

It is clear that the only questions of fact presented by the pleadings were as to the amount received and the amount expended by Albright. This was the view taken of them by the supreme court. That court said: "The right of office and that the appellee [defendant in error here] was the *de jure* *officer were fully determined in [338 the former suits, and cannot be considered in this; therefore the court below properly sustained the demurrer to all such parts of the answer as sought to raise this issue." The suits referred to by the court were Territory ex rel. Sandoval v. Albright, 12 N. M. 293, 78 Pac. 205, 13 N. M. 64, 79 Pac. 719, 11 A. & E. Ann. Cas. 1165, 200 U. S. 9, 50 L. ed. 346, 26 Sup. Ct. Rep. 210.

The court therefore addressed itself to the two propositions which it conceived were left in the case,—the right of Sandoval to recover the fees received by Albright, and the right of the latter to set off against them his disbursements for expenses. The court, passing on the first proposition, found, it said, no statute of the territory "governing this subject," but decided that "the common law, in the absence of a statute, authorizes a recovery by the officer *de jure* in such cases." On the second proposition it found that there could be no question of Albright's good faith, and that it considered the cases made good faith "the controlling consideration for the allowances of expenses to an ousted *de facto* officer," and affirmed the judgment of the trial court.

Plaintiff in error, however, goes back of the decision of the supreme court, and contends that he is not only an officer *de facto*, but an officer *de jure*. In other words, he asserts the correctness of the position taken in his answer, that, by the legislation creating Sandoval county, defendant in error ceased to be the assessor of Bernalillo, to

which he was duly elected; that therefore a vacancy existed to which plaintiff in error was duly appointed.

The basis of this contention is the power of the legislature to create Sandoval county, and that, by the exercise of the power, defendant in error was made a resident of Sandoval county, and became disqualified to be assessor of Bernalillo. From this it followed, it is argued, a vacancy occurred to which plaintiff in error was appointed under the act amending the act creating Sandoval county. It certainly follows that, if the residence of defendant in error in Sandoval county did not create a vacancy, there was 339] none to fill, unless, as it is *contended by defendant in error, that the legislature has the power to create a vacancy, and actually exercised the power.

In *Territory ex rel. Sandoval v. Albright*, 12 N. M. 293, 78 Pac. 204, the judgment of the trial court, which dismissed the quo warranto proceedings, was reversed, as we have seen. The supreme court said that the trial court, in considering the section of the acts relied on by plaintiff in error, "arrived at the conclusion that it was the intention of the legislature to declare that office [the office of assessor of Bernalillo county] vacant, and therefore, although those sections do not contain a declaration to that effect, the court was of the opinion that those sections should be given the effect of such a declaration." But the supreme court added, "We cannot concur with the trial court in this conclusion," and proceeded to analyze the legislation, and decided that it did not have the meaning plaintiff in error attributes to it. In other words, did not create a vacancy in the office of assessor of Bernalillo county. And considering the laws of the territory as to the qualification of county officers, decided that residence was not one of them. The court further decided that, when plaintiff in error was appointed, the act under which it is contended that it was done had not taken effect, and that therefore his appointment was unauthorized.

The court, considering the legislation in view of the powers of the legislature, as limited by the act of Congress of July 30, 1886 (24 Stat. at L. 170, chap. 818), concluded that the legislature had not the power to remove and appoint county officers, as contended, but the decision of the case was put on the other grounds which we have stated. In other words, put upon the construction of the statutes. And that construction we are not disposed to disturb. *Fox v. Haarstick*, 156 U. S. 674, 39 L. ed. 576, 15 Sup. Ct. Rep. 457; *English v. Arizona*, 214 U. S. 359, 53 L. ed. 1030, 29 Sup. 508

Ct. Rep. 658; *Crary v. Dye*, 208 U. S. 515, 52 L. ed. 595, 28 Sup. Ct. Rep. 360.

Under these views it is not necessary to decide whether the judgment in the quo warranto proceedings is conclusive of the issues in this case, as contended by defendant in error. *The decision upon [340 the respective rights of the parties arising from the statute of the territory may be rested on the grounds which we have expressed, and we come to the proposition whether Sandoval can recover the fees and emoluments received by Albright, and whether, if he can, may the latter set off his expenses. The first proposition is not controverted by Albright, although he suggests that there are some well-considered cases the other way, and he cites *Stuhr v. Curran*, 44 N. J. L. 181, 43 Am. Rep. 353. He also cites *Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009; *Butler v. Pennsylvania*, 10 How. 402, 13 L. ed. 472, for the view that there is no such thing as property in a public office. However, his ultimate concession is that the weight of authority is to the effect that a *de jure* officer may recover from the *de facto* officer the emoluments of the office, less the reasonable expenses incurred in earning such fees, when the *de facto* officer entered into the office in good faith and under color of title. And this was the view of the supreme court of the territory. To sustain the first proposition, the court reviewed *Stuhr v. Curran*, supra, and cites against it, *United States use of Crawford v. Addison*, 6 Wall. 291, 18 L. ed. 919; *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168; *Hunter v. Chandler*, 45 Mo. 452; *Glascok v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Douglass v. State*, 31 Ind. 429; *People ex rel. Benoit v. Miller*, 24 Mich. 458, 9 Am. Rep. 131; *People ex rel. Dorsey v. Smith*, 28 Cal. 21; *Nichols v. MacLean*, 101 N. Y. 538, 54 Am. Rep. 730, 5 N. E. 347; *Kreitz v. Behrensmeyer*, 149 Ill. 503, 24 L.R.A. 59, 36 N. E. 983; *Vaux v. Jeffersen*, 2 Dyer, 114b; *Arris v. Stukely*, 2 Mod. 260; *Lee v. Drake*, 2 Salk. 468; *Webb's Case*, 8 Coke, 45b; 1 Selwyn, N. P. 81; 1 Chitty, Pl. 112. It is not necessary to make a review of these cases. It is enough to say that they sustain the proposition for which they are cited.

The second question is more debatable; to wit, whether Sandoval was entitled to the gross receipts of the office, as contended by him, or to the net receipts, as contended by Albright, and as decided by the courts below.

Counsel for Sandoval sees and admits the difficulties which beset the question, and is not insensible to the justice, under *the [341

circumstances of this case, of the deductions allowed by the courts below.

There is argument based on the illegality of Albright's occupation of the office, and strength in the contention that a trespasser may not set off the expense he incurred in executing the trespass. It has been held, in a well-considered case, there can be no deduction for the personal services of the intruder. *People ex rel. Benoit v. Miller*, supra. It was said in that case, however, that "there may be reason for deducting from any official earnings the actual cost of obtaining them, which would have been entailed on any person who might have held the office." This may be said of the expenses in controversy in the case at bar. *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52, is the leading case which sustains the right to deduct such expenses. This case is followed by others in the same court, and the same view has been announced by other courts. We think they express the correct rule. It makes the measure of recovery the extent of the injury, and the injury, it is clear, is not the gross earnings of an office, but such earnings less, to use the language of Mr. Chief Justice Campbell in *People ex rel. Benoit v. Miller*, supra, "the actual cost of obtaining them, which would have been entailed on any person who might have held the office."

Judgment affirmed.

3421 *GEORGE F. ALBRIGHT, Appt.,
v.
JESUS MARIA SANDOVAL.

(See S. C. Reporter's ed. 342-344.)

Appeal — from territorial supreme court — Federal question.

The judgment of a territorial supreme court for the recovery of fees by a *de jure* officer from a *de facto* one is not reviewable in the Federal Supreme Court, as involving the validity of an authority exercised under the United States in the passage of the territorial legislation from which it was contended that the right to the fees was derived, where the decision was rested in fact upon the construction of the statutes, and not

NOTE.—As to review by the United States Supreme Court of territorial decisions—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

On Federal questions as sustaining appellate jurisdiction of the Supreme Court of the United States over territorial supreme courts—see note to *New York Foundling Hospital v. Gatti*, 51 L. ed. U. S. 254.
54 L. ed.

upon the want of power of the territorial legislature to pass them.

[For other cases, see Appeal and Error, 1019-1029, in Digest Sup. Ct. 1908.]

[No. 118.]

Argued and submitted January 28, 1910.
Decided February 21, 1910.

A PPEAL from the Supreme Court of the Territory of New Mexico to review a judgment which affirmed a judgment of the District Court of Bernalillo County, in that territory, for the recovery by a *de jure* officer from a *de facto* one, of the fees and emoluments of the office. Dismissed for want of jurisdiction.

See same case below (N. M.) 94 Pac. 947. The facts are stated in the opinion.

Mr. Edward L. Medler argued the cause and filed a brief for appellant.

Mr. Neill B. Field submitted the cause for appellee.

Mr. Justice McKenna delivered the opinion of the court:

The appeal involves the same questions as those that have just been decided in *Albright v. Sandoval*, No. 116. [216 U. S. 331, ante, 502, 30 Sup. Ct. Rep. 318.] In the latter case, the right of Sandoval to recover the fees and emoluments of the office of assessor of Bernalillo county from Albright is decided.

The case at bar is another action for additional fees received by Albright. The judgment rendered was for the sum of \$1,688.84, which, with interest, amounted to the sum of \$1,813.25. *The judgment was affirmed [343 by the supreme court. 94 Pac. 947. This appeal was then taken. A motion is made to dismiss it on the ground that the amount in dispute does not exceed \$5,000. To this it is replied that the case involves the validity of an authority exercised under the United States in the passage of the laws by which, it is contended, Albright derived a right to the office.

The appellant supports this contention by saying that his answer in the trial court raised the "legal propositions of the power and authority of the territorial legislature to pass the acts creating Sandoval county, and to vest the power of appointment in the county commissioners of Bernalillo county," and also contained a full record of the quo warranto proceedings in which the same questions were raised. But by reference to the opinion in No. 116 it will be seen that the supreme court rested its decision upon the construction of the statutes, not upon the want of power in the legislature to pass them. As to the acts themselves, the su-

preme court said: "It does not seem necessary or profitable in this case to consider the question of the power of the legislature, for the reason that however adequate the power of the legislature might be, if the legislature did not see fit, nor intend to exercise the power to declare the office of assessor of Bernalillo county vacant by the legislation enacted, the legal right of the incumbent elected by the people of the county is not affected by the legislation, and no vacancy existed, to be filled either by election or appointment." [12 N. M. 304, 78 Pac. 207].

As to the vacancy alleged to have occurred by the nonresidence of Sandoval in Bernalillo county, the court said that it was unable to find any provision of the statutes "requiring residence in the county as a qualification to hold the office of assessor." And further said that it was hence led to the logical conclusion "that even if it was admitted that Sandoval had been for years and was still residing in what would become Sandoval county when the act took effect, that fact would neither disqualify Sandoval from 344] holding his office nor *have the effect of rendering the office vacant." And again: "The legislature acted upon a mistaken view of the law, the result of which was to provide for the election of an officer to an office not vacant, but which, on the contrary, was in the possession of a legally elected and qualified incumbent." It was also decided that Albright's appointment was made before the law took effect, and necessarily was illegal.

Upon the second appeal of the case, the court did not enlarge on the ground of its decision. 13 N. M. 64, 79 Pac. 719, 11 A. & E. Ann. Cas. 1165. It follows that as Sandoval's right to the office and Albright's want of right were based upon the construction of the statutes of the territory, not upon power of the legislature to pass them, the motion to dismiss must be granted, and it is so ordered.

WILLIAM J. MOXLEY, a Corporation
Organized and Existing under the Laws
of the State of Illinois,
v.

HENRY L. HERTZ, Collector of Internal
Revenue for the First Collection District
of Illinois.

(See S. C. Reporter's ed. 344-357.)

Internal revenue — oleomargarine — artificial coloration.

Oleomargarine made to look like butter of a shade of yellow by the use of $\frac{1}{2}$ of 1 per cent of palm oil, a vegetable oil recognized as a possible ingredient by the act of August

2, 1886 (24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228), § 2, is not "free from artificial coloration" within the meaning of the proviso in § 8 of that act, as amended by the act of May 9, 1902 (32 Stat. at L. 194, chap. 784, § 3, U. S. Comp. Stat. Supp. 1909, p. 864), imposing a lesser tax on oleomargarine when free from artificial coloration that causes it to look like butter of any shade of yellow, although the addition of such palm oil may give the product a slightly better grain of texture, and a slightly better physiological effect upon those who eat it, where, but for its coloring power, it probably would not have been used. [For other cases, see Internal Revenue, 213-217, in Digest Sup. Ct. 1908.]

[No. 398.]

Argued December 13 and 14, 1909. Decided
February 21, 1910.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Seventh Circuit, presenting three questions as to whether oleomargarine containing palm oil is artificially colored so as to be subject to the higher rate of taxation prescribed by the Federal statutes. The first question answered in the affirmative. The second and third questions not answered.

The facts are stated in the opinion.

Mr. John Maynard Harlan argued the cause and filed a brief for William J. Moxley:

The principle of *Cliff v. United States*, 195 U. S. 159, 49 L. ed. 139, 25 Sup. Ct. Rep. 1, taken in connection with *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561, logically requires negative answers to all the certified questions.

The rule that one who claims the benefit of an exception must make it clear that he comes within its scope has no application to this case.

Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563; *United States v. Whitridge*, 197 U. S. 135, 143, 49 L. ed. 696, 698, 25 Sup. Ct. Rep. 406; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *United States v. G. Falk & Bro.* 204 U. S. 143, 51 L. ed. 411, 27 Sup. Ct.

NOTE.—On regulation of traffic in oleomargarine—see notes to *State v. Marshall*, 1 L.R.A. 52; *Com. use of Allegheny County v. Miller*, 6 L.R.A. 633; and *Com. use of Allegheny County v. Weiss*, 11 L.R.A. 532.

On the applicability of oleomargarine statutes where resemblance to butter results from choice of ingredients, and not from the introduction of foreign coloring matter—see note to *State v. Meyer*, 14 L.R.A. (N.S.) 1061.

Rep. 191. See also *United States v. Babbit*, 1 Black, 55, 17 L. ed. 94; *Bank for Savings v. The Collector* (Bank for Savings v. Field) 3 Wall. 495, 18 L. ed. 207.

Even if the proviso in § 8 of the oleomargarine law, as amended, were to be regarded as an exception to the preceding part of § 8, nevertheless it should be construed liberally in favor of the manufacturer and taxpayer.

Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; *Warrington v. Furber*, 8 East, 245.

The fact that the manufacturer intended and used the palm oil for the coloration of the oleomargarine cannot enter into the determination of the amount taxable under the statute.

Merritt v. Welsh, 104 U. S. 694, 26 L. ed. 896; *Seeberger v. Farwell*, 139 U. S. 608, 35 L. ed. 297, 11 Sup. Ct. Rep. 650; *Magone v. Luckemeyer*, 139 U. S. 612, 35 L. ed. 298, 11 Sup. Ct. Rep. 651; *United States v. Schoverling*, 146 U. S. 76, 81, 36 L. ed. 893, 895, 13 Sup. Ct. Rep. 24; *United States v. Irwin*, 24 C. C. A. 349, 45 U. S. App. 746, 78 Fed. 801.

The oleomargarine law, being a revenue law, should be construed most strongly against the government and in favor of the taxpayer.

United States v. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16,690; *Hartranft v. Wiegmann*, 121 U. S. 609, 616, 30 L. ed. 1012, 1015, 7 Sup. Ct. Rep. 1240; *United States v. Isham*, 17 Wall. 496, 21 L. ed. 728; *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; *Gurr v. Scudds*, 11 Exch. 192; *Eidman v. Martinez*, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; *Benziger v. United States*, 192 U. S. 38, 55, 48 L. ed. 331, 338, 24 Sup. Ct. Rep. 189; *Tomkins v. Ashby*, 6 Barn. & C. 543; *Doc ex dem. Scruton v. Snaith*, 8 Bing. 152; *Warrington v. Furber*, supra.

Solicitor General Bowers argued the cause and filed a brief for the collector:

There is a presumption against construction which would render a statute ineffective or inefficient, or which would cause grave public injury or inconvenience.

Bird v. United States, 187 U. S. 118, 124, 47 L. ed. 100, 103, 23 Sup. Ct. Rep. 42.

The statutory proviso relieving naturally colored oleomargarine from the general tax of 10 cents per pound is not to be construed liberally in favor of the manufacturer. The statutory distinction between naturally and artificially colored oleomargarine has a remedial purpose, namely, protection of the purchasing and consuming public against

deception through imposition upon them of articles which are neither true butter nor true oleomargarine. Such remedial legislation must be construed liberally toward accomplishment of the legislative purpose.

United States v. Dickson, 15 Pet. 141, 165, 10 L. ed. 689, 698; *Ryan v. Carter*, 93 U. S. 78-83, 23 L. ed. 807-809; *Cliff v. United States*, 195 U. S. 163, 49 L. ed. 141, 25 Sup. Ct. Rep. 1.

Mr. Justice McKenna delivered the opinion of the court:

The certificate cannot easily be condensed, therefore we give it in full. It is as follows:

"In this case, which has been argued and submitted to this court, questions of law arise concerning which the court desires the instruction and advice of the Supreme Court of the United States.

"The plaintiff in error brought suit (at law) in the trial court to recover the amount paid to the defendant in error, as collector of internal revenue, under constraint, as a tax of 10 cents per pound, assessed by the commissioner of internal revenue, for the manufacture by the plaintiff in error of 284,998 pounds of oleomargarine under due authority to engage in such business. Issues were joined, and, upon written stipulation by the parties, were submitted to the court for trial without a jury. After hearing the testimony, the trial court made and filed a special finding of facts upon the several issues so submitted, and thereupon judgment was rendered against the plaintiff in error, whereof reversal is sought on writ of error.

"The tax in controversy of 10 cents per pound purports to be assessed under the provisions of § 3 of the act of Congress approved May 9, 1902, published as chap. 784, 32 Stat. at L. 193, 194, U. S. [349 Comp. Stat. Supp. 1909, p. 864; and the present inquiry involves only the following of such finding of facts, viz.:

"(1) That in June, 1902 after the above-mentioned enactment, 'the commissioner of internal revenue officially promulgated and published and issued in regular course by the United States Treasury Department, the regulation as to "artificial coloration," in language as follows:

"Regulation as to Artificial Coloration.

"If, in the production of oleomargarine, the mixtures of compounds set out in the law of 1886 are used, and these compounds are all free from artificial coloration, and no artificial coloration is produced by the addition of coloring matter as an independent and separate ingredient, a tax of ¼ of 1 cent per pound only will be collected, al-

though the finished product may look like butter of some shade of yellow. For example, if butter that has been artificially colored is used as a component part of the finished-product oleomargarine (and that finished product looks like butter of any shade of yellow), as the oleomargarine is not free from artificial coloration, the tax of 10 cents per pound will be assessed and collected. But if butter is absolutely free from artificial coloration or cotton-seed oil free from artificial coloration, or any other of the mixtures or compounds legally used in the manufacture of the finished-product oleomargarine has naturally a shade of yellow in no way produced by artificial coloration, and through the use of one or more of these unartificially colored legal component parts of oleomargarine the finished product should look like butter of any shade of yellow, this product will be subject to a tax of only $\frac{1}{4}$ of 1 cent per pound, as it is absolutely free from artificial coloration that has caused it to look like butter of any shade of yellow.'

"Which said 'Regulation as to Artificial Coloration,' thenceforth continued to be the regulation of the commissioner's office when the oleomargarine hereinafter referred to was made and sold by the plaintiff.'

350] **"(2) The rulings and assessments in question by the commissioner of internal revenue were made in 1903.

"(3) 'The oleomargarine, on account of which said assessment was levied by said commissioner of internal revenue, and said reduced amount thereof was required by him to be paid by said plaintiff, was composed of oleo oil, lard, milk, cream, salt, and two vegetable oils commonly known as cotton-seed oil and palm oil, and of nothing else. The proportion of palm oil present in said oleomargarine was about $\frac{1}{2}$ of 1 per cent ($\frac{1}{2}$ per cent) of the total volume of said oleomargarine. Palm oil is a pure vegetable oil derived from the fruit of palm trees, which grow in certain parts of Africa, and has about the consistence of pure butter. Palm oil consists almost entirely of palmitine and olein, which are the chief constituents of pure butter. Palm oil is perfectly wholesome, is readily digested, and has long been used as an article of food in countries where it is produced. Palm oil was successfully employed in oleomargarine prior to May, 1902, and is a proper constituent of oleomargarine. The oleomargarine involved in this suit looked like butter of a shade of yellow, and such resemblance to butter of a shade of yellow was caused by the presence of the palm oil used in said oleomargarine, and the levy of said assessment by said commissioner of internal revenue was based upon and because of such resem-

blance to butter of a shade of yellow, resulting from such use of palm oil in said oleomargarine. In addition to coloring the oleomargarine in resemblance to butter, the palm oil probably gives to the oleomargarine slightly better grain of texture, causing it to act more like butter in the frying pan, and it also caused said oleomargarine to have a better physiological effect upon the persons who ate it; but such function of the palm oil, other than as coloring matter, was slight, and but for the coloring imparted to the oleomargarine would not probably have been actually used in its manufacture.

"Upon the foregoing facts,—distinguishing the case from that presented in *Cliff v. United States*, 195 U. S. 159, 49 L. ed. 139, 25 Sup. Ct. Rep. 1, as we *under-stand the facts there reported,—the questions of law concerning which this court desires the instruction and advice of the Supreme Court are these:

"First. With the oleomargarine caused 'to look like butter,' by the use of natural palm oil as one of the ingredients,—a pure vegetable oil,' named in the statute as an ingredient of oleomargarine,—which not only gives the coloration sought for the finished product, but otherwise (in some degree) improves the texture, quality, and healthfulness of the oleomargarine, can such use be denominated 'artificial coloration,' within the terms and meaning of the statute referred to, fixing the rate of taxation?

"Second. For the purpose of assessing the statutory tax on the oleomargarine described in the first question, Is the rate of taxation dependent, either (1) upon the ratio which the quantity of palm oil used bears to the other ingredients, or (2) the extent or ratio of other benefits than that of coloration given by the palm oil?

"Third. Can the fact that the manufacturer intended and used the palm oil for coloration of the oleomargarine enter into the determination of the amount taxable under the statute?"

It, as it will be observed, is implied in the certificate, and it is also contended at bar, that the facts of this case distinguish it from *Cliff v. United States*, supra. What the decision was in that case, therefore, becomes the first subject of inquiry. And an element of that inquiry is the act of Congress under which the tax in controversy was imposed, of which §§ 2 and 8 are only necessary to quote:

"Sec. 2. That, for the purposes of this act, certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All

substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lard-
352] ine, suine, and neutral; *all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, anotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter." [Act of August 2, 1886, 24 Stat. at L. 209, chap. 840, U. S. Comp. Stat. 1901, p. 2228.]

Sec. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of 10 cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *provided, when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be ¼ of 1 cent per pound*" [italics ours]. [Act of August 2, 1886, as amended May 9, 1902, 32 Stat. at L. 194, chap. 784, § 3, U. S. Comp. Stat. Supp. 1909, p. 864.]

The defendant in that case was charged with having knowingly purchased and received for sale oleomargarine which had not been properly stamped according to law. It was shown that out of 160 ounces of which the compound was composed, only 1½ ounces were palm oil, and the following ruling of the commissioner was introduced in evidence:

"This office rules that where so minute and infinitesimal a quantity of a vegetable oil is used in the manufacture of oleomargarine as is proposed to be used in palm oil, and through its use the finished product looks like butter of any shade of yellow, it cannot be considered that the oil is used with the purpose or intention of being a bona fide constituent part or element of the product, but is used solely for the purpose of producing or imparting a yellow color to the oleomargarine, and, therefore, that the oleomargarine so colored is not free from artificial coloration, and becomes subject to the tax of 10 cents per pound."

The contention was that Congress having, in § 2, defined oleomargarine to consist of
353] certain substances, the color *which resulted from the use of such substances, or any of them, was a natural, not an artificial, coloration. The contention, and the argument of counsel to support it, was given at length, so that its full extent and strength should be shown. Among other things, this was said: "Howsoever minute may be the quantity of palm oil used, it is

none the less a vegetable oil, a statutory, or, so to speak, a natural, ingredient of oleomargarine, and displaces in the finished product an equal volume of some other statutory ingredient of oleomargarine, as, for instance, cotton-seed oil." And it was argued that the statute conferred "no power upon the commissioner to prescribe the formula for the manufacture of oleomargarine, or the proportion of the different ingredients, or to exclude any ingredient except upon the ground of its being deleterious to health." The argument could not be misunderstood or evaded. It asserted the purity of the oleomargarine under the law, and that its color came from its purity, not from any illegal addition to it. The contention, therefore, was direct, and unqualified by any consideration of the relative quantity of the ingredients. Its force was recognized, but it was nevertheless rejected, and in reply it was pointed out that the statute was not enacted to permit the manufacture of oleomargarine, but to prevent its sale "as and for butter." And it was decided "that when any substance, although named as a possible ingredient of oleomargarine, substantially serves only the function of coloring the mass, and so as to cause the product to 'look like butter of any shade of yellow,' it is an artificial coloration." It was stated that palm oil is a vegetable oil, and one of the substances authorized to be used by § 2 in the composition of oleomargarine. But this, it was added, did not exempt the product from the higher tax if the palm oil or any other "statutory ingredient," to use the phrase of counsel, was used only for coloring. The statute was carefully analyzed, and the words, "and other coloring matter," in § 2, were declared to have an obvious purpose. "It was to prevent," it was said, "excluding from the operation of the statute *any-
354] thing in its nature oleomargarine [that is, to exempt from the higher tax anything in its nature oleomargarine] by the addition of a substance not in reality an ingredient, but serving substantially only the purpose of coloring the product to cause it to look like butter." And it was further said: "The fact that one of the ingredients of this compound is palm oil does not show that such oil does anything else than color the product composed of other ingredients, and if it does substantially only this, it is rightfully styled an artificial coloration." This language brings us to the point of distinction between that case and the case at bar. It is put beyond controversy that oleomargarine may be subject to the higher tax though its color result from a "statutory ingredient." To relieve from such consequence the ingredient must be there in sub-

stantial quantity,—in quantity substantial enough to contribute to the product something more than color. And this, it is insisted, the palm oil does in the case at bar, and the case is, therefore, it is further insisted, distinguished from the *Cliff Case*. The contention is that the defendant in the *Cliff Case* “stood upon the narrow proposition that palm oil being a vegetable oil, and, *therefore*, being a statutory ingredient of oleomargarine, it made no difference whether the amount of it used was small or large, or whether the *sole purpose* of its use was to impart the desired color; coloration due to its use was not, within the meaning of the statute, ‘artificial coloration.’”

It is further urged that “*Cliff* made no effort whatever to show what, if any, were the effects of palm oil upon the oleomargarine other than giving color to it,” but admitted, for the purpose of the case, “that the *sole and only* function of the palm oil was to make the oleomargarine ‘look like butter of a shade of yellow.’”

He did not show, as he might have shown, it is further urged, “what are found as facts in this case, namely: that palm oil in its nature is suitable for food; that, for many years prior to 1902, it had been used 355] for food, and that, when *so used, it was found healthful and digestible; and that palm oil had been successfully used in oleomargarine prior to May 9, 1902, the date of the passage of the amendment which, for the first time, made the tax upon oleomargarine that is *free* from artificial coloration smaller than the tax upon oleomargarine that is *not free* from artificial coloration. Prior to May 9, 1902, all oleomargarine was taxed under the original oleomargarine law passed in 1886, at the rate of 2 cents per pound, regardless of whether it was free or not free from artificial coloration.”

Are these contentions sustained by the facts certified? Do they show that the palm oil has substantially any other purpose than to color the product? It is certified that palm oil is a purely vegetable oil, “is perfectly wholesome, is readily digested, and has long been used as an article of food in countries where it is produced.” These are useful qualities, undoubted; and the extent of their contribution by the presence of $\frac{1}{2}$ of 1 per cent of palm oil is attempted to be estimated. It is the ingredient, the certificate says, that gives to the oleomargarine a “shade of yellow” and makes it resemble butter; that is, enables it to seem what it is not, and so far, at least, to defeat the purpose of the law against coloration. And the certificate further recites that, “in addition to coloring

the oleomargarine in resemblance to butter, the palm oil probably gives to the oleomargarine slightly better grain of texture, causing it to act more like butter in the frying pan, and it also caused said oleomargarine to have a better physiological effect upon the persons who ate it; but such function of the palm oil, other than as coloring matter, was slight, and but for the coloring imparted to the oleomargarine would not probably been used in its manufacture.”

We do not think these facts take the case out of the ruling in the *Cliff Case*. There is no more substantial contribution of character to the compound in this case than in that. The amount of palm oil used in that case was something greater than in this, and the purpose of its use was the same. It, of *course, added what—[356] ever qualities it possessed and could exist in a fraction of 1 per cent of the product of which it made a part. This did not need explicit statement, and it gains nothing now by explicit statement. What effect is claimed for it? It gives, it is said, a slightly better grain of texture, a better physiological effect upon those who eat it. But those effects are “slight,” it is certified. What is meant by “slight?” It is the word of a rather indeterminate meaning. It usually implies unimportance or insignificance, and is practically given that meaning in the certificate. The palm oil, it is certified, contributes so little to the value or quality of the oleomargarine that, but for its coloring power, it would not be used. It may be, as counsel says, that the motive of its use cannot make it illegal, and that one cannot become an offender against the law by doing what it permits. But the question here is not what the law permits. That was decided in the *Cliff Case*. The question here is whether we shall exaggerate a slight use of a “statutory ingredient” into a substantial use of it, and by doing so bring its use within the permission of the statute, and relieve the product of which it is a “slight” part from a tax of 10 cents.

We have so far considered this case on the authority of the *Cliff Case*, deeming it unnecessary to repeat the reasoning of the latter, as though the question was *res integra*. It may be well, however, to develop the argument of counsel somewhat further. It is presented in a summary way in the following syllogism:

“First premise: Color due to the use of an authorized food ingredient, not artificially colored, is not artificial coloration. (*McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561.)

"Second premise: Palm oil, being a vegetable oil, suitable for food, and its nature such as to make oleomargarine suitable for food, and being itself not artificially colored, is an authorized food ingredient. (Cliff Case.)

"Conclusion: Therefore color due to the use of palm oil is not artificial coloration."

357] *The premises and conclusions are assumed by ignoring, not by following, the cases cited to support them. The error arises by making the term "authorized food ingredient" unqualified, and by disregarding what the Cliff Case makes essential. The quality of suitability for food of an ingredient is made determinative, and wholly determinative, disregarding its quantity, its relation and proportion to other ingredients; and this, counsel indeed contends for, and is the proposition presented in the second question certified. But the contention contravenes the rule in the Cliff Case, where the distinction was made between the mere addition of an authorized food ingredient and its service in the compound for something more substantial than coloration. We now repeat it. Any other rule would give too easy a way to evade the statute, and make its purpose yield not to what is essential to the manufacture of oleomargarine, but what is nonessential; and render a law which was intended to prevent deception an easy means to accomplish it.

We are not called upon to consider whether the first premise of counsel's syllogism is sustained by *McCray v. United States*, supra, but we are concerned to say, to meet a contention of counsel, that it will not be put into antagonism with the Cliff Case by the meaning we have given the latter. On the contrary, the cases support each other. In both, this court declined to follow arguments based upon the mere letter of the statute, in destruction of its manifest intention. The contention in the *McCray* Case was that butter, whether artificially colored or not, was an authorized ingredient of oleomargarine, and, when added to oleomargarine, made it free from artificial coloration. This was pronounced an "obvious *non sequitur*." The product, it was said, would be "oleomargarine," but it would not be "oleomargarine free from artificial coloration within the intentment of the proviso" of § 2.

It follows from these views that the first question certified must be answered in the affirmative; the second and third questions do not call for specific answers on this record.

*LAUREL HILL CEMETERY, Plff. [358
in Err.,
v.

CITY AND COUNTY OF SAN FRANCISCO, Board of Supervisors of the City and County of San Francisco, et al.

(See S. C. Reporter's ed. 358-366.)

Municipal corporations — ordinances — who may question validity.

1. The availability for burial purposes of large tracts of land within the limits of the city of San Francisco cannot be alleged by a cemetery association owning a burial ground within those limits, to invalidate, under the Federal Constitution, an ordinance forbidding the burial of the dead within the limits of the city and county of San Francisco.

[Validity of municipal ordinances, generally, see *Municipal Corporations*, II. b, in *Digest Sup. Ct. 1908.*]

Constitutional law — due process of law — forbidding burial within municipal limits — police power.

2. A cemetery association owning a burial ground within the limits of the city and county of San Francisco is not deprived of its property without due process of law, contrary to the United States Constitution, 14th Amendment, by an ordinance forbidding the burial of the dead within those limits.

[For other cases, see *Constitutional Law*, 500-522, 878-888, in *Digest Sup. Ct. 1908.*]

[No. 100.]

Argued January 21 and 24, 1910. Decided February 21, 1910.

IN ERROR to the Supreme Court of the State of California to review a decree which affirmed a decree of the Superior Court of the City and County of San Francisco, in that state, in favor of defendants, in a suit to restrain the enforcement of an

NOTE.—On municipal power over nuisances affecting safety, health, and personal comfort—see note to *Harrington v. Providence*, 38 L.R.A. 305.

On injunction by municipal corporations against nuisances affecting public morals, peace, good order, health, and safety—see note to *Red Wing v. Guptil*, 41 L.R.A. 323.

As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

For a discussion of police power generally—see notes to *State v. Marshall*, 1 L.R.A. 51; *Electric Improv. Co. v. San Francisco*, 13 L.R.A. 131; *State v. Sehlemmer*, 10 L.R.A. 135; and *Barbier v. Connolly*, 28 L. ed. U. S. 923.

ordinance forbidding the burial of the dead within the city and county limits. Affirmed.

See same case below, 152 Cal. 464, 27 L.R.A. (N.S.) 260, 93 Pac. 70, 14 A. & E. Ann. Cas. 1080.

The facts are stated in the opinion.

Mr. Thomas E. Haven argued the cause and filed a brief for plaintiff in error:

If the cemetery in question has never been, and will not become, a nuisance, and is not dangerous to life, or detrimental to the public health, it is not within the constitutional powers of the municipality to suppress it.

Yates v. Milwaukee, 10 Wall. 505, 19 L. ed. 986; Hume v. Laurel Hill Cemetery, 142 Fed. 565.

Ordinances enacted under the police power are invalid if they go beyond the necessities of the case.

Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 592, 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

The prohibition of burials from which no injury can result is neither reasonable nor necessary.

Los Angeles County v. Hollywood Cemetery Asso. 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153; Hume v. Laurel Hill Cemetery, supra; Freund, Pol. Power, § 178; Lake View v. Letz, 44 Ill. 81.

Courts cannot know judicially that the burial of human remains in proximity to the habitations of the living is dangerous to the health of the inhabitants.

Brown v. Piper, 91 U. S. 37, 42, 43, 23 L. ed. 200-202; St. Louis Gaslight Co. v. American F. Ins. Co. 33 Mo. App. 369; Underhill, Ev. § 241, p. 371; Minnesota v. Barber, 136 U. S. 313, 319, 327, 34 L. ed. 455, 457, 460, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

Cemeteries are not so dangerous to health as to constitute nuisances *per se*.

Los Angeles County v. Hollywood Cemetery Asso. and Lake View v. Letz, supra; 5 Am. & Eng. Enc. Law, 2d ed. p. 791; Monk v. Packard, 71 Me. 309, 36 Am. Rep. 315; Lake View v. Rose Hill Cemetery Co. 70 Ill. 195, 22 Am. Rep. 71; Begein v. Anderson, 28 Ind. 79; Kingsbury v. Flowers, 65 Ala. 485, 39 Am. Rep. 14; Wood, Nuisances, 2d ed. p. 6, § 3; Dunn v. Austin, 77 Tex. 146, 11 S. W. 1125; Musgrove v. Cath-

olic Church, 10 La. Ann. 431; New Orleans v. Church of St. Louis, 11 La. Ann. 244; Ellison v. Washington, 58 N. C. (5 Jones's Eq.) 57, 75 Am. Dec. 433.

Prohibition of burials is unreasonable and beyond the necessities of the case if possible dangers can be avoided by regulation of burials without absolute prohibition.

Los Angeles County v. Hollywood Cemetery Asso. supra; Freund, Pol. Power, p. 132, § 141; Hume v. Laurel Hill Cemetery, supra; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133.

A power to regulate does not properly include a power to suppress or prohibit, for the very essence of regulation is the existence of something to be regulated.

24 Am. & Eng. Enc. Law, 2d ed. pp. 243, 244; Ex parte Patterson, 42 Tex. Crim. Rep. 256, 51 L.R.A. 654, 58 S. W. 1011; McConvill v. Jersey City, 39 N. J. L. 44; Austin v. Austin City Cemetery Asso. 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528; Re Hauck, 70 Mich. 396, 38 N. W. 269; State v. Mott, 61 Md. 297, 48 Am. Rep. 105; Re Frazee, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72.

A mere tendency to endanger the health of the public is not a sufficient warrant for the prohibition of a lawful business.

Lake View v. Rose Hill Cemetery Co. supra; Miller v. Horton, 152 Mass. 540, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100; Lochner v. New York, supra.

Complainant is entitled to be heard upon the question as to whether or not the burial of the dead within the city and county of San Francisco is dangerous to life and detrimental to the public health.

Dobbins v. Los Angeles, 139 Cal. 179, 96 Am. St. Rep. 95, 72 Pac. 970; Re Smith, 143 Cal. 373, 77 Pac. 180.

The ordinance is unreasonable for the reason that it prohibits burials upon large, unoccupied tracts of land.

Wygant v. McLauchlan, 39 Or. 429, 54 L.R.A. 636, 87 Am. St. Rep. 673, 64 Pac. 867.

The ordinance deprives complainant and its lot owners of their property without due process of law.

Lawton v. Steele, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Holden v. Hardy, 169 U. S. 398, 42 L. ed. 793, 18 Sup. Ct. Rep. 383.

Mr. Jesse H. Steinhart argued the cause, and, with Mr. Percy V. Long, filed a brief for defendants in error:

The state court has decided that the ordinance is within the terms of the powers

granted to the municipality, and the Federal court is bound by this decision, except as to any Federal question.

Cooley, Const. Lim. 7th ed. p. 31; Crowley v. Christensen, 137 U. S. 86, 92, 34 L. ed. 620, 624, 11 Sup. Ct. Rep. 13; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289.

The court will not consider the fact, as alleged in the complaint, that there are large tracts of unoccupied land in the city and county of San Francisco, removed from human habitations.

New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736; The Winnebago, 205 U. S. 354, 51 L. ed. 837, 27 Sup. Ct. Rep. 509; Lampasas v. Bell, 180 U. S. 276, 45 N. E. 527, 21 Sup. Ct. Rep. 368; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Cooley, Const. Lim. 7th ed. p. 232; Brown v. Ohio Valley R. Co. 79 Fed. 176; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; Austin v. Boston, 7 Wall. 694, 19 L. ed. 224; Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044.

The police power includes that general and indefinite extent of power vested in the state for the purpose of protecting, preserving, and promoting the public health, safety, morals, welfare, prosperity, and convenience. It is that indefinite power inherently residing in the government, and placed there so that the government may fulfill the purposes for which it was formed; to wit, the protection and promotion of the health, comfort, safety, welfare, and prosperity of its citizens.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

Every doubt is resolved in favor of the ordinance.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

Especially in reviewing a state decision upholding the ordinance.

Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567.

The question always is whether or not the act is within the reasonable discretion of the legislature.

Holden v. Hardy, *supra*; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Powell v. Pennsylvania, 127 54 L. ed.

U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

The legislative conclusion is conclusive on the court whenever there is a question whether or not the matter is within the police power.

North Chicago City R. Co. v. Lake View, 105 Ill. 212, 44 Am. Rep. 788; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Powell v. Pennsylvania, *supra*.

The Federal court will not declare the act unconstitutional because it believes that regulation instead of prohibition should have been attempted.

Powell v. Pennsylvania and Crowley v. Christensen, *supra*.

The judiciary will not declare the ordinance unconstitutional merely because it prohibits harmless as well as harmful things.

Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; 21 Harvard L. Rev. No. 3, p. 177.

The court will not declare the act unconstitutional when the legislative conclusion has the support of public opinion, common belief, or scientific authority.

Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Re Viemeister, 179 N. Y. 235, 70 L.R.A. 796, 103 Am. St. Rep. 859, 72 N. E. 97, 1 A. & E. Ann. Cas. 334.

The ordinance in this case is not unreasonable or arbitrary.

People ex rel. Oak Hill Cemetery Asso. v. Pratt, 129 N. Y. 68, 29 N. E. 7; Brick Presby. Church v. New York, 5 Cow. 538; Coates v. New York, 7 Cow. 585; Kincaid's Appeal, 66 Pa. 411, 5 Am. Rep. 377; Sohler v. Trinity Church, 109 Mass. 1; Charleston v. Wentworth Street Baptist Church, 4 Strobb. L. 309; Humphrey v. Front Street M. E. Church, South, 109 N. C. 132, 13 S. E. 793; Carpenter v. Yeadon, 86 C. C. A. 122, 158 Fed. 766, 151 Fed. 879; Newark v. Watson, 56 N. J. L. 667, 24 L.R.A. 843, 29 Atl. 487; Palmer v. Hickory Grove Cemetery, 84 App. Div. 600, 82 N. Y. Supp. 973; Cronin v. People, 82 N. Y. 318, 37 Am. Rep. 564; Scovill v. McMahon, 62 Conn. 378, 21 L.R.A. 58, 36 Am. St. Rep. 350, 26 Atl. 479; Austin v. Austin City Cemetery Asso. 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528; Bryan v. Birmingham, 154 Ala. 447, 129 Am. St. Rep. 63, 45 So. 922; Page v. Symonds, 63 N. H. 17, 56 Am. Rep. 481; Young v. Mahoning County, 51 Fed. 585; Dodd v. State Bd. of Health, 67 N. J. L. 463, 51 Atl. 456; Odd Fellows' Cemetery Asso. v. San Francisco, 140 Cal. 226, 73 Pac. 987.

It has the support of scientific authority. Sir Henry Thompson, 4 Popular Science

Monthly, p. 596; 135 North American Review, p. 266; 2 Buck, Hygiene & Public Health, p. 460; 93 North American Review, p. 131.

The danger from burial within a city is clear.

Lowe v. Prospect Hill Cemetery Asso. 58 Ncb. 94, 46 L.R.A. 237, 78 N. W. 488; 2 Stevenson & M. Hygiene & Public Health, p. 697; 3 Wharton & St. Med. Jur. ¶ 409b; 2 Buck, Hygiene & Public Health, p. 459; 135 North American Review, p. 266; 167 North American Review, p. 211.

363] *Mr. Justice Holmes delivered the opinion of the court:

This is an action to restrain the city and county of San Francisco and its officers from enforcing an ordinance forbidding the burial of the dead within the city and county limits. The allegations of the complaint are lengthy, but the material facts set forth are as follows: The plaintiff was incorporated in 1867 as a rural cemetery under a general act. The land in question had been dedicated as a burying ground, being at that time outside the city limits, and a mile or two away from dwellings and business. It was conveyed to the plaintiff, and later a grant of the same was obtained from the city in consideration of \$24,139.79, which sum the city retains. The land has been used as a cemetery ever since; forty thousand lots have been sold, and over two million dollars have been spent by the lot owners, and other large sums by the plaintiff, in preparing and embellishing the grounds. By the terms of the above-mentioned general statute the lots, after a burial in them, are inalienable, and descend to the heirs of the owner, and the plaintiff is bound to apply the proceeds of sales to the improvement, embellishment, and preservation of the grounds. There is land still unsold, estimated to be worth \$75,000. There now are many dwellings near the cemetery, but it is alleged to be in no way injurious to health, or offensive, or otherwise an interference with the enjoyment of property or life. There also is an allegation that there are within the city large tracts, some of them vacant and some of them containing several hundred acres, in several of which interments could be made more than a mile distant from any inhabitants or highway. The ordinance in question begins with a recital that "the burial of the dead within the city and county of San Francisco is dangerous to life and detrimental to the public health," and goes on to forbid such burial under a penalty of fine, imprisonment, or both. The complaint sets up that it violates article 1, § 8, and the 14th

Amendment of the Constitution of the United States.

*The answer denied some of the above [364 statements on the ground of ignorance, and categorically denied the averment as to the large vacant tracts available for burying within the city. The defendants moved for judgment on the pleadings, the notice showing the ground to be that the complaint did not state a cause of action, but going on to say that the motion would be made upon all the papers on file. The motion was granted, and an exception to the judgment was affirmed by the supreme court of the state. 152 Cal. 464, 93 Pac. 70, 14 A. & E. Ann. Cas. 1080. As the state court and the arguments before us assumed the material allegations of the complaint to be true, we shall assume that the judgment was ordered upon the complaint without regard to the denials in the answer, although it was then on file.

The only question that needs to be answered, if not the only one before us, is whether the plaintiff's property is taken contrary to the 14th Amendment. In considering it, the allegation as to the large tracts available for burying purposes may be laid on one side. The plaintiff has no grievance with regard to them. The Winnebago (Iroquois Transp. Co. v. DeLaney Forge & Iron Co.) 205 U. S. 354, 360, 51 L. ed. 836, 839, 27 Sup. Ct. Rep. 509. Moreover, it is said by the supreme court of the state that burial within the San Francisco city or county limits already was forbidden by statute, except in existing cemeteries or such as might be established by the board of supervisors. The board of supervisors passed the ordinance now complained of; so that, as pointed out by the court, the ordinance in effect merely prohibited burials in existing cemeteries. It was, therefore, a specific determination by the law-making authority as to the relation of those cemeteries to their respective neighborhoods, and the question is whether the court can say that it was wrong.

To aid its contention, and in support of the averment that its cemetery, although now bordered by many dwellings, is in no way harmful, the plaintiff refers to opinions of scientific men who have maintained that the popular belief is a superstition. Of these we are asked, by implication, to take judicial *notice, to adopt them, and, on [365 the strength of our acceptance, to declare the foundation of the ordinance a mistake and the ordinance void. It may be, in a matter of this kind, where the finding of fact is merely a premise to laying down a rule of law, that this court has power to form its own judgment without the aid of a jury. Prentis v. Atlantic Coast Line R. Co. 211 U.

S. 210, 227, 53 L. ed. 150, 159, 29 Sup. Ct. Rep. 67. But whatever the tribunal, in questions of this kind great caution must be used in overruling the decision of the local authorities, or in allowing it to be overruled. No doubt this court has gone a certain distance in that direction. *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; *Lochner v. New York*, 198 U. S. 45, 58, et seq., 49 L. ed. 937, 942, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133. But it has expressed through the mouth of the same judge who delivered the judgment in the case last cited the great reluctance that it feels to interfere with the deliberate decisions of the highest court of the state whose people are directly concerned. *Welch v. Swasey*, 214 U. S. 91, 106, 53 L. ed. 923, 930, 29 Sup. Ct. Rep. 567. The reluctance must be redoubled when, as here, the opinion of that court confirms a specific determination concerning the same spot, previously reached by the body that made the law. See *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 341, 45 L. ed. 879, 888, 21 Sup. Ct. Rep. 625; *Smith v. Worcester*, 182 Mass. 232, 234, 235, 59 L.R.A. 728, 65 N. E. 40.

But the propriety of deferring a good deal to the tribunals on the spot is not the only ground for caution. If every member of this bench clearly agreed that burying grounds were centers of safety, and thought the board of supervisors and the supreme court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. On the contrary, evidence that vaccination was deleterious was held properly to have been excluded. *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765, s. c. 183 Mass. 242, 67 L.R.A. 366] 935, 66 N. E. 719. See *Otis v. Parker*, 187 U. S. 606, 608, 609, 47 L. ed. 323, 327, 328, 23 Sup. Ct. Rep. 168. Again, there may have been other grounds fortifying the ordinance besides those recited in the preamble. And yet again, the extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic. Since, as before the making of constitutions, regulation of burial and prohibition of it in certain spots, especially in crowded cities, have been familiar to the Western

world. This is shown sufficiently by the cases cited by the court below; *e. g.*, *Coates v. New York*, 7 Cow. 585; *Kincaid's Appeal*, 66 Pa. 411, 5 Am. Rep. 377; *Sohier v. Trinity Church*, 109 Mass. 1, 21; *Carpenter v. Yeadon*, 86 C. C. A. 122, 158 Fed. 766. The plaintiff must wait until there is a change of practice, or at least an established consensus of civilized opinion, before it can expect this court to overthrow the rules that the lawmakers and the court of his own state uphold.

Judgment affirmed.

Mr. Justice McKenna took no part in the decision of this case.

† *HAWAIIAN TRUST COMPANY [367 (LIMITED) and Muriel Campbell Shingle, Executors of Abigail K. Campbell Parker, Deceased, Appts.

v.
HENRICH MARTENS VON HOLT et al.,
Trustees. (No. 106.)

SAME

v.

SAME.

(No. 107.)

(See S. C. Reporter's ed. 367-371.)

Wills — devise of income — time of enjoyment.

The widow is not entitled to any part of the income from her deceased husband's realty before the same comes into the executors' hands as trustees under a will directing the executors, who are also named as trustees, to obtain a decree of distribution, as soon as may be, and devising the residue of the testator's estate, not before otherwise devised or bequeathed, to the trustees living at the date of the decree of distribution, who, "with respect to all property which shall be so distributed to them," are to reduce the same to possession and manage it, collecting the rents and income, and keeping separate the accounts pertaining to the realty, and to pay over to the widow, in lieu of dower, one third of the income of the "realty last aforesaid."

[Nos. 106, 107.]

Argued January 26, 1910. Decided February 21, 1910.

APPEAL from the Supreme Court of the Territory of Hawaii to review decrees affirming decrees of the Circuit Court of the First Judicial Circuit in that territory,

†Substituted as parties October 11, 1909, on suggestion of the death of Abigail K. Campbell Parker.

in suits to construe a will, holding that the testator's widow was not entitled to any part of the income from realty until the same came into the trustees' hands. Affirmed.

See same case below, No. 106, 18 Haw. 34, on rehearing, 18 Haw. 658; No. 107, 18 Haw. 342.

The facts are stated in the opinion:

Mr. Aldis B. Browne argued the cause, and, with Messrs. Alexander Britton, Evans Browne, Sidney M. Ballou, Mason F. Prosser, Robbins B. Anderson, F. E. Thompson, and C. F. Clemons, filed a brief for appellant:

Separate accounting as between income of realty and personalty was an obvious necessity in the orderly accounting and administration of the estate. Because it was not in terms directed by the testator cannot justify taking the omission of such unnecessary direction as the basis of interpreting the will and the testator's intention thereunder against the manifest first recipient of his bounty, and for whose rights and interests the whole will exhibits the highest solicitude.

2 Am. & Eng. Enc. Law, p. 1210.

Where a widow accepts a provision in her husband's will as a substitute for her dower right, she is regarded as a purchaser for a valuable consideration. Her claim is a preferred one, and she is entitled to receive all that is so given her by the will, although other legacies and devises may have to abate to pay debts.

Borden v. Jenks, 140 Mass. 562, 54 Am. Rep. 507, 5 N. E. 623; Pollard v. Pollard, 1 Allen, 490; Security Co. v. Bryant, 52 Conn. 311, 52 Am. Rep. 599; Lord v. Lord, 23 Conn. 327; Re Gotzian, 34 Minn. 159, 57 Am. Rep. 43, 24 N. W. 920; Howard v. Francis, 30 N. J. Eq. 444.

The fact of the widow being a purchaser for value marks the difference between her position and that of the children, who are mere volunteers.

Williamson v. Williamson, 6 Paige, 305.

The legacy of the value of one third of the personalty, given the widow in paragraph three, would have drawn interest if the will had not provided to the contrary. The provision for family support, under paragraph five, is to be regarded as in lieu of such interest, but it should not be regarded as also postponing the widow's share in the income from the realty.

2 Woerner, Am. Law of Administration, § 454; Lamb v. Lamb, 11 Pick. 376; Lovering v. Minot, 9 Cush. 151; Pollock v. Learned, 102 Mass. 54; Sargent v. Sargent, 103 Mass. 299; Ayer v. Ayer, 128 Mass. 575; Williamson v. Williamson, 6 Paige, 298; Green v. Green, 30 N. J. Eq.

451; Van Blarcom v. Dager, 31 N. J. Eq. 795; Green v. Blackwell, 32 N. J. Eq. 773; Pell v. Mercer, 14 R. I. 432.

The cases cited show the distinction between interest on specific legacies and cases where the bequest is of the income for life in the residuum. They also point out that it makes no difference that the gift purports to be payable at the close of the administration, nor that a trustee is interposed between the gift and the taker.

Flickwir's Estate, 136 Pa. 381, 20 Atl. 518; Green v. Green; Lovering v. Minot; and Sargent v. Sargent,—supra.

The context of the will must be resorted to for the purpose of ascertaining whether or not the testator intended that the realty should, in case of insufficiency of the personalty, aid the personalty to the extent of the amount necessary for the payment of the legacy.

Harris v. Fly, 7 Paige, 425; Leigh v. Savidge, 14 N. J. Eq. 129; Seaver v. Lewis, 14 Mass. 85; Hoes v. Van Hoesen, 1 N. Y. 123.

Unless it affirmatively appears to have been the intention of the testator to charge the realty with the payment of the legacies, the realty is not liable. Nor is the fact that the legacy is given in lieu of dower enough to make its payment a charge upon the realty. In the event the personalty was insufficient, the fact that the legacy was taken in lieu of dower might be an equitable reason for charging the realty with a deficit, but is not in itself sufficient to make the payment of the legacy chargeable to or a lien upon the realty.

Conard's Appeal, 33 Pa. 49.

In the will at hand, the sum of money bequeathed to the widow is clearly but equivalent to one third of the value of the personalty at the time of the adjudication of the value of the entire personal estate; and it would necessarily include accrued revenues from the date of the testator's death to the time of the adjudication of such values. Where the widow is given the income of the residue of the estate during widowhood, she is entitled to the whole value of the income of the personal estate from the day of the death of the testator, and not from the time it is settled in the probate court.

Pollock v. Learned, 102 Mass. 55.

Mr. E. M. Watson argued the cause and filed a brief for appellees:

There can be no doubt that a testator may provide for a legacy or annuity, the payment of which is to be made or commence at a definite time in the future, and it is a well-settled general rule that where such a provision is found in a will, the legatee or annuitant has no right or claim

to the money before the specified time arrives.

18 Am. & Eng. Enc. Law, pp. 792-795; 2 Roper, Legacies, 1245.

None of the cases to be found in the books go further than to hold that where the income of the testator's residuary estate is bequeathed to a legatee for life, and no time is prescribed in the will for the commencement or enjoyment of the use or the income of such residue, then the person so taking such residue for life is entitled to the proceeds from the date of the death of the testator.

Williamson v. Williamson, 6 Paige, 298; Fearn v. Young, 9 Ves. Jr. 549; Cooke v. Meeker, 36 N. Y. 15; Lamb v. Lamb, 11 Pick. 371; Bancroft v. Security Co. 74 Conn. 218, 50 Atl. 736; Lovering v. Minot, 9 Cush. 156.

Even where trustees and executors are the same persons, their functions are wholly distinct, and the trustees in no way take over their functions until the actual closing of administration, the settlement of the final accounts, and the distribution of the property.

Re Higgins, 15 Mont. 474, 28 L.R.A. 124, 39 Pac. 506; Carr v. St. Paul's Parish, 71 N. H. 231, 51 Atl. 921; Cranson v. Wilsey, 71 Mich. 359, 39 N. W. 9; Re Long, 7 Haw. 371; 11 Am. & Eng. Enc. Law, p. 810; McClaskey v. Barr, 79 Fed. 416; Blanchard v. Williamson, 70 Ill. 650.

The mere fact that the period of two years is given the executrix and executors within which to pay this legacy is, in itself, presumptive evidence that the testator intended the income of the entire estate to be at the disposal of the personal representatives for the purpose of carrying out the directions in the will contained, including the payment of such legacy. If this be true, how then can it be for a moment contended that, under the terms of the will, the widow is entitled to share in the income of the realty, under paragraph nine of the instrument, from the date of the death of the testator? Such a proposition is absolutely negatived by the will itself.

2 Jarman, Wills, 5th ed. 613.

While it is unquestionably true that personal estate, in the absence of expressions in the will to the contrary, is primarily liable for the payment of the legacy (Roper, Legacies, p. 692; 19 Am. & Eng. Enc. Law, p. 1302), yet a testator may by his will indicate an intention to constitute his real estate or particular portions of his property, either real, or personal, or both, the primary fund for this purpose, and where such intent can be gathered from the will a court of equity will give it effect.

Gardner v. Gardner, 3 Mason, 178, Fed. 54 L. ed.

Cas. No. 5,227; Re Woodworth, 31 Cal. 617; Scott v. Morrison, 5 Ind. 551; Quinby v. Frost, 61 Me. 77; Atwater v. Fowler, 1 Edw. Ch. 417; Risk's Appeal, 110 Pa. 171, 1 Atl. 85.

A direction for payment of legacies out of the "testator's estate" includes realty as well as personalty (and income of realty as well as income of personalty).

Van Winkle v. Van Houten, 3 N. J. Eq. 172; Worth v. Worth, 95 N. C. 242; Lloyd's Estate, 174 Pa. 184, 34 Atl. 519; Hunt v. Hunt, 4 Gray, 190; Gorman v. McDonnell, 127 Ala. 549, 28 So. 964; Longacre v. Stiver, 135 Ind. 585, 35 N. E. 900; Harris v. Fly, 7 Paige, 421; Jackson ex dem. Pearson v. Housel, 17 Johns. 281; Schouler, Wills, 2d ed. § 510.

Here our claim is that the legacy provided for in paragraph three to the widow is chargeable on both the income of the realty and personalty of the estate, and the authorities not only sustain the proposition that such a charge may be indicated by the terms of the will, but they go even further and hold that a charge of legacies on the income may be restricted to the income of the land alone, where it appears that such is the intention of the testator.

Mudd v. Powers, 136 Mass. 274; Kingsland v. Betts, 1 Edw. Ch. 596; Wilson v. Halliley, 1 Russ. & M. 590.

One who does not appeal from a decree is not entitled, on appeal from a decree of affirmance, to contest a provision of the original which is merely affirmed by the latter.

Harrison v. Perca, 168 U. S. 313, 42 L. ed. 479, 18 Sup. Ct. Rep. 129.

Messrs. W. L. Stanley, Henry Holmes, and C. H. Olson also filed a brief for appellees.

*Mr. Justice Holmes delivered the [368 opinion of the court:

These are bills in equity, brought by the respondents, trustees under the will of James Campbell, for instructions as to the meaning of a clause in the will. James Campbell died on April 21, 1900, leaving large amounts of real and personal property. His will was proved on June 26, 1900. By it the same persons were made, first, executors, and afterwards trustees. On July 3, 1905, a decree of distribution was made, discharging the executors, and ordering them to turn the property over to themselves as trustees. The testator left a widow and children, and the question before the court is whether the widow, the appellant, is entitled to any part of the income from realty before the same came to the trustees' hands. The bill in No. 106 originally raised other questions, but the

widow is the only appellant, and what we have stated is the single matter here. The supreme court decided against the appellant on the merits in 106, the principal case. 18 Haw. 34. The bill in 107 was filed after the decree in 106, on the notion that the decree did not fix the time when the widow's income from realty began. The supreme court regarded the matter as *res judicata*, but discussed the merits again, and then affirmed a decree dismissing the bill. 18 Haw. 342.

By the first clause of the will, the executors were to reduce all the estate, real and personal, to possession, to collect the income thereof "pending the distribution thereof," as thereafter provided, and to have the value adjudged. By the second, they were to pay the debts and funeral expenses. By the third, there was given to the widow a sum of money equal to one third of the value of the personal property only, adjudged as above, after payment of debts, etc. This sum was to be paid in cash, and if the condition of the estate should not warrant the payment of the whole at one time, then it was to be paid "as rapidly as the income and interests of my estate shall permit, without the sale 369] of any real estate, or *the sacrifice of any personal property, as a means of raising such sum, but provided that the entire sum be paid within two years from the date of my decease, and no deferred payments shall, within said period of two years, draw any interest." The fourth clause gives the use and occupation of the testator's dwelling house and grounds, furniture, horses, carriages, etc., to the widow, and to the children so long as they remain unmarried, and the executors or trustees are to keep the house and grounds in suitable condition and repair at the charge of the estate; with further details. The fifth clause directs the executors to pay to the widow, "for the use of herself and our children, as a family allowance, such sum, monthly," as may be decreed by the probate court, and the trustees, after entering upon their functions, are to make such further provision for the maintenance of the children as is thereafter directed. By the sixth clause, after satisfying the second and third, the executors "shall, as soon as may be, conclude the probate proceedings hereunder, and obtain a decree of distribution of my estate," and the testator gives to the trustees and to those living and resident within the Hawaiian Islands at the date of such decree, all the residue of the estate not before otherwise devised or bequeathed.

The trusts, so far as material, after a further provision in clause seven as to the house and grounds and their contents, are

as follows: "Eighth. With respect to all property which shall be so 'distributed to them,' except that mentioned in seven, the trustees are to reduce it to possession and manage it, paying charges and their own commissions. "And to collect all the rents, issues, profits, income, and revenue thereof . . . and to invest and reinvest, and keep invested," and at will to change the investment of any and all moneys that shall come to their hands by virtue hereof," not otherwise specially disposed of, "and to segregate, and keep separate and apart (during the life of my wife) the accounts of and pertaining to the realty of my estate from the accounts pertaining to any and all other thereof." "Ninth. And from *and out of the net income, rents, is- [370
sues, and profits of and from the realty last aforesaid, said trustees shall pay the equal one third part or portion thereof, in semi-annual or (at the discretion of said trustees) more frequent payments, to my said wife, for and during the remainder of her natural life." Habendum to her absolutely. By the tenth clause the remaining two thirds of the net income "from said realty" are given to the children, with a proviso for their minority and making surplus revenues capital. Finally, the sixteenth clause states that the provision made for the widow "is intended, and shall be by her accepted (if at all), in lieu and full satisfaction of her dower interest in my estate."

It will be seen from the dates of the probate of the will, June 26, 1900, and of the decree turning over the property to the trustees, July 3, 1905, that probably a longer time was taken to finish the administration than the testator expected, and that if the widow did not have a right to her third of the income from the real estate until in fact the estate went to the trustees, she will lose a considerable sum that has accumulated in the meantime. The loss is made the more aggravating that the estate seems to have been ready for distribution on February 10, 1902. Nevertheless, we think that any doubts are artificial, and agree with the supreme court of Hawaii that the language of the will is too clear to admit any interpretation but one. It is said that the provision is in lieu of dower, and that the will, as construed, leaves her worse off than if there had been no will. Whether that would be so or not, if we take into account that she is one of the executors and trustees, getting her share of the commissions, we do not know, or think of much importance. The testator seems to treat it as an open question whether she will accept the provision. However that may be, the words are explicit. The eighth clause purports to deal only

with the "property which shall be so distributed to them." That phrase dominates the whole clause. It is the rents "thereof" that they are to collect, as by clause one the executors were to collect all income 371] *before distribution; the accounts pertaining to the realty, that is the realty so distributed to them, are to be kept separate, and the ninth clause gives the widow one third of the income of "the realty last aforesaid." It is argued that, under the earlier clauses, the realty and accrued income would be kept intact, and that it is reasonable to suppose that the testator meant his wife to have one third of the income of the land, as she had one third of the personalty. It might be reasonable to suppose so if the testator had not declared in terms what he meant. What he gave was not one third of the income [of the realty] generally, as in *Lovering v. Minot*, 9 Cush. 151, and as it was taken to be by the probate judge, but one third of the income of the realty "last aforesaid,"—that is, the realty distributed to the trustees. It was one third of the income of the realty in the hands of the trustees, the income collected by them from it, and of which they were to keep a separate account. Perhaps the testator thought that the family allowance provided in clause five would be a sufficient substitute during the relatively short time for which he thought that the administration would last. Perhaps he did not think of the event that has happened at all. It would seem that the widow had herself partly to blame for the delay between February 10, 1902, and July 3, 1905, as she was an executrix and trustee. At all events, we are of opinion that she took no income from real estate, *eo nomine*, before July 3, 1905, and did take her share from that date.

Decrees affirmed.

372] *UNITED STATES, Plff. in Err.,
v.

K. P. PLOWMAN.

(See S. C. Reporter's ed. 372-375.)

Mines—cutting timber from mineral lands.

The authority to cut timber from the public domain under the act of June 3, 1878 (20 Stat. at L. 88, chap. 150, U. S. Comp. Stat. 1901, p. 1528), upon "lands being mineral, and not subject to entry un-

der existing laws of the United States, except for mineral entry," does not extend to land adjacent to lands valuable for mineral purposes, but only includes lands known to be themselves valuable for minerals, which are the only lands excluded by the Federal statutes from any but mineral entry.

[For other cases, see *Mines*, I., in *Digest Sup. Ct.* 1908.]

[No. 96.]

Argued January 20 and 21, 1910. Decided February 21, 1910.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Idaho, in favor of defendant in an action to recover the value of timber cut from the public domain. Reversed.

See same case below, 81 C. C. A. 682, 151 Fed. 1022.

The facts are stated in the opinion.

Assistant Attorney General **HARR** argued the cause and filed a brief for plaintiff in error:

At the time of the passage of the act of June 3, 1878, and since, the only public lands not subject to entry under the laws of the United States except for mineral entry were those which were valuable for minerals, and more valuable for mining than for other purposes.

Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; *Davis v. Wiebbold*, 139 U. S. 507, 517, 522, 35 L. ed. 238, 242, 243, 11 Sup. Ct. Rep. 628; *Colorado Coal & I. Co. v. United States*, 123 U. S. 307, 327, 31 L. ed. 182, 190, 8 Sup. Ct. Rep. 131; *Dughi v. Harkins*, 2 Land Dec. 721; *Re Spong*, 5 Land Dec. 193; *Magalia Gold Min. Co. v. Ferguson*, 6 Land Dec. 218; *Re Abercrombie*, 6 Land Dec. 393; *Re Downs*, 7 Land Dec. 71; *Cutting v. Rein- inghaus*, 7 Land Dec. 265; *Creswell Min. Co. v. Johnson*, 8 Land Dec. 440; *Re Laney*, 9 Land Dec. 83; *Pacific Coast Marble Co. v. Northern P. R. Co.* 25 Land Dec. 247; *Reid v. Larallee*, 26 Land Dec. 103; 2 *Snyder, Mines*, § 143, p. 116; 1 *Lindley, Mines*, 1st ed. § 207, p. 251; *Alford v. Barnum*, 45 Cal. 482; *Merrill v. Nixon*, 15 Nev. 401.

Mineral lands, subject only to entry as such, cannot properly be held to mean one thing in the statutes relating to the entry of such lands and another thing in the statute in question.

United States v. Central P. R. Co. 118 U. S. 235, 240, 30 L. ed. 173, 175, 6 Sup. Ct. Rep. 1038.

The language of the statute being clear and explicit, no construction which will de-

NOTE.—As to right to cut timber on public land—see note to *King-Ryder Lumber Co. v. Scott*, 70 L.R.A. 873.

feat the obvious meaning of the language used is permissible.

Sutherland, Stat. Constr. § 237, p. 312.

The act of June 3, 1878, from the first has been construed by the Land Department to authorize the cutting of timber only upon land which is in fact mineral.

Ann. Rep. Comr. Gen. Land Office, 1878, p. 119; 1 Land Dec. 602; Re Georgetown, B. & L. R. Co. 1 Land Dec. 610; 4 Land Dec. 521; 5 Land Dec. 129; 12 Land Dec. 457; 29 Land Dec. 571.

Such construction is entitled to great weight, and should not be disregarded except for the most cogent reasons.

United States v. Philbrick, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413; United States v. Johnston, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. Rep. 446; Robertson v. Downing, 127 U. S. 607, 32 L. ed. 269, 8 Sup. Ct. Rep. 1328; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 366, 33 L. ed. 363, 364, 10 Sup. Ct. Rep. 112; Merritt v. Cameron, 137 U. S. 542, 34 L. ed. 772, 11 Sup. Ct. Rep. 174.

The fact of the lands being valuable for minerals and subject only to mineral entry is the criterion of the right to cut.

United States v. Edwards, 38 Fed. 812; United States v. Richmond Min. Co. 40 Fed. 415; United States v. Legg (Feb. 14, 1903, D. C. Mont.) Compilation of Public Timber Laws & Regulations & Decisions; United States v. Copper Queen Consol. Min. Co. 7 Ariz. 80, 60 Pac. 885; United States v. Dodge, Compilation of Public Timber Laws & Regulations & Decisions, p. 180; Morgan v. United States, 94 C. C. A. 518, 169 Fed. 242.

The right to cut timber is exceptional, and the statute must be strictly complied with.

Northern P. R. Co. v. Lewis, 162 U. S. 366, 40 L. ed. 1002, 16 Sup. Ct. Rep. 831.

No appearance for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an action to recover the value of timber cut from the public domain in Idaho. The defendant justifies under the act of June 3, 1878, chap. 150, 20 Stat. at L. 88, U. S. Comp. Stat. 1901, p. 1528. That act authorizes citizens of the United States and other persons, bona fide residents of certain states and territories, including Idaho, "and all other mineral districts of the United States," to cut "for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry" in the state,

territory, or district of their residence. This authority is given subject to regulation by the Secretary of the Interior for the protection of the timber *and under- [373 growth, and is not given to railroads. The only question before us is how far the authority extends with reference to the specific land upon which the wood is cut.

There was a trial by jury and the issue is exhibited sufficiently by a passage or two from the charge, and the instructions asked on behalf of the government, but refused. The passages from the charge are as follows: "The law cannot be construed to limit the cutting of timber simply to ground that is known to contain mineral, or ground which is or which might be legally located as a mining claim. . . . The law includes as mineral lands not only those tracts in which mineral has actually been discovered, and which have been or could be legally located as mining locations, but also all other lands lying in reasonably close proximity to or in the general neighborhood of such known mineral tracts. . . . Take, for instance, a large section of country. . . . There in the lower part of the map, as you will see, is a section of country about 6 miles square; the upper part indicates another section 6 miles square. We will suppose now there are found here and there in that section of country mineral locations. They may not be contiguous; they may even be some distance apart; but you will be justified, under the law as I have given it to you, in holding all that particular section of country to be mineral ground. . . . The question for you to decide is not whether those little tracts on that map there—the ground cut over by the defendant—contain mineral, but whether that whole section of country surrounding that for miles around is what may be denominated a mineral country. If you find it is a mineral country within the meaning of the law as I have defined it to you, then your verdict must be for the defendant." The government asked for instructions that it was not sufficient to show that the land in question was adjacent to lands valuable for mineral purposes, but that the authority given by the act extended only to lands valuable for minerals. It is needless to set them forth at length. There was a verdict and judgment *for the defendant. The ruling [374 and refusals were excepted to, but the exceptions were overruled, and the judgment affirmed by the circuit court of appeals, 81 C. C. A. 682, 151 Fed. 1022, on the authority of United States v. Basic Co. 57 C. C. A. 624, 121 Fed. 504, and United States v. Rossi, 66 C. C. A. 442, 133 Fed. 380. The case then was brought to this court.

The instructions appear to us to have paid too little regard to the words of the act, defining the land on which it permits timber to be cut as "mineral, and not subject to entry under existing laws of the United States, except for mineral entry." As was said in *Northern P. R. Co. v. Lewis*, 162 U. S. 366, 376, 40 L. ed. 1002, 1006, 16 Sup. Ct. Rep. 831, "the right to cut is exceptional and quite narrow," and the party claiming the right must prove it. The only lands excluded in 1878 or now from any but mineral entry are lands "valuable for minerals" or containing "valuable mineral deposits." Rev. Stat. §§ 2302, 2318, 2319, U. S. Comp. Stat. pp. 1410, 1423, 1424. See § 2320. The matter was much discussed in *Davis v. Wieboldt*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628, and there it was said that the exceptions of mineral land from pre-emption and settlement, etc., "are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant." P. 519. A Land Department rule is quoted, with seeming approval, that "if the land is worth more for agriculture than mining, it is not mineral land, although it may contain some measure of gold or silver," pp. 521, 522, citing *United States v. Reed*, 12 Sawy. 99, 104, 28 Fed. 482. Again it was said: "The exception of mineral lands from grant in the acts of Congress should be considered to apply only to such lands as were, at the time of the grant, known to be so valuable for their minerals as to justify expenditure for their extraction." P. 524. These are the tests to which the act of 1878 must be taken to refer, since it refers to and rests upon the statutes construed to adopt these tests.

It is said that such a construction empties the statute of all its use, because if the 375] land is known to be valuable for minerals, a mining claim to it will be located, only the owners of which can cut the timber, whereas the statute gives the right to all residents. If that were true, courts still would be bound by the explicit and unmistakable words. It is not unknown, when opinion is divided, that qualifications sometimes are inserted into an act that are hoped to make it ineffective. But the objection is stated too strongly. As pointed out at the argument, in 1878 probably there was a great deal of mineral land still unexplored on which claims had not been located, not to speak of mere exceptional cases in which the act would apply. The regulations of the Secretary of the Interior for a long time, and it would seem always, 54 L. ed.

have been in accord with our opinion and the language of the act.

Judgment reversed.

Mr. Justice McKenna dissents.

EMILIE SAXLEHNER, Petitioner,
v.

EDWARD WAGNER, William Wagner, and
Sophia Wagner.

(See S. C. Reporter's ed. 375-381.)

Trademark — infringement — Hunyadi as name for bitter water.

The owner of a trademark or tradename in the words "Hunyadi Janos," for a natural bitter water, is not entitled, in the absence of fraud or unfair competition, to enjoin a manufacturer of an artificial bitter water from advertising and labeling the product, "Artificial Hunyadi,"—especially since the word "Hunyadi" has become a generic name for mineral waters of a certain type, coming from a more or less extensive district, if not from anywhere, in Hungary.

[For other cases, see Trademarks, IV., in Digest Sup. Ct. 1908.]

[No. 81.]

Argued January 17, 1910. Decided February 21, 1910.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of Ohio, dismissing the bill in a suit to restrain the use of the word "Hunyadi" in connection with an artificial bitter water. Affirmed.

See same case below, 85 C. C. A. 321, 157 Fed. 745.

The facts are stated in the opinion.

Messrs. Antonio Knauth and John G. Johnson argued the cause and filed a brief for petitioner:

The name of a spring and the water bottled therefrom are protected, according to principles applied to trademarks in general.

Congress & E. Spring Co. v. High Rock Congress Spring Co. 45 N. Y. 291, 6 Am. Rep. 82; *Apollinaris Co. v. Scherer*, 23 Blatchf. 459, 27 Fed. 18; *Hill v. Lockwood*, 32 Fed. 389; *Dunbar v. Glenn*, 42 Wis. 118, 24 Am. Rep. 395; *Carlsbad v. W. T. Thackeray & Co.* 57 Fed. 18; *Northcutt v. Tur-*

NOTE.—On infringement of trademarks—see notes to *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 34 L. ed. U. S. 997, and *Dr. S. A. Richmond Nervine Co. v. Richmond*, 40 L. ed. U. S. 155.

ney, 101 Ky. 314, 41 S. W. 21; Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7.

Names which can be properly called geographical names can be legally used only by those whose products come from the geographical region in question.

Newman v. Alvord, 51 N. Y. 189, 10 Am. Rep. 588; A. F. Pike Mfg. Co. v. Cleveland Stone Co. 35 Fed. 896; Carlsbad v. Kutnow, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. 167; Pillsbury-Washburn Flour Mills Co. v. Eagle, 41 L.R.A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608; Anheuser-Busch Brewing Asso. v. Fred Miller Brewing Co. 87 Fed. 864; California Fruit Cannery Asso. v. Myer, 104 Fed. 82; American Waltham Watch Co. v. United States Watch Co. 173 Mass. 85, 43 L.R.A. 826, 73 Am. St. Rep. 263, 53 N. E. 141; Morgan Envelope Co. v. Walton, 82 Fed. 469; Key West Cigar Mfg. Asso. v. Rosenbloom, 171 Fed. 296; Siegert v. Gandolfi, 79 C. C. A. 142, 149 Fed. 100.

A proprietary interest in the terms or symbols used is not essential to the maintenance of any suit to enjoin the misuse of these terms or symbols. An interest in the good will of the business or any other property threatened by such misuse is sufficient to entitle the plaintiff to an injunction.

Cohen v. Nagle, 190 Mass. 4, 2 L.R.A. (N.S.) 964, 76 N. E. 276, 5 A. & E. Ann. Cas. 553; Scriven v. North, 67 C. C. A. 348, 134 Fed. 376; Collinsplatt v. Finlayson, 88 Fed. 693; Draper v. Skerrett, 116 Fed. 206; Shaver v. Heller & M. Co. 65 L.R.A. 878, 48 C. C. A. 48, 108 Fed. 832; Manitowoc Pea-Packing Co. v. Numsen, 35 C. C. A. 267, 93 Fed. 196.

The controversies about the artificial Carlsbad water and the artificial Vichy water were decided upon the defense of laches, and therefore do not militate against the rule.

Carlsbad v. Schultz, 78 Fed. 469; La Republique Francaise v. Schultz, 94 Fed. 500, 42 C. C. A. 233, 102 Fed. 153, 115 Fed. 196.

The defense of laches was not available to the defendants, because they had not been prejudiced by complainant's prior laches.

Thackeray v. Saxlehner, 60 C. C. A. 562, 125 Fed. 911; London & S. F. Bank v. Dexter Horton & Co. 61 C. C. A. 515, 126 Fed. 601; Galliher v. Cadwell, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; Halstead v. Grinnan, 152 U. S. 412, 416, 417, 38 L. ed. 495-497, 14 Sup. Ct. Rep. 641; Wheeling Bridge & Terminal R. Co. v. Reymann Brewing Co. 32 L.R.A. 571, 61 U. S. App. 531, 90 Fed. 189; Demuth v. Old Town Bank, 85 Md. 326, 60 Am. St. Rep. 322,

37 Atl. 266; Shea v. Nilima, 66 C. C. A. 263, 133 Fed. 209.

It is no defense that the full name "Hunyadi Janos" was dropped from the defendants' labels before the bringing of the suit.

Saxlehner v. Eisner, 77 C. C. A. 417, 147 Fed. 189; India Rubber Co. v. Rubber Comb & Jewelry Co. 13 Jones & S. 258; Low v. Hart, 90 N. Y. 457; Thomas G. Plant Co. v. May Mercantile Co. 153 Fed. 229; Hutchinson v. Blumberg, 51 Fed. 829.

Even if respondents are entitled to use the word "Hunyadi" as a name for their product, with proper correctives and explanatives, sufficient care has not been taken to distinguish. "Hunyadi" is emphasized. "Wagner" and "Artificial" are inconspicuous on the label and in advertising. Both are omitted in the price list. The distinctions are insufficient.

Fuller v. Huff, 51 L.R.A. 332, 43 C. C. A. 453, 104 Fed. 141; Hansen v. Siegel-Cooper Co. 106 Fed. 692; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; Mendez v. Holt, 128 U. S. 521, 32 L. ed. 528, 9 Sup. Ct. Rep. 143; Shaver v. Heller & M. Co. 65 L.R.A. 878, 48 C. C. A. 48, 108 Fed. 833; Carlsbad v. Schultz, supra; Walter Baker & Co. v. Slack, 65 C. C. A. 138, 130 Fed. 514.

That others have infringed is no defense.

Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 202, 41 L. ed. 118, 130, 16 Sup. Ct. Rep. 1002; Taylor v. Carpenter, 3 Story, 458, Fed. Cas. No. 13,784; Taylor v. Carpenter, 2 Woodb. & M. 21, Fed. Cas. No. 13,785; Actiengesellschaft Vereinigte Ultramarin-Fabriken v. Amberg, 48 C. C. A. 264, 109 Fed. 151; Munroe v. Tousey, 36 N. Y. S. R. 520, 13 N. Y. Supp. 80; Cuvro v. Henkell, 50 Fed. 472; H. A. Williams Mfg. Co. v. Noera, 158 Mass. 110, 32 N. E. 1038; Celluloid Mfg. Co. v. Cellonite Mfg. Co. 32 Fed. 94; Cohen v. Nagle, supra.

The fact, even if proven, that the artificial product of respondents is better than the genuine natural water is no justification for calling it spurious "Hunyadi." The public is entitled to the very thing it expects, and cannot be deceived even for its own benefit.

Singer Mfg. Co. v. Loog, L. R. 8 App. Cas. 29; Coats v. Holbrook, 2 Sandf. Ch. 586; Pillsbury v. Pillsbury-Washburn Flour Mills Co. 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841; McLean v. Fleming, 96 U. S. 245, 252, 24 L. ed. 828, 831; Cleveland Stone Co. v. Wallace, 52 Fed. 431.

Where a manifest liability to deception exists in defendants' use of plaintiff's trade-name, even though there be no strict trademark right involved therein, it is not necessary to bring proof of an actual deception.

Amoskeag Mfg. Co. v. Trainer, 101 U.

S. 51, 25 L. ed. 993; Taendsticksfabriks Aktiebolaget Vulcan v. Myers, 139 N. Y. 364, 34 N. E. 904; Fuller v. Huff, supra; Carlsbad v. Kutnow, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. 167; National Biscuit Co. v. Baker, 95 Fed. 135; Lee v. Haley, L. R. 5 Ch. 155; North Cheshire & M. Brewery Co. v. Manchester Brewery Co. [1899] A. C. 83; American Waltham Watch Co. v. United States Watch Co. 173 Mass. 85, 43 L.R.A. 826, 73 Am. St. Rep. 263, 53 N. E. 141.

Mr. Walter F. Murray argued the cause and filed a brief for respondents:

Complainant has lost the title to the word "Hunyadi" as a trademark.

Saxlehner v. Eisner & M. Co. 179 U. S. 45, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; French Republic v. Saratoga Vichy Spring Co. 191 U. S. 427, 48 L. ed. 247, 24 Sup. Ct. Rep. 145; Benjamin Moore & Co. v. Auwell, 172 Fed. 513.

The failure of this court to grant an injunction against the use of the term "Hunyadi" in the case of Saxlehner v. Eisner & M. Co. supra, indicates that the title of the complainant therein has been lost.

Menendez v. Holt, 128 U. S. 514-523, 32 L. ed. 526-528, 9 Sup. Ct. Rep. 143.

In the absence of fraud, neglect of the owner to sue infringers of a trademark, continued for a long period of time, will cause the mark to become public property.

Coats v. Merrick Thread Co. 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966; Virginia Hot Springs Co. v. Hegeman & Co. 138 Fed. 855; La Republique Française v. Schultz, 42 C. C. A. 233, 102 Fed. 154; Ford v. Foster, L. R. 7 Ch. 628; Rowland v. Mitchell, 13 Rep. Pat. Cas. 457, 14 Rep. Pat. Cas. 37; Ripley v. Bandey, 14 Rep. Pat. Cas. 591; Re Hyde & Co.'s Trademark, L. R. 7 Ch. Div. 724; Sebastian, Trade Marks, 4th ed. p. 202; Woodmanse & H. Mfg. Co. v. Williams, 15 C. C. A. 520, 37 U. S. App. 109, 68 Fed. 489; New York Grape Sugar Co. v. Buffalo Grape Sugar Co. 24 Fed. 606; Wyeth v. Stone, 1 Story, 273, Fed. Cas. No. 18,107; Leggett v. Standard Oil Co. 149 U. S. 287, 37 L. ed. 737, 13 Sup. Ct. Rep. 902.

A trademark cannot be held in common by various competitors.

Delaware & H. Canal Co. v. Clark, 13 Wall. 311-328, 20 L. ed. 581-585; Columbia Mill Co. v. Alcorn, 150 U. S. 460-463, 37 L. ed. 1144-1146, 14 Sup. Ct. Rep. 151; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537-549, 34 L. ed. 997-1004, 11 Sup. Ct. Rep. 396.

In the absence of a technical trademark, it is incumbent upon the complainant to show fraud practised by the defendants up-
54 L. ed.

on the complainant in order to make out a case of unfair competition in trade.

Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396; Coats v. Merrick Thread Co. 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; French Republic v. Saratoga Vichy Spring Co. supra; Howe Scale Co. v. Wyckoff, Seamans, & Benedict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609; Von Faber-Castell v. Faber, 71 C. C. A. 383, 139 Fed. 257; La Republique Française v. Schultz, 94 Fed. 500; Lare v. Harper & Bros. 30 C. C. A. 373, 57 U. S. App. 279, 86 Fed. 481; Lamont, C. & Co. v. Hershey, 140 Fed. 763; American Brewing Co. v. Bienville Brewery, 153 Fed. 619.

Deception of the public as to the ingredients of an article of merchandise is not, in itself, unfair competition in trade, and, in the absence of legislation, is not actionable at the suit of a private individual or a group of such individuals.

American Washboard Co. v. Saginaw Mfg. Co. 50 L.R.A. 609, 43 C. C. A. 233, 103 Fed. 281; New York & R. Cement Co. v. Coplay Cement Co. 10 L.R.A. 833, 44 Fed. 277; Clinton E. Worden & Co. v. California Fig Syrup Co. 187 U. S. 527, 47 L. ed. 288, 23 Sup. Ct. Rep. 161.

Mr. Justice Holmes delivered the opinion of the court:

The petitioner is the owner of wells in Budapest from which comes the water known throughout the world by the arbitrary name, "Hunyadi Janos," given to it by her husband. The respondents make a [380] bitter water in Cincinnati, and label it "W. T. Wagner's Sons Carbonated Artificial Hunyadi, Conforming to Fresenius Analysis of Hunyadi Janos Springs." Formerly they for a time labeled it "W. T. Wagner's Sons Artificial Hunyadi Janos. Ofen Bitter Water. Highly Aërated;" but this label had been given up before the bill was brought. The petitioner seeks an injunction against the use of either "Hunyadi Janos" or "Hunyadi" on any water not coming from her wells. The circuit court of appeals for the seventh circuit, in a more or less similar case, granted an injunction against the use of the word "Hunyadi." Thackeray v. Saxlehner, 60 C. C. A. 562, 125 Fed. 911. In the present suit, the circuit court and the circuit court of appeals, treating the right of the petitioners to "Hunyadi Janos" as admitted, refused an injunction

against the use of "Hunyadi," and, finding that no unfair competition was shown, dismissed the bill. 85 C. C. A. 321, 157 Fed. 745. A writ of certiorari was allowed by this court.

We see no reason for disturbing the finding of the courts below, that there was no unfair competition and no fraud. The real intent of the plaintiff's bill, it seems to us, is to extend the monopoly of such trademark or tradename as she may have to a monopoly of her type of bitter water, by preventing manufacturers from telling the public in a way that will be understood, what they are copying and trying to sell. But the plaintiff has no patent for the water, and the defendants have a right to reproduce it as nearly as they can. They have a right to tell the public what they are doing, and to get whatever share they can in the popularity of the water by advertising that they are trying to make the same article, and think that they succeed. If they do not convey, but, on the contrary, exclude, the notion that they are selling the plaintiff's goods, it is a strong proposition that when the article has a well-known name, they have not the right to explain by that name what they imitate. By doing so, they are not trying to get the good will of the name, 381] but the good *will of the goods. See *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 91, 59 N. E. 667; *Chadwick v. Covell*, 151 Mass. 190, 191, 6 L.R.A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068. Although the application is different, the principle seems to be similar to the rule that when a patent has expired, descriptive words or even an arbitrary or personal name by which it has become known may be used, if sufficient precautions are taken to prevent the public from being deceived. See *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002.

The plaintiff says that no one can succeed in imitating a natural water. But all are free to try. In the absence of some fraud, injurious to the plaintiff, it would be going far under any circumstances to allow her to prevent advertising "Artificial Hunyadi." But it is enough to say that under the decision in *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 36, 45 L. ed. 60, 75, 21 Sup. Ct. Rep. 7, the defendants may do so in this case. In that decision it was said that "Hunyadi," as applied to similar water, had been public property in Hungary, and therefore had become so here; and that a later change there would not work a corresponding change in the United States. "The right to individual appropriation, once lost, is gone forever." See also *French Republic v. Saratoga Vichy Spring Co.* 191 U. S. 427, 437, 48 L. ed. 247, 252, 24 Sup. Ct. Rep. 145.

At the very least, the family name has become the name for any natural water of a certain type coming from a more or less extensive district, if not from anywhere in Hungary. It does not belong to the plaintiff alone in this country, even if she is the only one now sending the water here. But if there is any well-founded doubt as to the right to use a personal tradename with proper guards against deception to signify what one is imitating, where one has the right to imitate, there can be none that one is at liberty to refer to a geographical expression to signify the source or one's model. "Hunyadi," at best, is now only a geographical expression in effect.

Decree affirmed.

*W. P. HARRIS, Trustee of the Estate [382
of John Hargrove, Bankrupt, Plff. in Err.,
v.

FIRST NATIONAL BANK OF MT. PLEASANT,
ANT, TEXAS.

(See S. C. Reporter's ed. 382-385.)

Bankruptcy — jurisdiction — suit to recover assets.

A suit by the trustee in bankruptcy to recover property held by a third person, which, if the allegations of the petition are true, belonged to the bankrupt, and consequently passed to the trustee as the representative of the bankrupt's estate, is not made justiciable in the bankruptcy court by the provision of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 70e, as amended by the act of February 5, 1903 (32 Stat. at L. 797, chap. 487, U. S. Comp. Stat. Supp. 1909, p. 1308), conferring concurrent jurisdiction on courts of bankruptcy of suits by the trustee to avoid any transfer of the bankrupt's property which his creditors might have avoided, and to recover such property, or its value, from persons who are not bona fide holders for value.

[For other cases, see *Bankruptcy*, 35-45, in *Digest Sup. Ct.* 1908.]

[No. 98.]

Argued and submitted January 21, 1910.
Decided February 21, 1910.

IN ERROR to the District Court of the United States for the Eastern District of Texas to review a judgment dismissing, for want of jurisdiction, a suit by a trustee in bankruptcy, to recover property held by a third person, which is alleged to belong to the bankrupt. Affirmed.

The facts are stated in the opinion.

NOTE.—On jurisdiction of state courts of actions by or against assignees in bankruptcy—see note to *Loughin v. McCaulley*, 48 L.R.A. 36.

Mr. Charles S. Todd submitted the cause for plaintiff in error. Messrs. George Q. McGown, John A. Hurley, and T. E. Webber were on the brief.

Mr. W. L. Estes argued the cause, and, with Messrs. Hiram Glass, John L. King, and A. L. Burford, filed a brief for defendant in error.

Mr. Justice Day delivered the opinion of the court:

This case presents the single question of the jurisdiction of the district court of the United States to entertain a suit **383**] *brought by Harris, as trustee in bankruptcy, against the First National Bank of Mount Pleasant, Texas.

The petition alleged that Hargrove, the bankrupt, was indebted to the defendant bank for an overdraft in the sum of \$2,000; that, to secure the payment of the same, Hargrove delivered into the bank's possession as collateral security certain notes; that, at the time of the adjudication in bankruptcy, Hargrove had paid the overdraft in full.

Further, the petition alleged that, at the time Hargrove was adjudged a bankrupt, the bank had in its possession two certain promissory notes, which had been signed by one McGee as principal and by Hargrove as surety. That prior to the bankruptcy Hargrove paid the notes, and thus became entitled to the same. That defendant refuses to account for said notes, and wrongfully withholds them from the trustee. The prayer of the petition is that the bank be required to surrender to the trustee the notes so pledged as collateral security, and also the notes paid by Hargrove as surety, or, in default thereof, judgment against the bank in the sum of \$3,500, the value of all the notes. Upon issue made as to its jurisdiction, the district court held it was without jurisdiction, and dismissed the suit.

In *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000, this court held that under § 23 of the bankruptcy act of 1898 [30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418], the district court of the United States could, by the consent of the defendant, and not otherwise, entertain suits by the trustee against third persons to recover property conveyed by the bankrupt before the institution of proceedings in bankruptcy.

Subsequently, Congress, by the act of February 5, 1903 (32 Stat. at L. 797, chap. 487, U. S. Comp. Stat. Supp. 1909, p. 1308), amended certain sections of the bankruptcy act. To § 23b, which provided that suits by the trustee should only be

brought in courts where the bankrupt, whose estate was being administered by the trustee might have brought them if proceedings in bankruptcy had not been instituted, unless by the defendant's consent, these words were added: "*Except suits for the recovery of property *under sec- [384 tion sixty, subdivision b, and section sixty-seven, subdivision e.*"

Subdivision b of § 60 made provision for the recovery of preferences given by the bankrupt within four months before the filing of the petition in bankruptcy. To that subdivision these words were added: "*And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

Subdivision e of § 67 made provision for setting aside fraudulent conveyances, and the recovery of property so conveyed at the suit of the trustee. To that subdivision these words were added: "*For the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

A consideration of these amendments, having reference to the recovery of preferences and of property fraudulently conveyed, shows that they cannot include the action under consideration here. Nor is it claimed that they are sufficient of themselves to authorize the present suit. Reliance is had on the amendment made by the act of February 5, 1903, of subdivision e of § 70. We give that subdivision, putting the amendment in italics:

"e. The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. *For the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

It is to be noted that § 70, subdivision e, is not mentioned in the *amendment to [385 § 23, enlarging the jurisdiction of the Federal court to entertain suits without the consent of the defendant. And it has been held that suits under § 70, subdivision e, can only be brought in a court of bankruptcy

with the consent of the defendant. *Hull v. Burr*, 83 C. C. A. 61, 153 Fed. 945. The contrary view was taken in *Hurley v. Devlin*, 149 Fed. 268.

But we do not find it necessary to pass upon that question. Assuming for this purpose that actions may be brought by trustees in the courts of bankruptcy in cases coming within the terms of § 70, subdivision e, without the consent of defendant, we do not think the present action is one of that character.

That subdivision provides for avoiding transfers of the bankrupt's property which his creditors might have avoided, and for recovery of such property, or its value, from persons who are not bona fide holders for value. In this action, no such transfer is alleged; no attack is made upon a transfer by the bankrupt which would have been void as to creditors. The petition seeks to recover property held by the bank, if the allegations are true, which belonged to the bankrupt, and consequently passed to the trustee as the representative of the bankrupt's estate. The recovery sought is of property held for the bankrupt estate, which the defendant wrongfully refused to surrender. The District Court was right in denying jurisdiction of the suit, and its judgment is affirmed.

386] *JOHN H. OLMSTED and William H. Olmsted, Plffs. in Err.,
v.

DANIEL H. OLMSTED, Ellen A. Olmsted,
Wife of Daniel H. Olmsted, et al.

(See S. C. Reporter's ed. 386-395.)

Conflict of laws — wills — full faith and credit — legitimacy.

The courts of New York are not required by the full faith and credit clause of the Federal Constitution to give effect to a Michigan statute legitimatizing children born prior to the marriage of their parents, so as to control the devolution of title to lands in New York under a will,—especially where to give effect to such statute would

NOTE.—On conflict of laws as to legitimacy—see note to *Irving v. Ford*, 65 L.R.A. 177.

On conflict of laws as to wills—see note to *Lindsay v. Wilson*, 2 L.R.A. (N.S.) 408.

As to full faith and credit to be given to state records and judicial proceedings—see notes to *Lindley v. O'Reilly*, 1 L.R.A. 79; *Cumington v. Belchertown*, 4 L.R.A. 131; *Rand v. Hanson*, 12 L.R.A. 574; *Wiese v. San Francisco Musical Fund Soc.* 7 L.R.A. 578; *Darby v. Mayer*, 6 L. ed. U. S. 367; *Mills v. Duryee*, 3 L. ed. U. S. 411; *D'Arcy v. Ketchum*, 13 L. ed. U. S. 648; and *Huntington v. Attrill*, 36 L. ed. U. S. 1123.

disturb interests already vested when the statute was enacted.

[Conflict of Laws as to Wills, see Conflict of Laws, 179-187, in Digest Sup. Ct. 1908.]

[No. 102.]

Argued January 25, 1910. Decided February 21, 1910.

IN ERROR to the Supreme Court of the State of New York in and for the County of New York, in that state, to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which had reversed the judgment of the Appellate Division of the Supreme Court, First Department, and affirmed the judgment of the trial court, refusing to give such effect to a Michigan statute legitimatizing children born out of wedlock as to control the devolution of title to real property in New York by will. Affirmed.

See same case below in court of appeals, 190 N. Y. 458, 123 Am. St. Rep. 585, 83 N. E. 569; and in appellate division, 118 App. Div. 69, 102 N. Y. Supp. 1019.

The facts are stated in the opinion.

Mr. Mortimer Byers argued the cause and filed a brief for plaintiffs in error:

Full faith and credit must be given in New York to the Michigan decree and statute.

Hampton v. M'Connel, 3 Wheat. 234, 4 L. ed. 378; *Re Hall*, 61 App. Div. 266, 70 N. Y. Supp. 406; *West Cambridge v. Lexington*, 18 Mass. 506, 11 Am. Dec. 231; *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177; *Fauntleroy v. Lum*, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641; *Grey v. Stamford*, 61 L. J. Ch. N. S. 622; *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669.

Legitimacy once created will be everywhere recognized.

Miller v. Miller, supra; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Bates v. Virolet*, 33 App. Div. 436, 53 N. Y. Supp. 893; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Irving v. Ford*, 183 Mass. 448, 65 L.R.A. 177, 97 Am. St. Rep. 447, 67 N. E. 366; *Grey v. Stamford*, supra; *Re Goodman*, L. R. 17 Ch. Div. 266; *Contra*, *Smith v. Derr*, 34 Pa. 126, 75 Am. Dec. 641; *Shaw v. Gould*, L. R. 3 H. L. 55.

Such children as came into being before the period of distribution were comprehended by the terms of the devise.

2 *Jarman, Wills*, 6th Am. ed. 168; *Re Baer*, 147 N. Y. 348, 41 N. E. 702; *Gilliam v. Guaranty Trust Co.* 186 N. Y. 127, 116 Am. St. Rep. 536, 78 N. E. 697; *Bisson v. West Shore R. Co.* 143 N. Y. 125, 38 N. E. 104.

Mr. Charles H. Luscomb argued the cause and filed a brief for defendants in error:

Michigan never acquired jurisdiction either over the New York wife or the New York real estate, which is the subject-matter of this action; and, in default of this, its judgments, decrees, and statutes could have no extraterritorial force or effect.

Re Kimball, 155 N. Y. 68, 49 N. E. 331; Winston v. Winston, 165 N. Y. 555, 59 N. E. 273; Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 A. & E. Ann. Cas. 1; Atherton v. Atherton, 155 N. Y. 122, 49 L.R.A. 291, 63 Am. St. Rep. 650, 49 N. E. 933, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544.

The children legitimized in Michigan cannot enter the state of New York, claiming under a foreign divorce and remarriage, which, under Haddock v. Haddock, are absolutely void in New York, and facing lawful issue of the same Benjamin Olmsted, in possession of a vested interest in real estate there located, attempt to divest the lawful heirs in defiance of the New York statute. This they cannot do.

Re Kimball, *supra*.

Mr. Read G. Dilworth also argued the cause and filed a brief for defendants in error:

The Michigan divorce and marriage both being void in the state of New York, the Michigan statute, by which it is attempted to legitimize the two children of that marriage, does not apply. It can have no more effect than the marriage upon which such claim to legitimacy is based. The said children were never in a position to be reached by such statute.

Story, Conf. L. 113, 114.

Each state has the exclusive right to determine the disposition and title to real estate located within its borders. The statutes and decrees of the state of Michigan can have no extraterritorial force so far as they might effect the title to, or disposition of, real estate located beyond its borders.

Van Cleef v. Burns, 133 N. Y. 540, 15 L.R.A. 542, 30 N. E. 661; Story, Conf. L. 359-390; 2 Kent, Com. pp. 118, 149; Robertson v. Pickrell, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407.

If the Michigan statute enacted in 1881 in effect divests and deprives the issue of the marriage of Benjamin Olmsted and Mary Jane Olmsted of an interest in real estate, vested in them in 1874, it is confiscation, and deprives them of property without due process of law. It is therefore unconstitutional and in violation of the 5th Amendment to the United States 54 L. ed.

Constitution, as well as the Constitutions of both states.

Re Barringer, 29 Misc. 462, 61 N. Y. Supp. 1090; Westervelt v. Gregg, 12 N. Y. 209, 62 Am. Dec. 160; Ryder v. Hulse, 24 N. Y. 373; Story, Const. 1399; Fletcher v. Peck, 6 Cranch, 87-134, 3 L. ed. 162-177.

The laws of the state of New York in force at the death of Silas Olmsted in 1874 must control. At that time the plaintiffs in error, if they were in existence at all, were beyond question illegitimate.

Marshall v. King, 24 Miss. 85; McGaughey v. Henry, 15 B. Mon. 383; Miller v. Miller, 91 N. Y. 315, 43 Am. Rep. 669.

*Mr. Justice Day delivered the opinion of the court: [390

This case is brought here because of alleged violation, in the judgment of the supreme court of New York, of the full faith and credit clause of the Federal Constitution. The judgment was entered in the supreme court of New York by an order of the court of appeals of the same state. 190 N. Y. 458, 123 Am. St. Rep. 585, 83 N. E. 569.

The facts, in substance, are: Silas Olmsted, a resident of the state of New York, died in that state in 1874, devising by his will, duly probated, a one-half interest in certain real estate in New York to his son, Benjamin F. Olmsted, with the remainder over to the lawful issue of said Benjamin. In 1850, Benjamin F. Olmsted, while a resident of the state of New York, married Mary Jane Olmsted, of the state of New York, and lived with her in that state until January, 1870. Benjamin F. Olmsted had children by that marriage, who are defendants in error in this case. On February 28, 1874, without procuring a divorce from his first wife, Benjamin F. Olmsted went through a marriage ceremony in New Jersey with Sarah Louise Welchman. Two children, John H. and William H. Olmsted, who are the plaintiffs in error in this case, were born, in the state of New Jersey, of this attempted marriage. Thereafter, in 1880, Benjamin F. Olmsted and Sarah Louise Welchman, with their two children, went to live in the state of Michigan. In 1882, Benjamin F. Olmsted secured a divorce from his first wife, Mary Jane Olmsted, in accordance with the laws of Michigan, in the circuit court of Wayne county, Michigan. Service was made of process by publication in a Detroit newspaper, and no personal service was made on Mary Jane Olmsted, nor did she appear in the action, judgment being granted by default. On August 22, 1882, Benjamin F. Olmsted and Sarah Louise Welchman were married in the state of Michigan. By the provision of

a statute enacted in that state in 1881, children born out of wedlock became legitimate upon the subsequent marriage of 391] *their parents. In January, 1883, in an action in the supreme court of New York, a decree of separation and for alimony was granted to Mary Jane Olmsted from her husband, Benjamin F. Olmsted. Benjamin F. Olmsted did not appear in that action, and the record contains no evidence of service of summons upon him. He was represented by counsel on a motion to sequester his property, and upon appeal from an order thereon. The judgment was affirmed. Sarah Louise Welchman died January 30, 1900; Mary Jane Olmsted died January 22, 1902, and Benjamin F. Olmsted July 16, 1905.

The action was for partition of the New York real estate devised under the will of Silas Olmsted. The plaintiffs in error, John H. and William H. Olmsted, children of the marriage with Sarah Louise Welchman, claim the right to participate equally with the children of Benjamin F. Olmsted and Mary Jane Olmsted, as lawful issue of Benjamin F. Olmsted, in the real estate located in the state of New York, and devised under the will of Silas Olmsted. The supreme court of New York, by its judgment, denied the right of the plaintiffs in error to thus participate.

The opinion delivered in the New York court of appeals shows that its decision was rested, in part, upon the invalidity of the Michigan marriage, because the courts of Michigan had never obtained jurisdiction over Mary Jane Olmstead, the first wife of Benjamin F. Olmsted. For that view the learned court, in denying that it was bound to give full faith and credit to such a decree and to the Michigan statute of 1881, cited *Re Kimball*, 155 N. Y. 68, 49 N. E. 331; *Winston v. Winston*, 165 N. Y. 555, 59 N. E. 273; *Haddock v. Haddock*, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 A. & E. Ann. Cas. 1; *Atherton v. Atherton*, 155 N. Y. 129, 40 L.R.A. 291, 63 Am. St. Rep. 650, 49 N. E. 933, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544.

It also puts its decision on the ground that the Michigan statute of 1881, legitimating the children born previous to marriage, could not have the effect of admitting them to participate in the division of the real estate in the state of New York, as it was passed long after the death of Silas 392] *Olmsted, and the probate of his will, under which his legitimate grandchildren had vested estates as remaindermen, subject to the life use in the father. And further, said the court of appeals of New York, in speaking of the contention that the Michi-

gan act should be given full faith and credit in the state of New York:

"Should we sanction the doctrine contended for, then the legislature in any state could, in effect, nullify our own statutes and deprive our own citizens of property which, under our laws, they had become lawfully vested with and entitled to receive. Not only this, but the statute of Michigan, passed in 1881, could change the provisions of a will executed here and probated in 1874, bringing in persons as remaindermen who, under the provisions of the will, were not remaindermen, nor entitled to share in the estate. We think this should not be permitted."

By the laws of New York, 1895, chap. 531, it is provided:

"Section 1. All illegitimate children whose parents have heretofore intermarried, or shall hereafter intermarry, shall thereby become legitimized and shall be considered legitimate for all purposes. Such children shall enjoy all the rights and privileges of legitimate children, provided, however, that vested interests or estates shall not be divested or affected by this act."

By chapter 272 of the laws of New York of 1896, vol. 1, it is provided, § 18:

"An illegitimate child whose parents have heretofore intermarried, or shall hereafter intermarry, shall thereby become legitimized and shall be considered legitimate for all purposes, entitled to all the rights and privileges of a legitimate child; but an estate or interest vested [or trust created] before the marriage of the parents of such child shall not be divested or affected by reason of such child being legitimized."

The question, therefore, is as to the title to real estate in the state of New York. Does the full faith and credit clause of the Federal Constitution require that effect be given to the *Michigan act of 1881 [393 under the circumstances which we have detailed?

In *Clarke v. Clarke*, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873, the question was as to the effect to be given to a judgment rendered in the supreme court of South Carolina in the courts of the state of Connecticut, respecting real estate situated in the latter state. The South Carolina court held that a certain will worked an equitable conversion into personalty at the time of the death of the testatrix of all her real estate, wherever situated, and that the executor of the will was authorized to administer the same as personalty, and to sell and convey the same for the purpose of executing the will. The supreme court of Connecticut refused to follow the judgment of the supreme court of South Carolina, and the case was brought here under

the full faith and credit clause. This court, in disposing of the question, said:

"It is a doctrine firmly established that the law of a state in which land is situated controls and governs its transmission by will or its passage in case of intestacy. This familiar rule has been frequently declared by this court, a recent statement thereof being contained in the opinion delivered in *De Vaughn v. Hutchinson*, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461, where the court said (p. 570):

"It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. *United States v. Crosby*, 7 Cranch, 115, 3 L. ed. 287; *Clark v. Graham*, 6 Wheat. 577, 5 L. ed. 334; *McGoon v. Scales*, 9 Wall. 23, 19 L. ed. 545; *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 24 L. ed. 858."

In speaking of the contention of the plaintiff in error, that the South Carolina judgment must be given full force and effect, the court further said:

"The proposition relied on, therefore, is this: Although the court of last resort of Connecticut (declaring the law of that state) has held that the real estate in question had not become *personal property by virtue of the will of Mrs. Clarke, nevertheless it should have decided to the contrary, because a court of South Carolina had so decreed. This, however, is but to argue that the law declared by the South Carolina court should control the passage by will of land in Connecticut, and therefore is equivalent to denying the correctness of the elementary proposition that the law of Connecticut, where the real estate is situated, governed in such a case."

In the case of *Fall v. Eastin*, decided at this term, 215 U. S. 1, ante, 65, 23 L.R.A. (N.S.) 924, 30 Sup. Ct. Rep. 3, the same principle was recognized. In that case it was held that a deed made by a master, by order of the court, in the state of Washington, in execution of a decree where the court had jurisdiction of the parties, did not have any efficacy as to the title to real estate beyond the jurisdiction of the court. It is unnecessary to review the previous cases from this court; a number of them are examined in the opinion in *Fall v. Eastin*.

After stating the principle that the disposition of real estate, whether by deed, descent, or otherwise, must be governed by the laws of the state where the real estate is situated, this court said (215 U. S. 12):

"This doctrine is entirely consistent with the provision of the Constitution of the

United States, which requires a judgment in any state to be given full faith and credit in the courts of every other state. This provision does not extend the jurisdiction of the courts of one state to property situated in another, but only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit. 'It does not carry with it into another state the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must become a judgment there; and can only be executed in the latter as its laws permit.' *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177."

The principle established by these cases is applicable to the case at bar. The full faith and credit clause of the Constitution *applies with no more effect to the legislative acts of a foreign state than it does to the judgments of the courts of such state. The controversy herein concerns an interest in real estate located in the state of New York. Under a will probated in the state of New York, where the land is situated, it was devised to the lawful issue of Benjamin F. Olmsted. The contention of the plaintiffs in error is that by the act of 1881 of the state of Michigan, they had become legitimate, and are accordingly entitled to participate in the division of the estate. To this contention the highest court of the state of New York has answered that neither the law of the state of Michigan nor the act of the state of New York, legitimizing children, under such circumstances, can have the effect and force of disturbing interests already vested when the acts were passed.

We think there is nothing in the due faith and credit clause which requires the courts of New York to give the effect contended for to the Michigan statute. The legislature of Michigan had no power to pass an act which would affect the transmission of title to lands located in the state of New York. No more had it power to legislate concerning the titles to lands in New York than the courts of Michigan, by their judgments, would have authority to adjudicate such rights.

We are not concerned with the correctness of the decision of the court of appeals of New York, interpreting its statutes and applying the law of its jurisdiction to the construction of the will of Silas Olmsted. We hold that there is nothing in the Federal Constitution requiring the courts of the state of New York to give force and effect to the statute of the state of Michigan, so as to control the devolution of title to lands in New York.

Judgment affirmed.

396] *J. W. FORBES, Thomas Tatum Osborne, John T. Cox, et al., Plffs. in Err.,
v.

STATE COUNCIL OF VIRGINIA, JUNIOR ORDER UNITED AMERICAN MECHANICS OF THE STATE OF VIRGINIA.

(See S. C. Reporter's ed. 396-399.)

Error to state court—raising Federal question on rehearing.

An order of the highest state court, made in passing upon a petition for rehearing, which recites that, "on mature consideration," the prayer of said petition is denied, does not show that the court passed upon the Federal questions first raised by such petition, so as to sustain a writ of error from the Supreme Court of the United States.

[For other cases, see Appeal and Error, 1292-1310, in Digest Sup. Ct. 1908.]

[No. 104.]

Argued January 25, 1910. Decided February 21, 1910.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment dismissing a writ of error to the Chancery Court of the City of Richmond, in that state, which had adjudged certain persons to be in contempt of court for violating a prior decree enforcing the rights of a local benevolent society under its charter. Dismissed for want of jurisdiction.

See same case below, 107 Va. 853, 60 S. E. 81.

The facts are stated in the opinion.

Mr. C. V. Meredith argued the cause, and, with Messrs. Preston Cocke, E. B. King, and Smith W. Bennett, filed a brief for plaintiffs in error:

The mere absence of a written opinion cannot be regarded as absolutely conclusive, where the record shows that the question was not only specifically raised, but fully argued, and that it was on mature consideration overruled. The difference in mode of procedure cannot be of such radical importance. What this court requires is that it shall clearly appear that the state court

overruled the Federal question, and for that reason refused the rehearing. That result clearly appears from the record in this case.

Howard v. Kentucky, 200 U. S. 164, 50 L. ed. 421, 26 Sup. Ct. Rep. 189; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 11, 51 L. ed. 685, 27 Sup. Ct. Rep. 407; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 66, 67, 43 L. ed. 368, 19 Sup. Ct. Rep. 97; Mallett v. North Carolina, 181 U. S. 592, 45 L. ed. 1017, 21 Sup. Ct. Rep. 730.

It was not a mere refusal, but a conclusion come to after mature consideration of the question presented. It was, therefore, a judgment of the court upon said question, and should be as effective as an extended opinion, setting forth reasons for the judgment.

Meyer v. Richmond, 172 U. S. 92, 43 L. ed. 377, 19 Sup. Ct. Rep. 106.

The court declined to hear Mr. Samuel A. Anderson, who filed a brief for defendant in error:

A Federal question is raised too late when suggested for the first time in a petition for rehearing after judgment in the highest court of a state, where such petition is denied without opinion.

Bushnell v. Crooke Min. & Smelting Co. 148 U. S. 690, 37 L. ed. 613, 13 Sup. Ct. Rep. 771; Pim v. St. Louis, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; Turner v. Richardson, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; Weber v. Rogan, 188 U. S. 10, 47 L. ed. 363, 23 Sup. Ct. Rep. 263; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375.

Failure to raise a Federal question until after a case has been finally decided in the highest court of a state will preclude a writ of error to the Supreme Court.

Scudder v. Comptroller (Scudder v. Coler) 175 U. S. 33, 44 L. ed. 62, 20 Sup. Ct. Rep. 26.

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to when Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 415.

Mr. Justice Day delivered the opinion of the court:

This case grows out of one heretofore in this court, *National Council, J. O. U. A. M. v. State Council*, 203 U. S. 151, 51 L. ed. 132, 27 Sup. Ct. Rep. 46. In that case this court affirmed a judgment of the supreme court of appeals of Virginia, which had affirmed a decree of the lower court of that state. The effect of that decree was to enjoin [397] *the National Council of the Junior Order of United American Mechanics of the United States, and certain persons, officers of a voluntary association, from using in the state of Virginia the corporate name of the State Council of the Virginia Junior Order of United American Mechanics of the State of Virginia, or any other name likely to be taken for it, and from using the seal of the said Virginia order, and from carrying out under such name the objects for which the Virginia order and the voluntary association had been organized, from granting charters to subordinate councils in the state, and from interfering in any way with the pursuance of its objects by the Virginia order within the state, and from designating their officers in the state by appellations set forth as used by the plaintiff. After this decree, thus affirmed, had become final in the Virginia state court, the plaintiffs in error proceeded to obtain a charter under the name of the "Virginia Branch of the National Council of the Junior Order United American Mechanics,"—a name which they urged was clearly distinguishable from that of the State Council of Virginia Junior Order United American Mechanics of the State of Virginia, protected by the original decree. Having taken out the charter by the name aforesaid, the plaintiffs in error were prosecuted for contempt of court in violating the original decree. Upon hearing in the chancery court, an order was entered finding the plaintiffs in error to be in contempt, and a fine of \$20 was imposed, on each of them, and the same was ordered to be paid to the clerk of the court within thirty-five days, and, in default thereof, each of the plaintiffs in error to stand committed to the custody of the sheriff, to remain in jail until the said sum be paid by them respectively.

A writ of error was allowed by the supreme court of appeals of Virginia to this order of the chancery court. In the supreme court of appeals a motion was made to dismiss the writ of error as having been improvidently granted. Upon consideration, the supreme court of appeals of Virginia sustained that motion upon the ground that [398] it had no jurisdiction *to review the judgment complained of, and dismissed the

writ of error accordingly. 107 Va. 853, 60 S. E. 81. The plaintiffs in error seek to bring the case here upon the ground that the ruling of the supreme court of appeals of Virginia denies them due process of law, and deprives them of the equal protection of the laws, in violation of the 14th Amendment of the Constitution of the United States.

An inspection of the record shows that no claim of the rights now asserted under the Federal Constitution was made until the petition for rehearing was filed after the judgment in the state court of final resort. That petition embodies many objections to the opinion and judgment of the supreme court of appeals of Virginia, not involving the Federal Constitution. As to the Federal Constitution, it was set up that if the Virginia statute, which provides that a writ of error shall lie to the supreme court of appeals of Virginia to a judgment for a contempt of court other than for the non-performance of, or disobedience to, a judgment, decree, or order, was applied to deny a review in the pending case, it would violate the 14th Amendment of the Constitution of the United States, in that it attempts to deprive the plaintiffs in error of a right to a writ of error from the supreme court of appeals of Virginia, as given under § 88 of the Constitution of Virginia, and thereby deprive plaintiffs in error of their liberty without due process of law, and denied to them the equal protection of the laws; that a denial by the supreme court of appeals of Virginia of a writ of error under § 88 of the Virginia Constitution, which provides that the supreme court of appeals of Virginia shall have appellate jurisdiction in all cases involving the life or liberty of any person, will be in violation of the 14th Amendment, in that it would deprive them of property without due process of law, and would deny to them the equal protection of the laws.

In passing upon the petition for rehearing, the supreme court of appeals of Virginia said: "On mature consideration of the petition of the plaintiffs in error to set aside the judgment *entered herein on [399] January 16, 1908, and to grant a rehearing of said cause, the prayer of said petition is denied."

It has been many times held in this court that an attempt to introduce a Federal question into the record for the first time by a petition for rehearing is too late. *Locher v. Schroeder*, 149 U. S. 580, 585, 37 L. ed. 856, 859, 13 Sup. Ct. Rep. 934; *Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322.

There is an exception to this rule when it appears that the court below entertained the motion for rehearing, and passed upon

the Federal question. But it must appear that such Federal question was in fact passed upon in considering the motion for rehearing; if not, the general rule applies. *Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; *Leigh v. Green*, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; *Corkran Oil & Development Co. v. Arnaudet*, 199 U. S. 182, 50 L. ed. 143, 144, 26 Sup. Ct. Rep. 41; *McMillen v. Ferrum Min. Co.* 197 U. S. 343, 49 L. ed. 784, 25 Sup. Ct. Rep. 533; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 112, 118, 53 L. ed. 431, 434, 29 Sup. Ct. Rep. 227.

But, it is alleged, the memorandum which we have quoted shows that the Virginia court must have considered and passed upon the Federal question made in the petition for a rehearing. Except that the order is said to be upon "mature" consideration, it is almost word for word the order on rehearing reviewed in *McCorquodale v. Texas*, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146, which was held to amount to no more than a denial of the motion. See 211 U. S. 437. In that case the rule was again laid down that it was too late to raise a Federal question upon a petition for rehearing, unless the Federal question was passed upon in ruling upon the petition.

It results that the writ of error in this case must be dismissed.

Dismissed.

400] *SOUTHERN RAILWAY COMPANY,
Plff. in Err.,
v.

SAMUEL E. GREENE.

(See S. C. Reporter's ed. 400-418.)

Constitutional law—equal protection of the laws—foreign corporation—franchise tax.

A foreign railway corporation which has come into the state in compliance with its laws, and has therein acquired property of a fixed and permanent nature, upon which it has paid all taxes levied by the state, is a person within the jurisdiction of the state, and, as such, is protected by the equal protection of the laws clause of U. S. Const., 14th Amend., against the imposi-

tion, under 1 Ala. Code 1907, §§ 2391-2400, of an additional franchise tax for the privilege of doing business within the state, where no such tax is imposed upon domestic corporations carrying on a precisely similar business.

[For other cases, see Constitutional Law, 254-265, in Digest Sup. Ct. 1908.]

[No. 450.]

Argued December 16, 17, 1909. Decided February 21, 1910.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the Birmingham City Court in that state, sustaining a demurrer to the complaint, in an action by a foreign railway company to recover back the amount of a franchise tax alleged to have been wrongfully exacted. Reversed.

See same case below, 160 Ala. 396, 49 So. 404.

Statement by Mr. Justice Day:

Action was brought in the city court of Birmingham, Alabama, by the Southern Railway Company, to recover the sum of \$22,458.36, for so much money received by the defendant as judge of the probate court of Jefferson county, Alabama, which sum the plaintiff claimed was wrongfully exacted from *it under the provisions of the [401 act of March 7, 1907. This sum is the amount taxed against the Southern Railway Company under the said legislative act, and, under the practice in Alabama, if illegally exacted, it may be recovered.

This act is found in the Code of Alabama of 1907, vol. 1, page 986, §§ 2391 to 2400, inclusive. It provides for the payment of an annual franchise tax to the probate judge by every foreign corporation authorized to do business within the state, in which it has a resident agent, with certain exceptions, for the use of the state, upon the actual amount of the capital stock employed by it in the state; in the amount of \$25 on the first \$100, 5 per cent on the next \$900, and 1/10 of 1 per cent on all the remaining amount of capital so employed.

Provision is made for the assessment of the tax by proceedings before the probate

NOTE.—On taxation of corporate franchises—see note to *Louisville Tobacco Warehouse Co. v. Com.* 57 L.R.A. 33.

On constitutional equality in relation to corporate taxation—see note to *Bacon v. State Tax Comrs.* 60 L.R.A. 321.

On recognition or exclusion of foreign corporations—see notes to *Cone Export & Commission Co. v. Poole*, 24 L.R.A. 289, and *McCanna & F. Co. v. Citizens' Trust & S. Co. v. United States*, 24 C. C. A. 13.

On the validity of a license tax imposed

on a foreign corporation as a condition of permission to do business within the state—see note to *Reymann Brewing Co. v. Brister*, 45 L. ed. U. S. 269.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621, and *State v. Loomis*, 21 L.R.A. 789.

judge, with an appeal to the circuit court in certain cases. The statute enacts that no foreign corporation required to pay a tax under this statute shall do any business in the state of Alabama not constituting interstate commerce, or maintain or commence any action in any of the courts of the state, upon contracts made in the state other than contracts based upon interstate commerce, unless such corporation shall have paid said tax within sixty days after the same shall have become due. The payment of the tax in one county shall be sufficient, notwithstanding the corporation shall do business or have a resident agent in more than one county.

The payment of the franchise tax required by this statute does not exempt any corporation paying the same from payment of the regular license or privilege tax specified or required for engaging in or carrying on business, the license for which is required from individuals, firms, or corporations. In addition to the amount of the franchise tax required to be paid to the state, such foreign corporation shall pay to the county, for the use of the county, an amount equal to one half of the amount paid by it to the state. Loans of money upon which a mortgage tax is paid are deducted from capital employed *in the state upon which there shall be paid the recording privilege tax required by law.

The complaint averred that the act is unconstitutional and void, as it impaired the obligation of a contract between the plaintiff and the state of Alabama, and in that it deprived the plaintiff of its property without due process of law, and denied to it the equal protection of the laws.

Plaintiff averred that it is a corporation created under the laws of the state of Virginia, and as such authorized to lease, use, operate, and acquire any railroad or transportation company, then or thereafter incorporated by the laws of the United States, or any of the states thereof. That it thus organized, in February, 1894, and has since carried on the business of acquiring, owning, and operating lines of railroads in various states, and conducting interstate and intrastate transportation of persons and property. That, in conformity with the laws of the state of Alabama, on July 16, 1894, it filed in the office of the secretary of state a copy of its charter, and designated an agent upon whom service could be made, and that, at the same time, it paid to the treasurer of the state of Alabama the sum of \$250, being the sum required as a license fee for beginning business in the state. It avers that, after thus complying with the laws of Alabama, it commenced carrying on its authorized business within the state,

and has therein carried on the same business ever since; that between the time of entering the state, as aforesaid, and the year 1899, it purchased and acquired, as permitted and authorized by the laws of Alabama, various lines of railroad and the franchises under which they had been built and operated, which lines are connected with, and continuous with, other lines owned by the plaintiff.

The complaint states that these lines of railroad, situated in the state of Alabama, had been theretofore constructed under its laws by duly authorized corporations, and the complaint contains a list of such lines; that it acquired said lines, paying large sums of money therefor, in pursuance of and reliance *upon the laws of the state of [403 Alabama, that since such acquisition it has continued to operate such lines of railroad, transacting a large amount of business thereon, both interstate and intrastate, and has expended large sums of money in the maintenance and improvement thereof.

Plaintiff avers that, from time to time, ownership taxes, similar to those assessed against other persons and corporations, have been assessed against it, all of which the plaintiff has paid. It has also paid from year to year the license tax exacted of it and other persons and corporations operating railroads in the state of Alabama under § 3489 of the Code of Alabama of 1896, under § 1128 of the Code of Alabama of 1886. It has also paid on account of its ownership of such railroad, taxes assessed against it under the act of March 7, 1897, taxing the franchises or intangible property, in the state, of every person and corporation engaged in transporting persons or property over any railroad therein. It has also paid the license fee, and has procured the license provided for by the act of the legislature of the state of Alabama, approved March 7, 1907, entitled, "An Act to Further Regulate the Doing of Business in Alabama by Foreign or Nonresident Corporations, or Corporations Organized under or by Authority of the Law of Any Other State or Government than the State of Alabama, and to Fix a Punishment for the Violation Thereof."

Plaintiff states that all these exactions have been made by the state of Alabama upon corporations owning and operating railroads in Alabama, without regard to whether the corporation owning and operating such railroad was a domestic corporation or a corporation organized under the laws of some other state, with the sole exception of the license fee last above mentioned, which is a nominal amount (\$10 per annum), is exacted from foreign corporations only, for mere police purposes, in order that there may be a registration of such foreign

corporations, doing business in Alabama, in the office of the secretary of state. Plaintiff avers that the legislative act of March 7, 1907, under which it was compelled to 404] pay the said sum of \$22,458.36, *does not apply to persons or corporations of the state of Alabama owning the same character of property and carrying on the same kind of business as is owned and carried on by corporations organized under the laws of other states, nor is there any similar exaction against domestic corporations owning such property and engaged in the same character of business.

Plaintiff recites the proceedings before the probate judge of Jefferson county, resulting in the finding that the capital of the plaintiff employed in the state of Alabama was \$14,903,246, and the assessment thereon of the tax of \$22,458.36, as aforesaid, its payment under protest, and prays judgment for its recovery. A demurrer to the complaint was sustained and judgment rendered for defendant. Upon appeal, the supreme court of Alabama affirmed the judgment. 49 So. 404.

Mr. Alfred P. Thom argued the cause, and, with Messrs. Alex. P. Humphrey, James Weatherly, and Humphrey & Humphrey, filed a brief for plaintiff in error:

The Southern Railway Company is a person "within the jurisdiction" of the state of Alabama.

Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

An inequality of public burdens not based upon reasonable classification is a denial to the disfavored person of the equal protection of the laws.

Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 A. & E. Ann. Cas. 757; Connolly v. Union Sewer Pipe Co. 184 U. S. 560, 46 L. ed. 690, 22 Sup. Ct. Rep. 431.

Here is an effort to exact a discriminatory tax, unequal and unjust, upon the use of property, predicated alone upon the character of its owner. In any view, this is beyond the power of the legislature of Alabama, and this act is therefore void.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952; Com. v. Mobile & O. R. Co. 23 Ky. L. Rep. 784, 54 L.R.A. 916, 64 S. W. 451; American Smelting & Ref. Co. v. Colorado, 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198, 9 A. & E. Ann. Cas. 978; Seaboard Air Line R. Co. v. Railroad Commission, 155 Fed. 792; Chicago, R. I. & P. R. Co. v. Ludwig, 156 Fed. 152.

Messrs. Alexander M. Garber and Samuel D. Weakley argued the cause, and, with Mr. Henry C. Selheimer, filed a brief for defendant in error:

It is undoubtedly true that plaintiff in error is a person within the jurisdiction of the state, within the meaning of the 14th Amendment, and as such is entitled to the equal protection of the law.

Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

It is not a denial of the equal protection of the law to impose upon a foreign corporation a tax for the privilege of doing business in the taxing state, when no such tax, or a tax of a different amount, is imposed on domestic corporations engaged in the same business.

19 Cyc. Law & Proc. p. 1227; Gray, Limitations of Taxing Power, § 1318; Ducat v. Chicago, 10 Wall. 410, 19 L. ed. 972; New York v. Roberts, 171 U. S. 662, 43 L. ed. 325, 19 Sup. Ct. Rep. 58; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; Com. v. Milton, 12 B. Mon. 212, 54 Am. Dec. 522; Southern Bldg. & L. Asso. v. Norman, 98 Ky. 294, 31 L.R.A. 41, 56 Am. St. Rep. 367, 32 S. W. 952; Hughes v. Cairo, 92 Ill. 339; Scottish Union & Nat. Ins. Co. v. Herriott, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665.

Laws which impose upon foreign corporations the same taxation and other restrictions as are imposed upon corporations of the taxing state by the states where such foreign corporations were created do not infringe any provision of the Federal Constitution.

Fire Asso. of Philadelphia v. New York, supra; Home Ins. Co. v. Swigert, 104 Ill. 653; Gray, Limitations of Taxing Power, § 1314.

Subject to certain limitations as respects interstate and foreign commerce, a state may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax or a sum proportioned to the amount of its capital used within the state.

New York v. Roberts, 171 U. S. 659, 43 L. ed. 323, 19 Sup. Ct. Rep. 58.

The same reasoning which persuaded the

Supreme Court of the United States and the court of appeals of New York that the New York statute, as applied to foreign corporations, was not in violation of any provision of the Constitution of the United States, applies to the Alabama statute complained of, and supports its constitutionality.

People ex rel. Pennsylvania R. Co. v. Wemple, 138 N. Y. 1, 19 L.R.A. 694, 33 N. E. 720; *People v. Equitable Trust Co.* 96 N. Y. 388; *Home Ins. Co. v. New York*, 134 U. S. 599, 33 L. ed. 1029, 10 Sup. Ct. Rep. 593.

If the power be conceded to the state, under the Federal Constitution, to make a certain species of property subject to taxation, it is not a violation of that Constitution that the rate or amount differs from that imposed on other species.

Coulter v. Louisville & N. R. Co. 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

The Federal Constitution imposes no restraint on the state in regard to unequal taxation.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Savannah, T. & I. of H. R. Co. v. Savannah*, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690; *New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs.* 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 A. & E. Ann. Cas. 381; *St. Louis, I. M. & S. R. Co. v. Davis*, 132 Fed. 629; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396.

The validity of the tax is not affected by the fact that plaintiff in error has a right by contract with the state to do business in the state, assuming that such contract exists.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *People ex rel. Pennsylvania R. Co. v. Wemple*, supra; *Columbus Southern R. Co. v. Wright*, supra; *American Smelting & Ref. Co. v. Colorado*, 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198, 9 A. & E. Ann. Cas. 978; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 296, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; 19 Cyc. Law & Proc. p. 1205.

Mr. Justice Day delivered the opinion of the court:

The supreme court of Alabama placed its decision upon the ground that the act 54 L. ed.

of March 7, 1907, should be sustained as a lawful tax, not upon the franchises of a foreign corporation, as property, but as a tax "to add to the license tax already required an additional privilege tax for the continued exercise of the corporate franchises in the state." 49 So. 408.

The errors assigned attack the validity of the act of March 7, 1907, upon grounds, among others, that it violates the 14th Amendment of the Federal Constitution, in that it denies to the plaintiff the equal protection of the laws, and deprives it of its property without due process of law.

The 14th Amendment provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

*The important Federal question [412 for our determination in this case is: When a corporation of another state has come into the taxing state, in compliance with its laws, and has therein acquired property of a fixed and permanent nature, upon which it has paid all taxes levied by the state, is it liable to a new and additional franchise tax for the privilege of doing business within the state, which tax is not imposed upon domestic corporations doing business in the state of the same character as that in which the foreign corporation is itself engaged?

The Federal Constitution, it is only elementary to say, is the supreme law of the land, and all its applicable provisions are binding upon all within the territory of the United States. Whenever its protection is invoked, the courts of the United States, both state and Federal, are bound to see that rights guaranteed by the Federal Constitution are not violated by legislation of the state. One of the provisions of the 14th Amendment, thus binding upon every state of the Federal Union, prevents any state from denying to any person or persons within its jurisdiction the equal protection of the laws. If this statute, as it is interpreted and sought to be enforced in the state of Alabama, deprives the plaintiff of the equal protection of the laws, it cannot stand.

The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the state of Alabama within the meaning of the 14th Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation.

That a corporation is a person, within the meaning of the 14th Amendment, is no longer open to discussion. This point was decided in *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737, wherein this court declared:

"The inhibition of the Amendment that no state shall deprive any person within its [413] jurisdiction of the equal protection *of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of 'person' there is no doubt that a private corporation is included."

And see *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, and cases cited on p. 154.

Is the plaintiff corporation a person within the jurisdiction of the state of Alabama? In the present case, the plaintiff is taxed because it is doing business within the state of Alabama. The averments of the complaint, admitted by the demurrer, show it has acquired a large amount of railroad property by authority of, and in compliance with, the laws of the state; that it is subject to the jurisdiction of the courts of the state; that it has paid taxes upon its property, and also upon its franchises within the state; in short, that it came into the state in compliance with its laws, and, at the time of the imposition of the tax in question, had been for many years carrying on business therein under the laws of the state. We can have no doubt that a corporation thus situated is within the jurisdiction of the state. *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

The argument on the part of the state of Alabama places much weight upon the cases in this court which have sustained the right of the state to exclude a foreign corporation from its borders, and to impose conditions upon the entry of such corporations into the state for the purpose of carrying on business therein. That line of cases has been so amply discussed in the opinions and concurring opinions in the cases of *Western U. Teleg. Co. v. Kansas* and *Pullman Co. v. Kansas*, decided at the present term [216 U. S. 1, 56, ante, 355, 378, 30 Sup. Ct. Rep. 190, 232], that any extended discussion of them is superfluous now. It is sufficient for the present purpose to say that we are not dealing with a corporation seeking admission to the state of Alabama, nor with one which has a limited license, which it seeks to renew, to do business in that state; nor with one which has come into the state upon conditions which it has since violated. In the case at bar we have a corporation which has [414] come into and is doing business *with-

in the state of Alabama, with the permission of the state, and under the sanction of its laws, and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property, which the foreign corporation has acquired under the permission and sanction of the laws of the state. This feature of the case was dealt with by Mr. Justice Brewer, then a circuit judge, in the case of *Ames v. Union P. R. Co.* 64 Fed. 165, 177, wherein he said:

"It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value."

Notwithstanding the ample discussion of the questions involved in the case of the *Western U. Teleg. Co. v. Kansas* and *Pullman Co. v. Kansas*, to which we have already referred, we deem it only fair to the learned counsel for the state of Alabama to notice some of the cases which it is insisted have disposed of the question herein involved, and maintained the right of the state to impose a tax upon a foreign corporation, lawfully within the state, for the privilege of doing business in the state, when no such tax, or one less burdensome, is imposed upon domestic corporations engaged in the same business. The first case referred to is *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972, in which a tax was sustained upon a foreign insurance company which had come into the state upon complying with certain terms prescribed by the state, and was thereafter subjected to a tax on all their premiums, the statute declaring it unlawful in the companies otherwise to do business in the state. It is sufficient to say of that case *that it arose before the [415] 14th Amendment had become part of the Federal Constitution, and that no reference is made in the opinion of the court to the 14th Amendment, although the case was decided after that Amendment went into effect.

In *New York v. Roberts*, 171 U. S. 662, 43 L. ed. 323, 19 Sup. Ct. Rep. 58, a tax was imposed upon the franchises or business of corporations, with certain exceptions, computed upon the amount of capital stock employed within the state. It was pointed out by Mr. Justice Shiras, who delivered the opinion of the court, that the tax was imposed as well for New York corporations as

for those of other states, and he said: "So that it is apparent that there is no purpose disclosed in the statute either to distinguish between New York corporations and those of other states, to the detriment of the latter, or to subject property out of the state to taxation."

In *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403, the tax imposed was applicable alike to corporations doing business in New York, whether organized in that state or not; and in the course of the opinion in the case Mr. Justice Field, speaking for the court, said: "It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation."

In *Fire Asso. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108, a Pennsylvania corporation which was taxed in the state of New York was subjected to a license fee, which license ran for a period of a year, and it was held that the state had the power to change the conditions of admission to the state, and to impose as a condition of doing business in the state, at any time or for the future; the payment of a new or further tax. Mr. Justice Blatchford, speaking for the court, said: "If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state, or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given."

We have adverted to these cases with a 416] view of showing that *the precise point involved herein is not concluded by any of them. It would not be frank to say that there is not much said in the opinions in those cases which justifies the argument that the power of the state to exclude a foreign corporation, not engaged in interstate commerce, authorizes the imposition of special and peculiar taxation upon such corporations as a condition of doing business within the state. But none of the cases relied upon presents the question under the conditions obtaining in the case at bar. We have here a foreign corporation within a state, in compliance with the laws of the state, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method, not employed as to domestic corporations of the same kind, carrying on a precisely similar business.

As we have already indicated, the discussion of the question herein involved has largely been anticipated in the recent cases from Kansas, involving the right to tax the Western Union Telegraph Company and the

Pullman Company. Those cases are the latest declaration of this court upon the subject, and in one aspect of them really involve the determination of the case at bar. In the *Western U. Teleg. Case*, it was held that a state could not impose a tax upon an interstate commerce corporation as a condition of its right to do domestic business within the state, which tax included within its scope the entire capital of the corporation, without as well as within the borders of the state. The Kansas tax was sought to be sustained as a legal exaction for the privilege of doing domestic business within the state. It was held invalid because it violated the right secured by the Constitution of the United States, giving to Congress the exclusive power to regulate interstate commerce, and because it violated the due-process clause of the Federal Constitution in undertaking to make the payment of a tax upon property beyond the borders of the state a condition of doing domestic business within the state. In that case, the 14th Amendment was directly applied in the due-process feature. In this case, we have an *application of the same Amendment, [417 asserting the equal protection of the laws.

We therefore reach the conclusion that the corporation plaintiff, under the conditions which we have detailed, is, within the meaning of the 14th Amendment, a person within the jurisdiction of the state of Alabama, and entitled to be protected against any statute of the state which deprives it of the equal protection of the laws.

It remains to consider the argument made on behalf of the state of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the 14th Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the state is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the state. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf, C. & S. F. R. Co. v.*

Ellis, 165 U. S. 150, 155, 165, 41 L. ed. 666, 668, 671, 17 Sup. Ct. Rep. 255; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 559, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.

It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama, carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the 418] privilege of a foreign *corporation to do business in the state, and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the 14th Amendment, that such attempted taxation under a statute of the state does violence to the Federal Constitution.

The judgment of the Supreme Court of Alabama is therefore reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion. Reversed.

Dissenting: The CHIEF JUSTICE, Mr. Justice McKenna, and Mr. Justice Holmes.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,

v.

JOHN B. GASTON. (No. 451.)

CENTRAL OF GEORGIA RAILWAY COMPANY, Plff. in Err.,

v.

JOHN B. GASTON. (No. 466.)

(See S. C. Reporter's ed. 418-420.)

These cases are governed by the decision in *Southern R. Co. v. Greene*, ante, 536.

[Nos. 451, 466.]

No. 451, argued December 16, 17, 1909. No. 466, submitted January 3, 1910. Decided February 21, 1910.

TWO WRITS OF ERROR to the Supreme Court of the State of Alabama to review judgments which affirmed judgments of the Montgomery City Court in that state, sustaining demurrers to complaints in actions by foreign railway companies to recover the amount of franchise taxes alleged to have been wrongfully exacted. Reversed.

See same case below, No. 451 (Ala.) 49 So. 412; No. 466, 160 Ala. 671, 49 So. 412.

The facts are stated in the opinion.

Mr. Gregory L. Smith argued the cause, and, with Mr. H. L. Stone, filed a brief for plaintiff in error in No. 451:

The state may tax certain property or certain callings, so long as there is no arbitrary "discrimination against persons engaged in such callings under like circumstances.

Armour Packing Co. v. Lacy, 200 U. S. 235, 50 L. ed. 456; 26 Sup. Ct. Rep. 232; *Kehrer v. Stewart*, 197 U. S. 69, 49 L. ed. 668, 25 Sup. Ct. Rep. 403; *Home Ins. Co. v. New York*, 134 U. S. 606, 33 L. ed. 1031, 10 Sup. Ct. Rep. 593; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594.

When a law imposes arbitrary burdens upon one set of persons or corporations within the jurisdiction of the state, not imposed upon others, and not justified by the character of the business of such persons or corporations with reference to such burdens, so as to form a just basis for their imposition, it denies to such persons or corporations the equal protection of the law, and is in conflict with the 14th Amendment of the Constitution of the United States.

South & North Ala. R. Co. v. Morris, 65 Ala. 193; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 151, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; *Phoenix Carpet Co. v. State*, 118 Ala. 143, 72 Am. St. Rep. 143, 22 So. 627; *Montgomery v. Kelly*, 142 Ala. 557, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 102, 46 L. ed. 106, 22 Sup. Ct. Rep. 30; *Magoun v. Illinois Trust & Sav. Bank*, supra.

Even where a foreign corporation is within the domain of the state only by license, it cannot be arbitrarily excluded when to so exclude it would violate any provision of the Constitution of the United States.

National Council v. State Council, 203 U. S. 153, 51 L. ed. 132, 27 Sup. Ct. Rep. 46; *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 249, 50 L. ed. 1014, 26 Sup. Ct. Rep. 619, 6 A. & E. Ann. Cas. 317.

To exclude a railroad company from the domain of the state after it has, with the permission of the state, purchased a railroad therein, and is engaged in operating

the same, would take its property without due process of law.

Ames v. Union P. R. Co. 64 Fed. 170.

Where no property rights are concerned, the state may arbitrarily exclude a foreign corporation from its boundary.

Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 257, 50 L. ed. 1018, 26 Sup. Ct. Rep. 619, 6 A. & E. Ann. Cas. 317; *Northwestern Nat. L. Ins. Co. v. Riggs*, 203 U. S. 255, 51 L. ed. 173, 27 Sup. Ct. Rep. 126, 7 A. & E. Ann. Cas. 1104; *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370.

Although it may generally put such burdens upon such corporations as it sees fit as a condition to continuing business therein, the state cannot place arbitrary burdens upon a foreign railroad corporation which would operate to take its property without due process of law.

Smyth v. Ames, 169 U. S. 469, 42 L. ed. 835, 18 Sup. Ct. Rep. 418.

The distinction between an insurance company case and a case involving the right of a railroad company lies in the fact that when a state permits a railroad company to acquire a railroad within its border, it impliedly agrees that it may utilize such property; and, because of the nature of the railroad business, it cannot exclude such corporation from its domain without taking this property.

National Council v. State Council, 203 U. S. 161, 51 L. ed. 136, 27 Sup. Ct. Rep. 46; *Seaboard Air Line R. Co. v. Railroad Commission*, 155 Fed. 803; *Chicago, R. I. & P. R. Co. v. Swanger*, 157 Fed. 791; *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952.

Messrs. Robert E. Steiner, Leon Weil, T. M. Cunningham, Jr., A. R. Lawton, and Horace Stringfellow submitted the cause for plaintiff in error in No. 466:

Equal protection under the 14th Amendment is denied when, upon one of two parties engaged in the same kind of business, and under the same conditions, burdens are cast which are not cast upon the other.

Cotting v. Kansas City Stock Yards Co. (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 151, 41 L. ed. 667, 17 Sup. Ct. Rep. 255.

A state may exclude foreign corporations from doing business therein, and, having the power to exclude, it may impose such conditions as "a prerequisite to corporate life" as it may deem proper, provided they 54 L. ed.

are not repugnant to the Constitution and laws of the United States.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 A. & E. Ann. Cas. 317.

Having complied with such conditions and obtained the franchise from the state, the corporation will not be granted relief therefrom in the Federal courts, however oppressive they may be.

Home Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403.

The principle upon which such relief is denied is that the corporation is held voluntarily to assent to the condition by accepting the franchise. It is not permitted to enjoy the privilege and repudiate the accompanying conditions.

Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 22 L. ed. 678.

The power of the state to impose any conditions upon the admission of a foreign corporation to do business in the state, however harsh or oppressive, is based upon its right to refuse such admission; and from this right to refuse is based a correlative power to revoke, and upon this right to revoke is based a further power to change the conditions of admission at any time for the future, and to impose as a condition the payment of a new tax, or further tax, as a license fee.

Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108.

Manifestly this legal fiction should apply only when the corporation, as to the new condition, is the same as when it was admitted. Legal fictions cannot be so stretched as to presume the existence of the impossible, nor are they allowed to work injustice.

Jones v. McPhillips, 82 Ala. 102, 2 So. 468; *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; *Bouvier's Law Dict.* title, Fiction, § 6.

A state cannot discriminate against the property of a foreign corporation within its jurisdiction.

Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

Even where the power to revoke, alter, or amend is expressly reserved by constitutional provisions or in the charter, it is held that such power is not without its limitations; that beyond the sphere of reserved powers the vested rights of property in corporations in such cases are surrounded by

the same sanctity and are as inviolate as in other cases.

Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; *Hammond Packing Co. v. Kansas*, 212 U. S. 345, 53 L. ed. 542, 29 Sup. Ct. Rep. 370.

A state, except as to the acts of its agents and officers, may be estopped by its conduct like individuals, even as the same rules of contract that apply to the one apply to the other.

Turner v. Mobile, 135 Ala. 73, 33 So. 132; *Magee v. Doe*, 22 Ala. 699; *Hackett v. Ottawa*, 99 U. S. 86, 25 L. ed. 363; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Curran v. Arkansas*, 15 How. 304, 14 L. ed. 705; *National Waterworks Co. v. Kansas City*, 65 Fed. 691; *Cowan v. Southern R. Co.* 118 Ala. 560, 23 So. 754; *Northern P. R. Co. v. Smith*, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794; *Swain v. Seamens*, 9 Wall. 254, 19 L. ed. 554.

The compliance by plaintiff in error, a foreign corporation, with the conditions imposed upon its admission, constituted the terms upon which the permission or consent of the state to its doing business therein could be obtained. When such terms were complied with, the consent of the state to the doing of its business therein was necessarily given, and when vast sums were expended by the corporation in the acquisition of property in the state, necessary to the enjoyment of such permission, the value of which is dependent upon the use, the state, under the authorities *supra*, is inhibited from arbitrarily revoking such permission, by the mischief that would follow from the refusal of the right to continue in such business.

Chicago, R. I. & P. R. Co. v. Swanger, 157 Fed. 791; *Seaboard Air Line R. Co. v. Railroad Commission*, 155 Fed. 803; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *Ames v. Union P. R. Co.* 64 Fed. 177.

The state may not arbitrarily revoke the power of plaintiff in error to do business in the state under the provisions of the state Constitution providing for the revocation, amendment, or alteration of grants, privileges, and franchises, and impose any condition upon the continuance of such business it may deem proper.

Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. *supra*; *Hammond Packing Co. v. Arkansas*, 212 U. S. 345, 53 L. ed. 542, 29 Sup. Ct. Rep. 370; *Union P. R. Co. v. United States*, 99 U. S. 700, 25 L. ed. 496.

544

Messrs. **Alexander M. Garber** and **Samuel D. Weakley** argued the cause in No. 451, and submitted the cause in No. 466 for defendant in error. Mr. Henry C. Selheimer was on the brief.

For contentions of counsel, see their brief as reported in *Southern R. Co. v. Greene*, ante, 536.

Mr. Justice **Day** delivered the opinion of the court:

No. 451 was argued and submitted with *Southern R. Co. v. Greene*, No. 450, just decided [216 U. S. 400, ante, 536, 30 Sup. Ct. Rep. 287]. Nos. 451 and 466 were argued at the same time in the supreme court of Alabama with the case of *Southern R. Co. v. Greene*, No. 450, and were decided on the authority of that case. That court said (49 So. 412): "These cases [Nos. 450, 451, and 466] were argued, submitted, and considered together, and the points raised by the pleadings in each case are, for convenience, treated of and embodied in the one opinion," referring to the opinion in the *Greene Case*.

These cases are embraced within the opinion in the *Greene Case* in this court. For the reasons stated in that case, both of these cases are reversed, and remanded to the supreme court of Alabama for further proceedings consistent with that opinion.

Mr. Justice **Lurton** was not on the bench when Nos. 450 and 451 were argued and submitted. No. 466 was submitted after he took his seat on the bench, and I am permitted to say, for the *reasons [420 stated in the opinion in No. 450, *Southern R. Co. v. Greene*, he concurs in the judgment in No. 466.

Reversed.

Dissenting: The CHIEF JUSTICE, Mr. Justice **McKenna**, and Mr. Justice **Holmes**.

WILLIAM A. WRIGHT, Comptroller General of the State of Georgia, the County of Wilkes, and the County of Taliaferro. Appts.,

v.

GEORGIA RAILROAD & BANKING COMPANY.

(See S. C. Reporter's ed. 420-438.)

Taxes — exemption — duration.

1. The partial exemption from taxation under a charter provision that the stock

NOTE. — As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L.R.A. 405; *Fletcher v. Peck*, 3 216 U. S.

of a railway company and its branches shall be wholly exempt for seven years, "and after that" shall be subject to a tax not exceeding a given per cent on the net proceeds of their investments, cannot be regarded as limited to the thirty-six years during which the company was to have exclusive rights within a defined territory, on the theory that the words "and after that" do not mean "thereafter," and do not refer to the limitation immediately preceding, but to the thirty-six years' limitation of the exclusive right regulated by the preceding part of the same section of the charter.

[For other cases, see Taxes, 471-475, in Digest Sup. Ct. 1908.]

Taxes — exemption — capital stock.

2. Capital, in whatever form invested, appropriate to the purpose of the company, and not merely the shares held by stockholders, must be regarded as meant by the word "stock," as used in a provision of a railway charter that the stock of the com-

pany and its branches shall be exempt from taxation for seven years, and after that shall be subject to a tax not exceeding a given per cent upon the net proceeds of their investments, in view of the recognition in other provisions of the charter of the distinction between capital stock and "shares," and of at least sixty years' legislative and executive acquiescence in reading this partial exemption as applicable to the capital stock of the company, and of a series of decisions of the highest state court, holding either that the whole of the capital was exempt, in whatever form invested, or so much of the investment as corresponded in value to the authorized capital stock.

[For other cases, see Taxes, 427-432, in Digest Sup. Ct. 1908.]

Judgment — conclusiveness as between state and Federal courts.

3. A judgment of a state court sustaining the exemption claimed by a railway company under its charter from any taxa-

L. ed. U. S. 162; *McCauna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 20; and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

On the taxation of capital stock of corporations—see note to *State Board v. People*, 58 L.R.A. 513.

On corporate taxation as affected by the contract clause in the Federal Constitution—see note to *Adams v. Yazoo & M. Valley R. Co.* 60 L.R.A. 33.

As to impairing obligation of contract for exemption from taxation—see note to *Wicomico County v. Bancroft*, 70 C. C. A. 294.

As to conclusiveness and effect of judgments as between Federal and state courts—see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478, and *Union & Planters' Bank v. Memphis*, 49 C. C. A. 468.

Exemption from taxation under grant of rights equal to other corporation.

The great weight of authority supports the proposition approved in *WRIGHT V. GEORGIA R. & BKG. CO.*, that the grant to one corporation of the rights, powers, and privileges of another and distinct corporation does not carry any exemption from taxation which the latter corporation enjoys.

Thus, in *Memphis v. Phoenix F. & M. Ins. Co.* 91 Tenn. 566, 19 S. W. 1044, affirmed in 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471, an immunity from taxation enjoyed by the corporation is held not to pass to a new corporation granted no more than the "rights and privileges" of the older one.

And a clause in a railroad charter investing the company thereby incorporated "for the purpose of making and using its road" with all the "powers, rights, and privileges" of another railroad, grants only such powers, rights, and privileges as are necessary for the stated purpose: and as immunity from taxation is not one of these, it is not

conferred. *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091.

So, an act of incorporation, investing a railroad company with all the rights and powers necessary to construct and maintain its road, and declaring that for such purpose it may have and use all the powers and privileges of, and be subject to the same obligations imposed upon, another railroad in its charter, confers no immunity from taxation such as the other road had. *Annapolis & E. Ridge R. Co. v. Anne Arundel County*, 103 U. S. 1, 26 L. ed. 359.

A grant to branch roads of a railroad corporation of all the powers, rights, and privileges the company enjoys with respect of its main line in the construction, use, and preservation of the branches, does not include the tax exemption of the main road. *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72.

A subrogation to all the rights and privileges heretofore granted to another corporation does not include an immunity from taxation,—especially where a new Constitution has, in the meantime, been adopted which requires the property of such corporations to be taxed, like that of individuals, in proportion to its value. *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26.

Nor does an act investing a corporation with all the "powers, rights, reservations, restrictions, and liabilities" of another corporation confer the latter's tax immunity. *Home Ins. & T. Co. v. Tennessee*, 161 U. S. 198, 200, 40 L. ed. 669, 670, 16 Sup. Ct. Rep. 476.

A provision in a corporate charter that the company chartered shall have all the powers allowed, perform all the duties required, and have and enjoy, subject to the same conditions, limitations, and restrictions, all the rights, powers, and privileges of another corporation therein named, does not carry over to the new company an exemption from taxation belonging to the old one, so as to exonerate it from a privilege

tion except one based on its net profits, which, under the local law of the state, is not *res judicata* as to taxes for other years than the one directly involved, can be accorded no greater efficacy in the Federal courts.

[For other cases, see Judgment, 1053-1054a, in Digest Sup. Ct. 1908.]

Taxes — exemption — capital stock.

4. The excess of the value of a railway and its appurtenances over the nominal value of its authorized capital stock, the result of natural increase in the value of such property, and of renewals, alterations, and betterments made from time to time, is included in the partial exemption from taxation under the charter provision that the stock of the company and its branches shall be wholly exempt for seven years, and after that shall be subject to a tax not exceeding a given per cent on the net proceeds of their investments, the legislative purpose being otherwise plain that the authorized capital be adequate to the construction and equipment of the roads.

[For other cases, see Taxes, 427-435, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — franchise tax.

5. A tax upon the franchise of a railway company impairs the obligation of a charter exemption from any property tax other than one based on its net profits.

[For other cases, see Constitutional Law, 1362, 1363, in Digest Sup. Ct. 1908.]

tax. *Wallace v. Cornersville & L. Turnp. Co.* 92 Tenn. 369, 22 S. W. 75.

A foreign corporation purchasing a domestic railroad, and afterwards incorporated in the same state with "all the rights, privileges, and powers" of its vendor, is not thereby invested with the tax immunity of the original company. *Nashville, C. & St. L. R. Co. v. Com.* 97 Ky. 162, 30 S. W. 200.

To the contrary is *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326, holding that a grant of "all the rights, powers, and privileges" of the old corporation carries its exemption over to the new one.

The recital, in an act incorporating a railroad company, of a charter granted it by another state into which its line was projected, followed by a provision that such railroad shall be a domestic body corporate with all the powers and privileges given by its foreign charter, invests the company thus created with the same exemption from taxation that the other state gave it. *Atlantic, T. & O. R. Co. v. Mecklenburg*, 87 N. C. 129.

The addition of the word "immunity" to the words "rights" and "privileges" was regarded in *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471, as sufficient to pass the exemption from taxation enjoyed by an earlier corporation, and the same view had been taken by the Tennessee supreme court. 91 Tenn. 566, 19 S. W. 1044.

When the state makes an agreement with parties for the leasing of a state railroad, and confers on such road in such agreement

Taxes — exemption — consolidation of corporations.

6. No immunity from taxation which did not then exist was conferred by Ga. act of January 21, 1852, authorizing the consolidation of the stocks of two railway companies under the name and style of one of such companies, which should continue to exercise all the powers and privileges conferred by existing law upon the corporation of that name, and be under all the liabilities and restrictions imposed upon it.

[For other cases, see Taxes, 453-458, in Digest Sup. Ct. 1908.]

Taxes — exemption — charter grant of rights equal to other corporations.

7. Incorporating a railway company with power to exercise all the powers and privileges conferred by an earlier act incorporating another railway company does not confer upon the new corporation the immunity from taxation enjoyed by the earlier company under its charter.

[For other cases, see Taxes, 367-371, in Digest Sup. Ct. 1908.]

[No. 70.]

Argued January 11, 1910. Decided February 21, 1910.

A PPEAL from the Circuit Court of the United States for the Northern District of Georgia to review a decree enjoining the

the same "exemptions, privileges, immunities, rights, and guaranties," and imposes the same "liabilities, disabilities, and public burdens, and no more," as are possessed by the rest upon certain named and previously chartered railroads which are severally exempt from taxation beyond a stated percentage of their net incomes, and requires the lessees to incorporate, the new corporation and leased road cannot be subjected to a higher rate of taxation, or a different tax, notwithstanding an antecedent outstanding general statute enacting that every private charter thereafter granted shall be subject to the right of the state to withdraw the franchise, unless such right is expressly surrendered in such charter. *Western & A. R. Co. v. State*, 54 Ga. 428.

But, when the charter of a railroad corporation gives it immunity, to a certain extent and under certain circumstances, from taxation, and also extends to it, "as fully as if the same had been inserted" therein, "all the rights, privileges, immunities, and franchises" of another railroad not inconsistent with its own charter, its immunity from taxation is not enlarged by reference to the other charter, which gives the other company a right to commute and be exempt from taxes by provisions fundamentally different from those upon the same subject in the last charter. *St. Louis, I. M. & S. R. Co. v. Berry*, 41 Ark. 509, affirmed in 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529.

collection of certain taxes upon the property of a railway company, which are alleged to impair the contract obligations of such company. Modified by excluding from the benefits of the charter exemption the property of a branch railroad acquired by consolidation, and, as so modified, affirmed.

See same case below, 132 Fed. 912.

The facts are stated in the opinion.

Messrs. John C. Hart and Samuel H. Sibley argued the cause, and, with Mr. Boykin Wright, filed a brief for appellants:

The case finally made by the amended petition, and relied on and sustained by the court below, turned upon the effect as an estoppel of the judgment upon the taxes of 1874. The effect as an estoppel of the judgment of a state court is a local, and not a Federal, question.

Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 26, 45 L. ed. 408, 21 Sup. Ct. Rep. 282; Phoenix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471; Covington v. First Nat. Bank, 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. Rep. 562.

The last deliberate opinion of the state court of last resort upon the application of the tax laws of the state to the charter contract of the appellee, while not binding upon this court, will be given great consideration.

Jetton v. University of the South, 208 U. S. 499, 52 L. ed. 588, 28 Sup. Ct. Rep. 375.

The judgment of a Federal court upon the existence and extent of a tax exemption is an estoppel in future litigation.

Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252.

But what effect an adjudication of a state court has on future litigation is not even a Federal question. When the litigant proposes, as here, to stand not on his rights under the charter contract and the Federal Constitution, but chooses instead to stand on his rights under a former judgment of a state court, his rights depend upon the laws of that state alone. This court could not review the decision of the state courts upon them.

Yazoo & M. Valley R. Co. v. Adams, and Phoenix F. & M. Ins. Co. v. Tennessee, *supra*.

Since manifestly the effect as an estoppel of the judgment of a state court ought to be no greater when pleaded in one court than in another, the Federal courts, when exercising original jurisdiction, will give the former judgment in the state court the same effect, and no more, than it would be given in the state courts. If the rule is in the state courts that tax matters are not

within the scope of *res judicata*, and that a judgment in a contest over taxes for one year is no estoppel in litigation over taxes of another year, the rule will be observed by the Federal courts.

Union & Planters' Bank v. Memphis, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604; Covington v. First Nat. Bank, *supra*; Goldsmith v. Georgia R. & Bkg. Co. 62 Ga. 490; Georgia R. & Bkg. Co. v. Wright, 124 Ga. 596, 53 S. E. 251.

But if the general rules of estoppel as applied to tax matters by Federal courts be regarded, the issues here raised are not foreclosed because not actually and necessarily decided in the other judgment.

Hunter v. Davis, 19 Ga. 413; Draper v. Medlock, 122 Ga. 234, 69 L.R.A. 483, 50 S. E. 113, 2 A. & E. Ann. Cas. 650; Memphis City Bank v. Tennessee, 161 U. S. 186, 40 L. ed. 664, 16 Sup. Ct. Rep. 468; New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

The rule of construction is strictness in favor of the right to tax. No exemption will arise from implication. If there be doubt or ambiguity in the language, the doubt will be invariably resolved in favor of the state. Whether the question be as to the existence of any exemption, or as to the extent of an admitted exemption, the rule is the same.

Young v. McKenzie, 3 Ga. 31; McLcod v. Burroughs, 9 Ga. 214; Shorter v. Smith, 9 Ga. 517; Macon v. Central R. & Bkg. Co. 50 Ga. 620; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 176, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; Southwestern R. Co. v. Wright, 116 U. S. 231, 29 L. ed. 626, 6 Sup. Ct. Rep. 375; Phoenix F. & M. Ins. Co. v. Tennessee, *supra*; Ford v. Delta & P. Land Co. 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. Rep. 230; Bank of Commerce v. Tennessee, 161 U. S. 134, 146, 40 L. ed. 645, 649, 16 Sup. Ct. Rep. 456; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 22, 45 L. ed. 395, 407, 21 Sup. Ct. Rep. 240.

The legislature appreciated the difference between exempting stock and property.

Central R. & Bkg. Co. v. Wright, 164 U. S. 327, 41 L. ed. 454, 17 Sup. Ct. Rep. 80.

The analogy of corporate taxation at the time would suggest that the capital stock, and not the property, was considered.

Augusta v. Georgia R. & Bkg. Co. 26 Ga. 663.

If the case of Georgia v. Georgia R. & Bkg. Co. 54 Ga. 423, is not available as an estoppel, it is destroyed as an authority by the case of Goldsmith v. Georgia R. & Bkg. Co. 62 Ga. 485.

The shares in the hands of the shareholders and the capital stock in the hands of the corporation are separate and distinct

properties, and the taxation or exemption of one is not the taxation or exemption of the other.

Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *Shelby County v. Union & Planters' Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537.

The exemption of the capital stock of this corporation does not exempt the surplus value of its property.

Hightower v. Thornton, 8 Ga. 500, 52 Am. Dec. 412; *Farrington v. Tennessee*, supra; *Bank of Commerce v. Tennessee*, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456; *Goldsmith v. Georgia R. & Bkg. Co.* supra.

If the term "stock" can be held to cover "property" at all, it is only by the equitable impressment of the attributes of the money which the corporators contributed as the original stock, and cannot be extended beyond the values and the properties so contributed, so as to include these unchangeable, intangible properties contributed by the state, as to the taxation of which no stipulation was made or intended.

St. Louis, I. M. & S. R. Co. v. Loftin, 98 U. S. 559, 25 L. ed. 222.

The fact that a franchise had never been taxed when the stipulations were made may explain why no agreement was made respecting it, but does not operate to hinder bringing within the power of taxation the new subject-matter.

Jetton v. University of the South, 208 U. S. 500, 52 L. ed. 588, 28 Sup. Ct. Rep. 375.

It is not a case of singling out the franchises granted these corporators for special taxation, and so putting an additional burden specifically upon their business, and thus indirectly making them purchase again their privileges under the charter; but it is simply the general exercise of the right to tax, operating uniformly upon all property within the state of this character.

Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760.

The stock or the property represented in the Washington branch is not within the charter contract.

Tomlinson v. Branch, 15 Wall. 460, 21 L. ed. 189; *Minot v. Philadelphia, W. & B. R. Co.* 18 Wall. 206, 21 L. ed. 888; *Philadelphia, W. & B. R. Co. v. Maryland*, 10 How. 376, 13 L. ed. 461; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471; *Annapolis & E. Ridge R. Co. v. Anne Arundel County*, 103 U. S. 1, 26 L. ed. 359; *Memphis & C. R.* 548

Co. v. Gaines, 97 U. S. 697, 24 L. ed. 1091; *Rochester R. Co. v. Rochester*, 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469; *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813.

Mere nonuser by a government of its power to levy a tax, it matters not for how long continued, can never be construed into a forfeiture of the power.

Wells v. Savannah, 181 U. S. 531, 45 L. ed. 986, 21 Sup. Ct. Rep. 697, 107 Ga. 1, 32 S. E. 669.

Mr. Hooper Alexander also filed a brief for appellants:

An exemption of "the stock" does not exempt "the property."

Providence Bank v. Billings, 4 Pet. 514, 561, 7 L. ed. 939, 955; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 436, 14 L. ed. 997, 1005; *Minot v. Philadelphia, W. & B. R. Co.* 18 Wall. 206, 226, 21 L. ed. 888, 894; *Tucker v. Ferguson*, 22 Wall. 527, 575, 22 L. ed. 805, 816; *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 674, 23 L. ed. 757, 761; *Farrington v. Tennessee*, 95 U. S. 679, 686, 24 L. ed. 558, 560; *St. Louis, I. M. & S. R. Co. v. Loftin*, 98 U. S. 559, 564, 25 L. ed. 222, 224; *Philadelphia, W. & B. R. Co. v. Maryland*, 10 How. 376, 393, 13 L. ed. 461, 468; *West Wisconsin R. Co. v. Trempealeau County*, 93 U. S. 595, 597, 23 L. ed. 814, 815; *Hoge v. Richmond & D. R. Co.* 99 U. S. 348, 355, 25 L. ed. 303, 304; *Bank of Commerce v. Tennessee*, 161 U. S. 134, 146, 40 L. ed. 645, 649, 16 Sup. Ct. Rep. 456; *Memphis & St. L. R. Co. v. Loftin*, 105 U. S. 258, 261, 26 L. ed. 1042, 1043; *Bank of Commerce v. Tennessee*, 104 U. S. 493, 26 L. ed. 810; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 177, 40 L. ed. 660, 661, 16 Sup. Ct. Rep. 471; *Central R. & Bkg. Co. v. Wright*, 164 U. S. 327, 335, 336, 41 L. ed. 454, 457, 458, 17 Sup. Ct. Rep. 80.

This court recognizes as existing in connection with all corporations four separate and distinct elements of taxable value: 1. Franchises; 2. Capital stock in the hands of the corporation; 3. Corporate property (and by this we take it that the court refers to physical property); 4. Shares of stock in the hands of the corporators.

Tennessee v. Whitworth, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645; *Farrington v. Tennessee*, supra; *Powers v. Detroit, G. H. & M. R. Co.* 201 U. S. 560, 50 L. ed. 866, 26 Sup. Ct. Rep. 556.

And it has been frequently asserted that these four are all separate and distinct objects for taxation.

Bank of Commerce v. Tennessee, supra; *Shelby County v. Union & Planters' Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct.

Rep. 558; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537.

An exemption of the "stock," even where there is no other evidence as to its meaning, is *a fortiori* to be deemed the shares of stock in the hands of the shareholders.

Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; Memphis & C. R. Co. v. Gaines, 97 U. S. 697, 24 L. ed. 1091; Tennessee v. Whitworth, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645; Shelby County v. Union & Planters' Bank, and Bank of Commerce v. Tennessee, *supra*.

Legislative contracts should be read in the light of the public policy entertained, and the purposes sought to be accomplished, at the time they were made.

Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968.

Doubt is fatal to the exemption.

Farrington v. Tennessee, *supra*.

Even in those jurisdictions where a judgment as to taxes is forever conclusive, as well on all questions which might have been presented and decided, as on those which were, such a judgment is conclusive only in cases identical with the one relied on.

Nesbit v. Independent Dist. 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592.

But in Georgia a judgment in a tax case is not an estoppel at all, except as to the taxes for the year concerning which the judgment was rendered.

Georgia R. & Bkg. Co. v. Wright, 124 Ga. 596, 53 S. E. 251.

Such a rule in any state as to the legal force and effect of the judgments of its own courts is recognized as binding upon this court.

Union & Planters' Bank v. Memphis, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604.

It does not even raise a Federal question, so as to give jurisdiction.

Phoenix F. & M. Ins. Co. v. Tennessee, *supra*.

While this court usually accepts the interpretation put upon state statutes by its own courts, it has long been settled that where the existence of, or effect of, a contract is in question, this court must and will decide these matters and interpret the alleged contract for itself.

Ohio Life Ins. & T. Co. v. Debolt, 16 How. 416, 14 L. ed. 997; Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173. 54 L. ed.

Upon this question the Federal courts will, if necessary, depart from the interpretations of the state judiciary, as well in order to sustain the later law, where it does not infringe upon the Constitution, as to avoid it when it does.

Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193.

Even if the word "stock" in this charter were held to mean the aggregate capital, the presumption is that a tax on the capital of a corporation does not exempt the property into which it passes, and before it will be held so to do it must affirmatively appear that such was the legislative intent.

Memphis & C. R. Co. v. Gaines; Tennessee v. Whitworth; and St. Louis, I. M. & S. R. Co. v. Loftin,—*supra*.

If it was deemed necessary by the legislature affirmatively to declare that the company, even after the thirty-six years, should still retain its existence and its other "privileges," the declaration to that effect necessarily excludes any presumption that it was also to retain its "immunities."

Memphis & C. R. Co. v. Gaines, *supra*; Home Ins. & T. Co. v. Tennessee, 161 U. S. 198, 40 L. ed. 669, 16 Sup. Ct. Rep. 476; Phoenix F. & M. Ins. Co. v. Tennessee, *supra*.

Mr. Ligon Johnson also filed a brief for appellants county of Wilkes and county of Taliaferro:

No exemption from taxation can be made by implication, and extending to one corporation the powers and privileges previously conferred upon another will not convey immunity from taxation.

Memphis & C. R. Co. v. Gaines, 97 U. S. 711, 24 L. ed. 1094; Phoenix F. & M. Ins. Co. v. Tennessee, 161 U. S. 177, 40 L. ed. 661, 16 Sup. Ct. Rep. 471; Home Ins. & T. Co. v. Tennessee, 161 U. S. 200, 40 L. ed. 670, 16 Sup. Ct. Rep. 476; Picard v. East Tennessee, V. & G. R. Co. 130 U. S. 642, 32 L. ed. 1053, 9 Sup. Ct. Rep. 640; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 588, 41 L. ed. 563, 17 Sup. Ct. Rep. 198.

Exemptions from taxation are regarded as in derogation of sovereign authority and common rights, and not to be extended beyond the exact and express requirements of the language used, construed *strictissima juris*.

Yazoo & M. Valley R. Co. v. Thomas, 132 U. S. 185, 33 L. ed. 306, 10 Sup. Ct. Rep. 68; Ford v. Delta & P. Land Co. 164 U. S. 666, 41 L. ed. 592, 17 Sup. Ct. Rep. 230.

Even though the state of Georgia had not specifically declared that no exemption

should exist under this consolidation, the exemption of the charter could not apply to any branches subsequently authorized, unless extended to them in terms.

Central R. & Bkg. Co. v. Georgia, 92 U. S. 667, 23 L. ed. 759; Chesapeake & O. R. Co. v. Virginia, 94 U. S. 726, 24 L. ed. 312; State ex rel. Wine v. Keokuk & W. R. Co. 99 Mo. 36, 6 L.R.A. 222, 12 S. W. 290, 152 U. S. 305, 38 L. ed. 453, 14 Sup. Ct. Rep. 592; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 300, 36 L. ed. 980, 13 Sup. Ct. Rep. 72; Keokuk & W. R. Co. v. Scotland County Ct. 152 U. S. 325, 38 L. ed. 462, 14 Sup. Ct. Rep. 605; Central R. & Bkg. Co. v. Wright, 164 U. S. 331, 41 L. ed. 455, 17 Sup. Ct. Rep. 80; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 25, 45 L. ed. 408, 21 Sup. Ct. Rep. 240.

Mr. Joseph R. Lamar argued the cause and filed a brief for appellee:

The provision in the charter of the Georgia Railroad, that the stock shall be subject to a tax not exceeding $\frac{1}{2}$ of 1 per cent on the net proceeds of their investment is a contract with the company, and not with the shareholders.

State v. Georgia R. & Bkg. Co. 54 Ga. 423; Gardner v. Georgia R. & Bkg. Co. 117 Ga. 525, 43 S. E. 863.

In the charter of the Georgia Railroad the word "company" is uniformly used as a plural noun; "their investments" being equivalent to "its investments;" and has been repeatedly so used by the supreme court of Georgia in construing this very charter.

State v. Georgia R. & Bkg. Co. 54 Ga. 427; Gardner v. Georgia R. & Bkg. Co. supra; Augusta v. Georgia R. & Bkg. Co. 26 Ga. 661.

The provision that the stock should be subject to an income tax not exceeding $\frac{1}{2}$ of 1 per cent on the net profits, by necessary implication prohibited any other subject or method of taxation.

Smith v. Stevens, 10 Wall. 321, 19 L. ed. 933; Sutherland, Stat. Constr. § 204.

The stock of the company as stock, as a unit, is alone what is to be subject to the tax; not parts of the stock, as the parts used in banking; not the particulars in which the stock consists, as the land, cars, rails, etc.

Augusta v. Georgia R. & Bkg. Co. supra.

Exemption of stock exempts from taxation all property of the company used for railroad purposes, and contributing to the creation of the taxed income.

State v. Georgia R. & Bkg. Co. and Augusta v. Georgia R. & Bkg. Co. supra; Western & A. R. Co. v. State, 54 Ga. 429;

Rome R. Co. v. Rome, 14 Ga. 275; State v. Western & A. R. Co. 66 Ga. 567; Memphis & C. R. Co. v. Gaines, 97 U. S. 707, 24 L. ed. 1093; Bank Tax Case (New York ex rel. Bank of Commonwealth v. Tax & A. Comrs.) 2 Wall. 208, 17 L. ed. 795; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Powers v. Detroit, G. H. & M. R. Co. 201 U. S. 561, 50 L. ed. 866, 26 Sup. Ct. Rep. 556.

Under the act of 1902, the franchise tax is a property tax. The exemption of stock exempts all of the railroad property, tangible and intangible, including the franchise.

Citizens' Bank v. Parker, 192 U. S. 74, 48 L. ed. 347, 24 Sup. Ct. Rep. 181; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 221, 41 L. ed. 977, 17 Sup. Ct. Rep. 604; Wilmington & W. R. Co. v. Reid, 13 Wall. 264, 20 L. ed. 568; Western & A. R. Co. v. State, supra; State v. Baltimore & O. R. Co. 48 Md. 49; Anne Arundel County v. Annapolis & E. Ridge R. Co. 47 Md. 592; Marion Nat. Bank v. Burton, 121 Ky. 876, 10 L.R.A.(N.S.) 948, 90 S. W. 944; Hancock v. Singer Mfg. Co. 62 N. J. L. 239, 42 L.R.A. 852, 41 Atl. 850.

The Washington branch is exempt, for both the constituent companies and the consolidated company had the tax privilege under statutes passed before the Code of 1863, when the state, for the first time, reserved the power to amend and repeal private charters.

Tennessee v. Whitworth, 117 U. S. 145, 29 L. ed. 835, 6 Sup. Ct. Rep. 649; Green County v. Conness, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. Rep. 69; Central R. & Bkg. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757.

While the minimum capital was \$1,500,000, the increase up to \$4,156,000 is also exempt from taxation. It was so held in 1859, after the Washington branch had been acquired, and after the stock had been increased beyond \$4,000,000.

Augusta v. Georgia R. & Bkg. Co. supra.

The value of the property in excess of \$4,156,000 is exempt from taxation, such excess not being surplus, but representing merely the enhanced value of the property in use solely for railroad purposes.

State v. Western & A. R. Co.; State v. Georgia R. & Bkg. Co.; and Augusta v. Georgia R. & Bkg. Co.,—supra.

The payment of this income tax covers also such property as may be necessary and proper for the use and enjoyment of the franchise secured by the lease to the company, whether it was received from the state, or has been purchased since the lease began.

State v. Western & A. R. Co. *supra*. See also Western & A. R. Co. v. State, *supra*.

Judge Bleckley's suggestion in Goldsmith v. Georgia R. Co. 62 Ga. 485, that property in excess of the value of the capital is subject to taxation, was necessarily *obiter*, because that case was dismissed for want of jurisdiction.

Hughes v. United States, 4 Wall. 237, 18 L. ed. 305.

The suggestion is not binding even as a precedent. It is contrary to the ruling in Augusta v. Georgia R. & Bkg. Co. 26 Ga. 662, and State v. Georgia R. & Bkg. Co. *supra*, and by statute in Georgia, in case of a conflict, the older decision prevails and is binding until expressly overruled.

Calhoun v. Cawley, 104 Ga. 344, 30 S. E. 773; Strickland v. State, 115 Ga. 226, 41 S. E. 713.

In view of the dissent in Georgia R. & Bkg. Co. v. Wright, 124 Ga. 597, 53 S. E. 251, there is no settled law in Georgia as to the effect of a judgment in a tax case when offered in support of a plea of *res judicata* in a suit involving the taxes of a subsequent year.

The court therefore properly followed the ruling of this court on that subject in New Orleans v. Citizens' Bank, 167 U. S. 396, 42 L. ed. 210, 17 Sup. Ct. Rep. 905; Deposit Bank v. Frankfort, 191 U. S. 499, 522, 48 L. ed. 276, 285, 24 Sup. Ct. Rep. 154.

Even if the effect to be given a tax judgment under a plea of *res judicata* is to be governed by state law, the amendment filed by the railroad did not oust the court of jurisdiction, for the original cause arose under the Constitution of the United States, and the injection of a non-Federal question forming an ingredient of the case would not defeat the original and rightful jurisdiction.

Osborn v. Bank of United States, 9 Wheat. 820, 823, 6 L. ed. 223, 224; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 32, 31 L. ed. 612, 8 Sup. Ct. Rep. 741; Tennessee v. Davis, 100 U. S. 264, 25 L. ed. 650.

The thirty-six-year limitation referred to the exclusive right to build railroads in a strip 40 miles wide, and had no relation to the later and independent enactment as to tax exemption.

Home of the Friendless v. Rouse, 8 Wall. 437, 19 L. ed. 497; Powers v. Detroit, G. H. & M. R. Co. 201 U. S. 559, 50 L. ed. 865, 26 Sup. Ct. Rep. 556.

In construing the charter, the court will consider the history of the time and the public purpose to be served in encouraging the building of the state's first railroad.

Citizens' Bank v. Parker, *supra*; Baltimore v. Baltimore & O. R. Co. 6 Gill, 288, 54 L. ed.

48 Am. Dec. 536; Augusta v. Georgia R. & Bkg. Co. and Rome R. Co. v. Rome, *supra*.

Mr. Joseph B. Cumming also argued the cause and filed a brief for appellee.

Mr. Alexander C. King and Messrs. King & Spalding also filed a brief for appellee:

The word "stock" is used in the sense of the "property" of the company.

Rome R. Co. v. Rome, 14 Ga. 276; Augusta v. Georgia R. & Bkg. Co. 26 Ga. 652; Bibb County v. Central R. & Bkg. Co. 40 Ga. 646; State ex rel. South Carolina R. Co. v. Hood, 15 Rich. L. 177; Central R. & Bkg. Co. v. Wright, 164 U. S. 327, 331, 41 L. ed. 454, 455, 17 Sup. Ct. Rep. 80; State v. Georgia R. & Bkg. Co. 54 Ga. 423.

The construction of the Georgia courts is therefore but a declaration of the plain legislative intent.

Rome R. Co. v. Rome; Augusta v. Georgia R. & Bkg. Co.; and State v. Georgia R. & Bkg. Co.,—*supra*.

The railroad plant includes the franchises.

Atlanta v. Grant, 57 Ga. 346; Farmers' Loan & T. Co. v. Candler, 87 Ga. 241, 13 S. E. 560; Wilmington & W. R. Co. v. Reid, 13 Wall. 264, 268, 20 L. ed. 568, 570; People ex rel. Burke v. Badlam, 57 Cal. 594, 601; Frederick County v. Farmers' & M. Nat. Bank, 48 Md. 120; Scotland County v. Missouri, I. & N. R. Co. 65 Mo. 124; State, Belvidere Bank, Prosecutor, v. Tunis, 23 N. J. L. 547; Morgan v. Louisiana, 93 U. S. 217, 223, 23 L. ed. 860, 861.

A decision in a tax case construing a charter should be *res judicata* in subsequent cases arising under such charter, as to the points decided.

New Orleans v. Citizens' Bank, 167 U. S. 396, 42 L. ed. 210, 17 Sup. Ct. Rep. 905; Southern P. R. Co. v. United States, 168 U. S. 1-48, 42 L. ed. 355-376, 18 Sup. Ct. Rep. 18; Goldsmith v. Georgia R. & Bkg. Co. 62 Ga. 485.

Where the state decisions at the time do not prescribe another rule, the Federal court will follow its own views.

Carroll County v. Smith, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576.

Subsequent changes of view or subsequent decisions on points not previously settled cannot control rulings made before their utterance, or make them erroneous.

Pease v. Peck, 18 How. 595, 599, 15 L. ed. 518, 520; Morgan v. Curtenius, 20 How. 1, 15 L. ed. 823; Roberts v. Bolles, 101 U. S. 119, 128, 25 L. ed. 880, 884.

The unbroken practice of the departments of government, acquiesced in by the legislature for a long series of years, is persuasive.

sive evidence as to the true meaning of a statute.

Howell v. State, 71 Ga. 224, 51 Am. Rep. 259; Solomon v. Cartersville, 41 Ga. 157; Macon & A. R. Co. v. Little, 45 Ga. 370; Miller v. Wilson, 60 Ga. 505; Wellborn v. Estes, 70 Ga. 390; Park v. Candler, 114 Ga. 501, 40 S. E. 523.

The privilege in regard to taxation covered the Washington branch.

Augusta v. Georgia R. & Bkg. Co. and State v. Georgia R. & Bkg. Co. *supra*; Humphrey v. Pegues, 16 Wall. 244, 247, 21 L. ed. 326, 327; Tennessee v. Whitworth, 117 U. S. 139, 145, 146, 29 L. ed. 833, 835, 6 Sup. Ct. Rep. 649.

Words, even in the charter of a corporation, conferring valuable franchises, are commonly to be taken according to their natural import.

Augusta v. Georgia R. & Bkg. Co. *supra*.

Mr. Justice Lurton delivered the opinion of the court:

This is a bill to restrain the enforcement of certain taxes imposed by the state of Georgia, which the railroad company claims to be in violation of a contract between itself and the state. The court below sustained the contention of the railroad company, and held that the scheme of taxation found in the charter of the company was of inviolable obligation, and enjoined any method of taxation conflicting with the stipulations of the charter; from this decree the comptroller has appealed.

The charter in question was granted by the state of Georgia in 1833,—a time long before the imposition of any restriction upon the power of the legislature of that state to stipulate for either an entire or partial exemption from taxation. It is, therefore, not denied by the state that the charter constitutes a contract which may not be impaired by subsequent legislation. In view of this concession we are only called upon to decide the extent of the charter exemption, and, incidentally, its duration.

The controlling section of the charter is the fifteenth. The part now relevant is as follows:

"The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads, or any of them; and after that, shall be subject to a tax not exceeding $\frac{1}{2}$ of 1 per cent per annum, on the net proceeds of their investments."

The period of absolute exemption has, of course, long since passed. The only question is as to the duration and extent of the partial exemption which followed.

That the property exempt altogether for seven years is the same property subject to a limited tax thereafter was long ago [423] decided by the supreme court of Georgia in a case which involved the interpretation of this very contract. *Augusta v. Georgia R. & Bkg. Co.* 26 Ga. 651, 661, *et seq.* The question in that case was as to the legality of municipal taxes assessed by the city of Augusta upon that part of the capital of the company employed in its banking business and upon real estate situated in that city. The taxes were held illegal. Interpreting this section, that court said:

"It means, first, that the stock of the company was to be subject to a tax, but not to any tax exceeding $\frac{1}{2}$ of 1 per cent on the net proceeds of its investments." Second. "That the stock of the company, as stock, as a unit, is alone what is to be subject to the tax; not parts of the stock, as the part used in banking, nor the particulars in which the stock consists, as, the land, cars, rails, etc." Third. "That this tax to which the stock is to be subject is to be a tax to be laid by the state."

We may as well turn to one side just here to deal first with the question of the duration of this commuted tax which is to follow the period of tax exemption, because we construe the words "after that," which immediately follow the exemption clause, as synonymous with "thereafter," and as fixing the time when that property which was theretofore exempt should be subject to the system of taxation provided by the succeeding clause.

It has been rather faintly urged that the duration of this commuted tax or partial exemption was limited to a term of thirty-six years after the completion of the railroad, and that this period has long since expired. This suggested limitation seems to have no other basis than that the words "and after that" do not mean "thereafter," as we have assumed, nor refer to the limitation immediately preceding, but to a more remote limitation found in the 2d section of the charter, and again in the earlier part of the 15th section. But the thirty-six-year limitation is one obviously applicable only to the grant of an exclusive [424] right, within a defined territory, to construct and operate railroads. This was intended to protect this pioneer railroad from being paralleled within that time. The recurrence to this exclusive right in the first part of the 15th section is only for the purpose of placing a condition thereon which, as matter of fact, never happened, and which, therefore, never became vested, and to provide that the termination of that right should not otherwise affect the corporate existence, estate, powers, or privileges of

the company. This reference to the exclusive right conferred first by the 2d section is followed by the provision above set out, providing that "the stock of the said company and its branches shall be exempt from taxation for and during seven years from and after the completion of said railroads, or any of them, and after that shall be subject to a tax not exceeding $\frac{1}{2}$ of 1 per cent per annum on the net proceeds of their investment." "After that" obviously refers to the last limitation,—the termination of the exemption period,—and it would be an indefensible construction to construe the words as referring it to the thirty-six-year limitation of the exclusive right regulated by the preceding part of the same section.

Coming now to the question as to what is the meaning and scope of the partial exemption found in this clause, we are confronted, first, with the contention that only the shares in the hands of shareholders are within either the first or second clause of this contract, and that the entire property of the company is subject to the taxing power of the state, unaffected by any contract for any stipulated form of limited taxation. This claim is, of course, bottomed on the contention that "stock of the said company and its branches" refers to and means only the shares in the capital stock held by the shareholders, and that the benefit of the stipulation was intended for the shareholders in their character as such.

The word "stock" is not uniformly used to designate the capital of a corporation, although its primary meaning is capital, in whatever form it may be invested. Indeed, it [425] is *not at all unusual to find the word used synonymously with "shares," and meaning the certificates issued to subscribers to the company's stock. It is therefore important to look at the connection in which the word is used when an exemption or substituted method of taxation is involved, to see whether the legislative intent was to exempt the capital of the company, in whatever form invested, or the shares of stock in the hands of the shareholders. *Powers v. Detroit, G. H. & M. R. Co.* 201 U. S. 543, 559, 50 L. ed. 860, 865, 26 Sup. Ct. Rep. 556. There is an obvious distinction between the capital stock of an incorporated company and the "shares" of the company. The one is the capital upon which the business is to be undertaken, and is represented by the property of every kind acquired by the company. Shares are the mere certificates which represent a subscriber's contribution to the capital stock, and measure his interest in the company. The charter, plainly enough, recognized this. Thus, in the 3d section, it is provided that "*the stock of the company . . . shall* 54 L. ed.

consist of 15,000 shares of \$100 per share, and *the said company to be formed on that capital.*" By a later section the times and places for taking subscriptions are defined, "so that, on summing up the whole, it may appear whether *the stock* is filled up, or *falls short of the aforesaid capital.*" In the 7th section we find the interest of the subscribers to the "stock" recognized and described as shares, while the capital of the company in which he holds such shares is described as "the stock of the said company." Thus, each subscriber is given "a number of votes equal to the number of shares he may hold in the *stock* of the company." That "stock," as used, means "capital," in whatever form invested, appropriate to the purpose of the company, is also plainly evidenced by the provision that, after the total exemption period, this stock shall be subjected to a specific tax "on the net proceeds of their investments." It has been suggested that by "their investments" was meant the investments of the shareholders in the company's stock. This interpretation is based upon *the use of [426] the plural "their;" but in many places in this same charter the company is referred to in the plural. As this same act provides for the organization of one or more companies to construct branch lines, and extends to them the same tax exemption, it is grammatically correct to read "their" as referring to this plurality of companies. That "stock" in the first clause means capital, and "their investments," the property into which the company's capital has gone, seems, in any view you take of it, the most rational interpretation of the matter. That the only mode of taxation stipulated for after the period of total exemption is a tax upon the net income of the company's property is seemingly the plain and obvious meaning of this contract. That this is the way in which it has been read and interpreted by everybody who has had to do with the matter of taxation in an official way since 1845, when the railroad seems to have been finished, affords strong evidence that this construction accords with the intent of the charter. Aside from at least sixty years of legislative and executive acquiescence in reading this partial exemption as applicable to the capital stock of the company, there has been a series of cases decided by the supreme court of Georgia which involved the meaning of this clause. In each case the court has held, either, that the whole of the capital was exempt, in whatever form invested, or so much of the investment as corresponded in value to the authorized capital stock. *Augusta v. Georgia R. & Bkg. Co.* 26 Ga. 651, 662, *et*

seq.; State v. Georgia R. & Bkg. Co. 54 Ga. 423; Goldsmith v. Georgia R. Co. 62 Ga. 485.

In the case of State v. Georgia R. & Bkg. Co. cited above, the court held that the act of 1874, which sought to assess an ad valorem tax against the property of the railroad company, was void, as in violation of the obligation of a contract by which the state was limited to a tax which should not exceed 1 per cent "on its earnings." *Goldsmith v. Georgia R. Co. is relied upon as overruling the earlier case. But this is a mistake for more than one reason. That case was dismissed for want of jurisdiction over the subject of the legality or illegality of the tax resisted. Hence, all that was said about the taxability of the appellee's property under this charter exemption was *obiter*. But so far as the question of the applicability of this partial exemption to the capital of the company, as invested in its railroad, is concerned, the opinion distinctly accepts the former case as a settlement of the question. Referring to the former case, Mr. Justice Bleckley said:

"It seems to have been the purpose of this court to hold in 54 Ga. 423, that except as to stock issued under the amendment of 1868, authorizing the Clayton branch, the limit put by the charter of the Georgia Railroad & Banking Company upon the taxing power extends to all the capital stock of the corporation as a railroad company, and is irrevocable. These questions were fairly involved in that case, and the adjudication of them there announced ought to be accepted as final."

That Mr. Justice Bleckley afterward concluded that the former case had not considered or decided whether any excess of value of property over the amount of the authorized and exempt capital would be subject to an ad valorem tax is true; but that does not detract from the recognition of the former as an authoritative opinion upon the point that the exemption was of the capital of the company.

We come now to the question as to whether so much of the value of the company's railroad and appurtenances as exceeds in value the amount of the authorized capital stock, under the charter and amendments prior to 1863, is subject to taxation as other property of like character, under the law of the state. This value "it is admitted exceeds by four millions of dollars the nominal value of the capital stock of said company," which excess, it is further conceded, has been "the result of natural increase in the value of said property, and by renewals, alterations, and betterments

of the same, from time to time, by said company."

That this is the true and proper method of taxation, admissible under the charter exemption, has been urged upon several grounds. First, it is said that this construction was given this very charter in Goldsmith v. Georgia R. Co. heretofore cited, and the appellants plead the judgment in that suit as *res judicata*. Confessedly, if this is a good plea, it must operate not only for the purpose for which it has been interposed, but will be entirely fatal to the claim that the exemption now in question has expired, or that it extended only to the shares in the hands of shareholders.

The opinion in that case does so construe the exemption, but, as we have already shown, the case went off wholly upon the question as to whether the trial court had any jurisdiction of the question, and the opinion, after construing the clause here involved, passed on to this matter as to whether the question could be made under the statutory remedy resorted to by the company, and concluded by holding that, whether the railroad company had been taxed illegally or not, the court below ought to have dismissed the proceeding for want of jurisdiction, and that the remedy, if any, was by bill in equity. Accordingly, the judgment which the supreme court entered was one which reversed the judgment below, and directed that the proceeding be dismissed for want of jurisdiction. This judgment in no way involved the construction of this exemption contract, nor the liability of the Georgia Railroad Company to taxation upon its property, or otherwise, and does not, therefore, have any efficacy as an estoppel. There was therefore no error in the ruling of the circuit court that this plea was bad. Upon the other hand, when the plea of estoppel just disposed of came in, the complainants amended their bill and set up the judgment in the earlier case of State v. Georgia R. & Bkg. Co. supra, *as an adjudication concluding not only the claim that the exemption was only of the shares in the hands of shareholders, but as an adverse decision of this claim that only so much of the "investments" of the company were exempt from a general ad valorem tax as equalled in value the authorized capital stock of the company under the charter and amendments prior to 1863.

But in Georgia R. & Bkg. Co. v. Wright, 124 Ga. 596, 53 S. E. 251, the supreme court of Georgia seems to have definitely decided that a judgment in a suit to collect a tax assessed for one year is not a bar to a suit for taxes subsequently assessed for another

year, although the question decided in the first case is the same question upon which the second suit must be also decided.

This court, as is well settled, accords to a judgment of a state only that effect given to it by the court of the state in which it was rendered. *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604; *Covington v. First Nat. Bank*, 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. Rep. 562.

We shall therefore disregard this plea, and determine the matter upon its merits, giving to the decision of the Georgia court consideration only as an authority.

Coming, then, to the question on its merits: Under the original charter and certain amendments there exists to-day an authorized capital stock of \$4,156,000. This leaves out of account a small increase under a later act, aggregating 440 shares, which capital is subject to taxation and is not now in dispute. The railroad property, including its railway, depots, equipments, and appurtenances proper, has a present value of some four millions of dollars in excess of the authorized capital. Now the contention is that, to the extent of this excess, the property of the company is assessable and taxable as other property. There is not much to be gained by the reference to *Farrington v. Tennessee*, 95 U. S. 687, 24 L. ed. 560, and *Bank of Commerce v. Tennessee*, 161 U. S. 134, 137, 40 L. ed. 645, 647, 16 Sup. Ct. Rep. 456, where something is said in an argumentative way about the taxability of a bank's surplus 430] whose capital was exempt. That *might well be if the bank should choose to enlarge its actual capital in the business by using profits as capital instead of distributing them as profits to the shareholders, where the exemption was of a specific amount of capital. The facts in this case are so different from the case presented of a bank's surplus as to make the illustration of little value, even if it were settled that in all cases a bank's surplus would be taxable although its capital was exempt. We have here nothing which corresponds very closely to a bank's surplus. An investment made nearly seventy-five years since, of \$4,156,000, has now a value of \$4,000,000 in excess of that cost. The property is the same property. The conceded fact is that through renewals, alterations, and betterments made from time to time, and the natural increase in the value of the road, this appreciation has come about. There has been no suggestion that there has been any hiding away of capital added, by either new stock, or by the use of bonds or other forms of credit, nor that the improvements made from time to time, called "renewals, al-

terations, and betterments," have been other than the necessities of an enlarging business and the improved maintenance naturally demanded. There is no suggestion that there has been any bad faith in covering up taxable assets under cover of assets immune. *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 506, 38 L. ed. 793, 800, 14 Sup. Ct. Rep. 968.

After all, the precise question is whether the legislative purpose, as expressed, was that the railroad incorporated should pay no tax except one based upon net profits of operation, or was it the intention that a specific amount of capital only should be so relieved? Undoubtedly, the state did not intend that any other capital than that authorized and invested directly in this specific railroad should be immune. That is plain by the express limitation of the charter. But is there any contingency under which this particular railroad is to be subject to any other taxation than one measured by the amount of its net profits? The contract, though one for a partial exemption from taxation, may nevertheless be read *in the light of the pur- [431] pose sought to be accomplished and the public policy entertained at the time. That is true of this as well as other contracts; namely, that the meaning may be discovered by regard to attendant circumstances. That the intent was to exempt a capital aggregating \$4,156,000, is, for the purpose of the present question, the necessary foundation of the claim now being looked at. That was, at the beginning, mere subscribers' promises to pay; next, money in the treasury of the company. While money, the charter says, it may, until needed, be invested "in the public stock of the United States or of the state of Georgia." But this capital was intended to be the only means by which this line of railroad was to be constructed and equipped. Thus, the original capital was fixed at one and a half million dollars, with power to enlarge same, "so as to make their capital adequate to the work." This power of increase does not seem to have been regarded as clear enough, and when an authorized extension of the work demanded more capital the charter was amended so as to increase it to \$4,000,000, "to meet excess of cost of road over present capital." To insure the completion of the authorized road within the limit of the fixed capital, it was provided that the engagements of the company should not exceed the company's capital, and that the officers and directors who should contract beyond that capital should be jointly and severally liable to the contractors and to the corporation. Finally, no power was given to issue bonds, the usual

incident to any modern railway construction. From the plain purpose that this authorized capital should be adequate to the construction and equipment of a particular railroad, it is plainly inferable that that railroad should be subject, after a time of complete immunity, only to a tax upon the profit of its operation. That railroad is the product of the investment of the authorized capital, and is, as such, subject only to a tax based upon its "net proceeds." This plan of tax upon net earnings is quite inconsistent with any other form [432] of taxation, and is *absolutely independent of any question as to whether the property thus taxed only upon its profits should have a less or greater value than the capital invested. A tax upon earnings is a tax which at last covers and includes, unless double taxation is intended, all property necessarily held and used to make that income, including the enjoyment of its franchises. It is not to be presumed, in the light of the public policy of the time, that the state intended that this pioneer railroad should be subjected to any form of taxation of property which produced the taxable income. *State v. Western & A. R. Co.* 66 Ga. 563, 567.

We are therefore of opinion that this property is not subject to any other method of taxation than that of the special system stipulated for by the contract, and that the act of the Georgia legislature, in so far as it provides for an ad valorem tax upon any part of this invested capital of the Georgia Railroad & Banking Company, does impair the obligation of the contract.

But it is said that the tax, so far as imposed upon the franchise of this company, is not in derogation of the charter, and that the decree below should be modified in this particular.

If we are right in construing the tax as one upon net income as a substitute for a property tax, the franchise may no more be taxed than any other property appropriate to the operation of the road. When the state gave up the right to levy and collect a property tax, and to take in substitution a tax upon the annual net profit, it gave up the right to tax the franchise of the company as certainly as it gave up the right to tax its railroad. The Georgia act taxing franchises treats the franchise as property, and requires that "they shall be returned and valued in the same way as returns are made by railroads of their physical property . . ." And that "all franchises of value shall be returned for taxation and taxed as other property." That a law which imposes a tax upon the franchise of a railroad company whose property is exempt from taxation is a law

in derogation of the exemption contract *is well settled. *Wilmington & W. [433 R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568; *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 67, 77, 46 L. ed. 87, 91, 22 Sup. Ct. Rep. 26.

Included in the total mileage owned and operated by the appellee railroad company is a line 18 miles long, known as the Washington branch. The company has all along claimed that this branch road was within the partial exemption clause of its original charter, granted in 1833. So far as appears from this transcript, this claim has not before been challenged, though no distinct issue seems ever to have been made in respect to its exclusion by reason of the legislation under which that branch was acquired. Neither does the answer of the comptroller in this case claim or set out any difference between the tax exemption applicable to the other parts of the appellee's railroad and this Washington branch, and the decree of the court below expressly finds that the original charter exemption includes this Washington branch. But the general denial that any part of the property of the railroad company was exempt from ad valorem taxation may well be regarded as covering the parts which make up the whole. To the decree holding the Washington branch exempt, the comptroller has moreover assigned error, based upon the legislation under which that branch was constructed. The right of exemption claimed for this branch was, however, distinctly put in issue by the counties of Wilkes and Taliaferro, which, for this purpose, were allowed to intervene, having a direct interest due to the fact that that branch, passing through those counties, would be subject to county taxation if not within the tax exemption clause. These counties have appealed from the decree below and assigned error also.

The first legislative enactment in regard to the construction of the Washington branch road seems to have been in the act of 1833; but nothing was ever done under that. The same may be said in reference to another act passed in 1836. In December, 1848, an act was passed in these words:

"The power heretofore granted to the Georgia Railroad & Banking Com-[434 pany to construct a branch of their road to Washington, in the county of Wilkes, be, and the same is hereby, revived and authorized to be exercised by said company, provided that the amount of the increased stock of said company (\$200,000) shall not be exempt from taxation as is secured to the present stock by the latter clause of the 15th section of the charter of said company, but

shall be subject to such tax as the legislature may hereafter impose."

But this was a section in an act amending the charter, and was never accepted. See 26 Ga. 651, 654. At the same legislative session, on February 5, 1850, another act was passed in these words:

"That [naming incorporators] be and they are hereby authorized to build, construct, and keep a plank or railroad from the town of Washington, in Wilkes county, to some point on the Georgia Railroad & Banking Company's railroad, and for that purpose shall be authorized to create and receive by subscription a capital stock not exceeding \$200,000, and shall be authorized to exercise all the powers and privileges conferred by the act of the general assembly passed in the year 1833, to incorporate the Georgia Railroad Company, and shall be under all the liabilities and restrictions therein contained."

So far as we can discover, the only legislative authority for the construction or acquirement of a branch railroad to Washington, accepted or acted under by it, is found in the act of January 21, 1852, entitled, "An Act to Authorize the Consolidation of the Stocks of the Georgia Railroad & Banking Company and of the Washington Railroad or Plank Road Company, Incorporated February the Fifth, Eighteen Hundred and Fifty, and for Other Purposes." The 1st section of that act provides:

"That the Georgia Railroad & Banking Company and the Washington Rail or Plank Road Company be authorized and empowered to consolidate their stocks, the said Georgia Railroad & Banking Company issuing stocks in their said *company to the stockholders of the Washington Railroad or Plank Road Company, on terms of equality with the general stockholders, in amount equal to the amount held by them respectively in the stock of the Washington Railroad or Plank Road Company, and that the two companies aforesaid, after the consolidation of their stocks, shall be known as one corporate body, under the name and style of the Georgia Railroad & Banking Company, and that said corporate body shall be authorized to exercise all the powers and privileges conferred by existing laws upon the Georgia Railroad & Banking Company, and be under all the liabilities and restrictions imposed on the same."

That this consolidation neither extinguished the Georgia Railroad & Banking Company, nor deprived it of any of its powers, privileges, or immunities, is plain. No such result has been claimed. Nor is it claimed that it thereby lost any tax exemption which it then had. The act authorizing the consolidation is substantially like 54 L. ed.

that under which the Central Railroad & Banking Company was consolidated with the Macon Railroad, considered in *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757, where it was held that the tax exemption which the Central Railroad had enjoyed continued after consolidation in respect of the property of that company, but that, as the Macon company, consolidated with it, had no exemption, its property continued subject to taxation. That the Washington Railroad or Plank Road Company would go out of existence when this merger was accomplished is plain; it was, indeed, absorbed by the Georgia company. The purpose was to vest in the latter all of the rights, powers, and privileges of the merged company without diminishing or enlarging them. See what is said by Chief Justice Fuller in commenting upon a similar merger in *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 300, 36 L. ed. 972, 980, 13 Sup. Ct. Rep. 72.

Did the Washington Railroad, before consolidation, possess any contract tax exemption?

The claim that it did is based upon the provision in the *act under which it [436] was incorporated, providing that it should "be authorized to exercise all the powers and privileges conferred by the act of the general assembly, passed in the year 1833, to incorporate the Georgia Railroad Company, and shall be under all the liabilities and restrictions therein contained."

The question, then, is whether, under the power "to exercise all the powers and privileges [italics ours] conferred by" the act incorporating the Georgia Railroad Company, the immunity from any other tax than one based upon a given per cent of annual net profits was granted to that company. The affirmative of this proposition finds some support in the cases of *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326; *Chesapeake & O. R. Co. v. Virginia*, 94 U. S. 718, 24 L. ed. 310; *Southwestern R. Co. v. Georgia*, 92 U. S. 676, note, 23 L. ed. 762, and *Tennessee v. Whitworth*, 117 U. S. 139, 29 L. ed. 833, 6 Sup. Ct. Rep. 649. In later cases this doctrine of a legislative transfer of a tax immunity under the term franchise, powers, estates, or privileges was questioned. Thus, in *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813, a tax immunity was held not to pass under a mortgage foreclosure sale, under the provision of a statute which authorized the purchaser to become a corporation, and "succeed to all such franchises, rights, and privileges" pertaining to the mortgagor company. In *Picard v. East Tennessee, V. & G. R. Co.* 130 U. S. 637, 642, 32 L. ed. 1051, 1053, 9 Sup. Ct.

Rep. 640, 642, it was held that such an immunity would not pass to a purchasing company under a decree enforcing a statutory lien, where the sale, as confirmed, was of the "property and franchises" of the mortgagor company. In that case it was said:

"It is true there are some cases where the term 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later, and, we think, the better, opinion, is that unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term 'privileges' it will not be so construed. It can have its full force by confining it to other grants to the corporation."

437] *In *Wilmington & W. R. Co. v. Alsbrough*, 146 U. S. 272, 297, 36 L. ed. 972, 979, 13 Sup. Ct. Rep. 72; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; and *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 630, 16 Sup. Ct. Rep. 471, the earlier cases were also much shaken, so far as they tended to establish that a tax exemption would be transferred by legislative enactment conferring upon one road the powers or franchises or privileges of another, in the absence of other language or pregnant circumstances, showing a plain intent to confer such exemption.

But whatever doubt upon this subject may have existed as to the effect of the transfer to one company of the powers and privileges of another in conferring a tax exemption possessed by the latter is set at rest by *Rochester R. Co. v. Rochester*, 205 U. S. 236, 252, 51 L. ed. 784, 791, 27 Sup. Ct. Rep. 469, 474. Mr. Justice Moody, after reviewing all of the cases referred to above and others, sums the matter up by saying:

"We think it is now the rule, notwithstanding earlier decisions and *dicta* to the contrary, that a statute authorizing or directing the grant or transfer of the 'privileges' of a corporation which enjoys immunity from taxation or regulation should not be interpreted as including that immunity."

There is an absence of anything in the history of this branch railroad which points to a purpose to grant any exemption from taxation. Thus, in the act of December 20, 1849, reviving the authority of the Georgia Railroad & Banking Company to construct such a branch, originally authorized by earlier acts, it was expressly provided that the stock to be issued for the purpose "should not be exempt from taxation, as is secured to the present stock by the later clause of the 15th section of the charter of

said company," etc. This provision was probably the very reason why the Georgia Railroad & Banking Company did not accept or act under that statute. At the same session of the legislature, an independent company was created to construct and operate the same branch road. Presumably with the knowledge of the fact that the Georgia Railroad & Banking Company could *not itself construct this road with [438 immunity from taxation, this act authorizing this new corporation to build the same branch, declared that this company should be "authorized to *exercise*" [italics ours] "all powers and privileges" conferred by the act originally creating the Georgia Railroad & Banking Company. It is one thing to have authority to "exercise" all the "powers and privileges" of another company, and another thing to enjoy an exemption from taxation. The "*exercise*" of the "powers and privileges" of the company referred to was reasonably essential to the construction and operation of the independent railroad. Its immunity from taxation was not. See 146 U. S. 279, 295, and *Merchants' Nat. Bank v. United States*, 101 U. S. 1, 25 L. ed. 979. The power of taxation is never to be regarded as surrendered or bargained away if there is room for rational doubt as to the purpose.

We conclude, therefore, that the Washington Railroad or Plank Road Company had no exemption from taxation at the time this consolidation occurred. That the consolidating act did not intend to confer any immunity from taxation which did not then exist is plain. The object was to vest in the Georgia company the property and franchises and rights and privileges of the Washington company. When the Georgia company succeeded to its property and franchises, it did so subject to whatever right the state had in the matter of taxation. The case in this aspect is controlled by *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757.

The decree of the court below is modified so as to exclude the 18 miles constituting the Washington Branch Railroad, but in all other respects it is affirmed. The costs of this appeal will be divided between Wright, Comptroller General, and the Georgia Railroad & Banking Company.

Affirmed.

*TOXAWAY HOTEL COMPANY [439
v.

J. L. SMATHERS & COMPANY et al.

(See S. C. Reporter's ed. 439-449.)

Bankruptcy — who may be involuntary bankrupt — hotel company.

A corporation engaged in conducting
216 U. S.

hotels at various points is not engaged principally in trading or mercantile pursuits, so as to be liable to an involuntary adjudication in bankruptcy under the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 4, as amended by the act of February 5, 1903 (32 Stat. at L. 797, chap. 487, U. S. Comp. Stat. Supp. 1909, p. 1309), although it also maintains two country stores, largely as an incident to the location of its hotels in a thinly settled mountainous region.

[For other cases, see Bankruptcy, I., in Digest Sup. Ct. 1908.]

[No. 88.]

Submitted January 18, 1910. Decided February 21, 1910.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fourth Circuit presenting the question whether a corporation engaged in conducting hotels at various points may be adjudicated an involuntary bankrupt. Answered in the negative.

Statement by Mr. Justice Lurton:

From the facts certified it appears that the Toxaway Hotel Company was, in May, 1905, duly incorporated under the laws of Georgia. Among the purposes of the company, as stated in the application for incorporation, were these: "to conduct hotels for the accommodation of the public, . . . to keep, manage, conduct, and carry on the business of running hotels, cottages, inns, and restaurants, with their usual and necessary adjuncts, including the running of billiard and pool rooms, bowling alleys, buying and selling liquors and tobacco in all their forms, conducting and leasing news and book stands; baths of all kinds, to conduct livery stables, operating farm and fish hatcheries, to run omnibuses and transfer lines, together with all other pursuits incident to the operation of hotels." The company acquired and operated six hotels, situated in a thinly populated part of the [440] mountains of western *North Carolina, having an aggregate capacity of 750 guests. These were carried on from March, 1905, until October, 1906, when an assignment was made. Within four months after such assignment, creditors filed a petition seeking to adjudicate the corporation a bankrupt, as having been "engaged principally" in trading and mercantile pursuits. It contested adjudication, and averred that it was not a corporation subject to involuntary

proceedings, as it had not been principally engaged either in "trading" or "mercantile pursuits," but was a hotel company, and, as such, was not one of the class of corporations specified in the 4th section of the bankrupt act, as amended.

The material facts as to the character of the business done by this corporation are these:

"That the business done by the corporation at these hotels during the first season, from March to October, 1905, as shown by the receipts, amounted to \$119,171.36; and that done during the second season, from January 1st to October 1st, 1906, as shown by the receipts, amounted to \$127,136.01.

"That during 1905, and until June, 1906, the said corporation did no other business than conducting hotels, excepting the cultivation of a small farm connected with one of the hotels, for the purpose of supplying vegetables and garden truck.

"That in June, 1906, said corporation acquired and began conducting two country stores,—one located at Toxaway Inn and the other at Lake Sapphire and Fairfield Inn. In these stores were kept stocks of general merchandisc, such as is usually carried in country stores; to wit, dry goods, groceries, notions, hats, caps, clothing, a small assortment of hardware, flour, meal, meat, feed, etc., the average value of each stock being from three to four thousand dollars.

"The said hotels were located in a thinly settled section of the mountains of North Carolina, quite a distance from any town; that the stores furnished the hotels from their stocks, and also with such produce and other things necessary for *the hotels [441 as came into the stores, and they also sold goods and merchandise to people generally; and also bought and sold some tan bark. That from two thirds to three fourths of the goods handled by these stores went as supplies to the hotels on orders from the stewards of the hotels, and the remainder were sold generally, principally to employees of the corporation, and also to the people at large. That the business of the hotels and the stores was kept without separation in one set of books. The corporation also kept a bar in the Toxaway Inn, at which liquors were sold exclusively to the guests, and had a number of boats and launches on the lakes at Toxaway Inn and at Fairfield, which it hired to patrons when called for.

"That said corporation employed about 130 persons in and about the hotels, and 4 persons in and about the stores."

Upon these facts the bankrupt court adjudicated the corporation bankrupt. An appeal was allowed to the circuit court of

NOTE.—As to what persons are subject to bankruptcy laws—see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.

appeals, and the question certified as to whether, upon the facts stated, this hotel company is subject to the provisions of the bankrupt act, and liable to be adjudicated a bankrupt.

Messrs. **Theodore F. Davidson, Louis M. Bourne, John M. Slaton, and Benjamin Z. Phillips** submitted the cause for the Toxaway Hotel Company, Mr. Haywood Parker was on the brief:

Only corporations engaged in manufacturing, trading, printing, publishing, mining, or mercantile pursuits are subject to the bankruptcy law.

Re New York & W. Water Co. 3 Am. Bankr. Rep. 508; Re Morris, 43 C. C. A. 91, 102 Fed. 1004; Re H. J. Quimby Freight Forwarding Co. 10 Am. Bankr. Rep. 424; Re Rollins Gold & S. Min. Co. 4 Am. Bankr. Rep. 327; Re New York Bldg.-Loan Bkg. Co. 127 Fed. 471; Re New York & N. J. Ice Lines, 14 Am. Bankr. Rep. 61; Re Tontine Surety Co. 8 Am. Bankr. Rep. 421; Re Oriental Soc. 5 Am. Bankr. Rep. 219; Re Woodside Coal Co. 5 Am. Bankr. Rep. 186; Re Keystone Coal Co. 6 Am. Bankr. Rep. 377; Re Philadelphia & L. Transp. Co. 7 Am. Bankr. Rep. 707; First Nat. Bank v. Wyoming Valley Ice Co. 14 Am. Bankr. Rep. 448; Gallagher v. De Lancey Stables Co. 19 Am. Bankr. Rep. 801; Re MacNichol Constr. Co. 14 Am. Bankr. Rep. 188; Re Fulton Club, 113 Fed. 997; McNamara v. Helena Coal Co. 5 Am. Bankr. Rep. 48; Re Bay City Irrig. Co. 14 Am. Bankr. Rep. 370; Re Cameron Town. Mut. Fire, Lighting & Wind-Storm Ins. Co. 2 Am. Bankr. Rep. 372; Re Chicago-Joplin Lead & Zinc Co. 4 Am. Bankr. Rep. 712; Re Snyder & J. Co. 13 Am. Bankr. Rep. 325; Re Toledo Portland Cement Co. 19 Am. Bankr. Rep. 117; Re White Star Laundry Co. 9 Am. Bankr. Rep. 30; Re Elk Park Min. & Mill Co. 4 Am. Bankr. Rep. 131; Re Chesapeake Oyster & Fish Co. 7 Am. Bankr. Rep. 173; Re Mining & A. Constr. Co. 60 Pac. 881; Re Pacific Coast Warehouse Co. 10 Am. Bankr. Rep. 474; R. H. Herron Co. v. Superior Ct. 136 Cal. 279, 89 Am. St. Rep. 124, 68 Pac. 814; Philpot v. O'Brien, 11 Am. Bankr. Rep. 205; White Mountain Paper Co. v. Morse, 62 C. C. A. 369, 127 Fed. 643; Burdick v. Dillon, 75 C. C. A. 603, 144 Fed. 737; Re New York & N. J. Ice Lines, 16 Am. Bankr. Rep. 832; Re Kingston Realty Co. 19 Am. Bankr. Rep. 845; Re Altonwood Park Co. 20 Am. Bankr. Rep. 31; Re Wentworth Lunch Co. 20 Am. Bankr. Rep. 29; Re Marine Const. & Dry Dock Co. 64 C. C. A. 648, 130 Fed. 446; Zugalla v. International Mercantile Agency, 16 Am. Bankr. Rep. 67; Hall & K. Co. v. Friday, 19 Am. Bankr. Rep. 841; Columbia Iron-

works v. National Lead Co. 64 L.R.A. 645, 62 C. C. A. 99, 127 Fed. 99; United States Hotel Co. v. Niles, 13 Am. Bankr. Rep. 403; Re Surety & Guarantee Trust Co. 9 Am. Bankr. Rep. 129; Re Parmelee Library, 9 Am. Bankr. Rep. 568; Re T. E. Hill Co. 17 Am. Bankr. Rep. 517; Re First Nat. Bank, 81 C. C. A. 260, 152 Fed. 64, 11 A. & E. Ann. Cas. 355; Re Barton Hotel Co. 12 Am. Bankr. Rep. 335.

A hotel corporation conducting hotels is not engaged in a trading or mercantile pursuit within the meaning of the bankruptcy act.

Re Chesapeake Oyster & Fish Co. 7 Am. Bankr. Rep. 173, 112 Fed. 960; Re Barton Hotel Co. 12 Am. Bankr. Rep. 335; United States Hotel Co. v. Niles, 13 Am. Bankr. Rep. 403, 68 L.R.A. 588, 67 C. C. A. 153, 134 Fed. 225; Gallagher v. De Lancey Stables Co. 158 Fed. 381, 19 Am. Bankr. Rep. 801; Re Wentworth Lunch Co. 20 Am. Bankr. Rep. 29, — L.R.A.(N.S.) —, 86 C. C. A. 393, 159 Fed. 413.

To be subject to the bankruptcy law, a corporation must not only be engaged in one of the pursuits enumerated in § 4, subsec. b, but must be "principally" so engaged; a mere incidental occupation therein will not suffice.

1 Remington, Bankr. 1908 ed. §§ 85, 86.

A principal business is that business which is a chief concern, and which is chiefly relied upon as a means of making money.

Re Mackey, 110 Fed. 355; Re Drake, 114 Fed. 229; Wulbern v. Drake, 56 C. C. A. 643, 120 Fed. 493; Re H. J. Quimby Freight Forwarding Co. supra; Philpot v. O'Brien, 11 Am. Bankr. Rep. 205; Bank of Dearborn v. Matney, 132 Fed. 75; Rise v. Bordner, 140 Fed. 566; Zugalla v. International Mercantile Agency, 16 Am. Bankr. Rep. 67; McNamara v. Helena Coal Co. 5 Am. Bankr. Rep. 48.

Mr. Julius C. Martin submitted the cause for J. L. Smathers & Company et al.:

A trader is one whose business is to buy and sell merchandise or any class of goods, deriving a profit from his dealings.

Bouvier, Law Dict. See also Re Smith, 2 Low. Dec. 69, Fed. Cas. No. 12,981; Re Chandler, 1 Low. Dec. 478, Fed. Cas. No. 2,591; 4 Nat. Bankr. Reg. 213; Wakeman v. Hoyt, Fed. Cas. No. 17,051.

Among persons held to be traders under former acts are: Bakers (Re Cocks, 3 Ben. 260, Fed. Cas. No. 2,933); innkeepers (Re Ryan, 2 Sawy. 411, Fed. Cas. No. 12,183); livery stable keepers (Re Odell, 9 Ben. 209, Fed. Cas. No. 10,426).

Under the present act, the following persons, among others, have been held to be

traders: Livery stable keepers (Re Morton Boarding Stables, 108 Fed. 791); sanatorium company (Re San Gabriel Sanatorium Co. 95 Fed. 271); hotels (Re Barton Hotel Co. 12 Am. Bankr. Rep. 335); real estate company (Re Kingston Realty Co. 157 Fed. 299; Re Troy Steam Laundering Co. 132 Fed. 266); constructing and repairing vessels is a mercantile pursuit (Columbia Iron Works v. National Lead Co. 64 L.R.A. 645, 62 C. C. A. 99, 127 Fed. 99); mercantile agency (Re Mutual Mercantile Agency, 111 Fed. 152).

To hold that a person or corporation cannot be adjudged an involuntary bankrupt when he or it were following two different occupations, one included in the bankruptcy statute and the other not, merely because the largest amount of business was done in that occupation not covered by the bankruptcy statute, would open wide a door through which any number of persons and corporations might escape the effect of the bankruptcy act.

Re San Gabriel Sanatorium Co. 95 Fed. 274.

The law is to be interpreted liberally to effectuate its purpose; that is, that all business corporations, as distinguished from public, quasi public, money saving or lending corporations, shall be amenable to bankruptcy.

Collier, Bankr. 5th ed. p. 64.

It does not appear in the record in this case, as certified to this court, whether the debts of the creditors set out in the petition were debts contracted by the company as a merchant, for goods sold to its stores, or as a hotel keeper, for provisions sold it for its hotels. These matters are important.

Armstrong v. Fernandez, 208 U. S. 324, 330, 52 L. ed. 514, 516, 28 Sup. Ct. Rep. 419; Olive v. Armour, 21 L.R.A.(N.S.) 109, 93 C. C. A. 153, 167 Fed. 517.

Mr. Justice Lurton, after stating the facts, delivered the opinion of the court:

The act of 1867 [14 Stat. at L. 517, chap. 176] applied to "all moneyed business or 446] commercial *corporations and joint-stock companies." The present act applies only to such corporations as are "principally engaged" in certain enumerated kinds of business. That of inn keeping, though as old as civilization, is not specifically enumerated. Unless, therefore, a corporation engaged in the business of hotel keeping is embraced within one or the other of those which are enumerated, it is not liable to an involuntary adjudication.

The contention is that this was a corporation principally engaged in "trading" or "mercantile pursuits."

For the present we shall only deal with 54 L. ed.

the bare question as to whether inn keeping is within a proper definition of "trading" or "mercantile pursuits." The keeping of a bar, cigar and news stand are obviously but ordinary incidents to the main business when conducted within the inn, and primarily for the convenience of guests. The maintenance of a livery and of small pleasure boats for the accommodation of guests may also be accepted as merely incidental to that class of hotels called "resorts." The significance of the fact that this company did, in addition to the ordinary business of hotel keeping, engage to a certain extent in an outside trading or mercantile business, will later be considered.

Having thus narrowed the question, we must answer that a corporation engaged principally in running hotels is not a corporation engaged principally in "trading" or "mercantile pursuits." An innkeeper is one who maintains a house for the entertainment of strangers, for a reasonable compensation. To secure this compensation he is given a lien upon the property of his guests within the inn. For this property he is under liability much like that of a common carrier. So long as he has room, he must receive all who may apply and are fit persons. He may not discriminate. To say that he buys and sells articles of food and drink is only true in a limited sense. Such articles are not bought to be sold, nor are they sold again, as in ordinary commerce. They are bought to be served as food or drink, and the price includes *rent, [447 service, heat, light, etc. To say that such a business is that of a "trader" or a "mercantile pursuit" is giving those words an elasticity of meaning not according to common usage.

Until changed by a Parliamentary declaration in 1825, act 6, Geo. IV., chap. 16, defining the persons included under the term "trader," as used in the bankrupt and insolvency acts, it was held that an innkeeper was not a tradesman. Newton v. Trigg, 1 Shower, 96; Luton v. Bigg, Skinner, 276, 291; Willett v. Thomas, 2 Chitty, 651.

In Luton v. Bigg it was said of an innkeeper: "He is in the nature of a public person, and his house and occupation a thing of necessity, and his gain does not rise from the victuals which he sells, but from his furniture and attendance."

In Newton v. Trigg, cited above, it was said: "An innkeeper cannot set his own prices, but is bound to reasonable prices. A tradesman may sell to whom he pleases. An innkeeper cannot refuse his guest. . . . He doth not get by buying and selling. He gets by the price and hire of his lodgings [also] by the profit or use of

his kitchen. The profits from the stables do not arise from the hay only, but from the standing."

Congress having never by express legislation declared an innkeeper a "trader," it must be presumed to have used the word in its well-understood public and judicial meaning, and cases based upon a Parliamentary meaning are not in point. See *Hall v. Cooley*, 3 N. Y. Leg. Obs. 282, Fed. Cas. No. 5,928, and *Re Cote*, 2 Low. Dec. 374, Fed. Cas. No. 3,267, where Judge Lowell, referring to the declaratory act giving a list of occupations which should constitute trading, said that Congress "had not defined a tradesman, and the question was therefore addressed to the common usage of this country and to the judge's knowledge of his own language." He defined a tradesman "as substantially the same as shopkeeper." In the case styled *Re Smith*, 2 Low. Dec. 69, Fed. Cas. No. 12,981, the same learned judge adopted the definition of Bouvier, who defines a tradesman as "one who makes it his business to buy merchandise or goods or chattels to sell" again "for the purpose of making a profit." If the occupation of inn keeping is not "trading," it is not a "mercantile pursuit," for little more than a broader significance can be given to that term than to "trading." It is, in fact, trading in the larger sense. "Mercantile" is defined "as having to do with trade or commerce; of or pertaining to merchants, or the traffic carried on by merchants" (Century dictionary). To be principally engaged in a mercantile pursuit, one must be carrying on commerce in some of its branches. See *Re Cameron Town Mut. F. Lightning & Windstorm Ins. Co.* 96 Fed. 756; *Loveland*, Bankr. § 48; *Re New York & W. Water Co.* 98 Fed. 711. The conclusion we reach accords with that announced by the sixth circuit court of appeals in *Re United States Hotel Co.* 68 L.R.A. 588, 67 C. C. A. 153, 134 Fed. 225, where the matter is considered and the cases bearing upon the subject reviewed.

But it is said that although this was a hotel company, and engaged in doing the business of an innkeeper, it was in fact principally engaged in trading and mercantile pursuits. If so, that is the end of the matter; for liability under the act is dependent upon what it was actually doing rather than upon what it was organized to do or professed to be doing. See *Friday v. Hall & K. Co.* just decided. [216 U. S. 449, *infra*, 562, 30 Sup. Ct. Rep. 261.]

It may have been engaged in doing two distinct kinds of business. But unless this corporation was "engaged principally" in mercantile pursuits, it was not amenable to the act. "Engaged principally" are plain

words of no ambiguous meaning. They need no construction. Amenability to the statute must turn upon the facts of the case where, as here, the same corporation was engaged in "mercantile pursuits" in addition to inn keeping. There is no way to settle whether it was "engaged principally" in the one or the other but by a comparison of the two. When we do this it is easy to see that the mercantile business which it did was of minor character, and was largely an incident to the location of the hotels of the company in a thinly settled mountainous region. The stores were country stores,—that is, stores dealing in a *great [449] variety of ordinary necessities. From two thirds to three fourths of the goods handled were used in the running of the hotels, upon order of the stewards. Much of the remainder were sold to the employees, and the rest to customers at large, who paid in money or bartered country supplies for goods. The average stocks carried were from three to four thousand dollars in value. They were, in a large sense, hotel commissaries. The business was done but for one season. If we compare the volume of that done by the inn-keeping business proper with that done by the stores, the minor character of the latter is plain. The hotels employed 130 persons; the two stores, 4. The receipts of the hotel business plus the mercantile business—for all were kept upon one set of books—for the year 1906 were \$127,136.01. The receipts for the previous year, when no stores were operated, were \$119,171.36. The volume of mercantile business must have been small compared to the volume of the hotel business proper. That the company was "engaged principally" in the hotel business proper is plain. It was, therefore, not amenable to the act.

The answer to the interrogatory of the Circuit Court of Appeals must therefore be in the negative.

J. H. FRIDAY et al., Petitioners,

v.

HALL & KAUL COMPANY.

(See S. C. Reporter's ed. 449-456.)

Bankruptcy — who may be involuntary bankrupt — manufacturing corporation.

A corporation whose principal business is making and constructing arches, walls, and abutments, bridges, buildings, etc., out

NOTE.—As to what persons are subject to bankruptcy laws—see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4

of concrete, in carrying on which business it buys and combines together raw materials, and supplies the necessary labor, machinery, and appliances, is a "corporation engaged principally in manufacturing," within the meaning of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 4, as amended by the act of Feb. 5, 1903 (32 Stat. at L. 797, chap. 487, U. S. Comp. Stat. Supp. 1909, p. 1309), defining the persons or corporations which may be adjudged involuntary bankrupts, although such company makes its product, and gives it form and shape, at the place where it is to remain.

[For other cases, see Bankruptcy, I, in Digest Sup. Ct. 1908.]

[No. 68.]

Argued January 10, 1910. Decided February 21, 1910.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree which reversed a decree of the District Court for the Western District of Pennsylvania, adjudicating a construction company to be an involuntary bankrupt. Reversed, and judgment of the District Court affirmed.

See same case below, 87 C. C. A. 23, 158 Fed. 593.

Statement by Mr. Justice Lurton:

The Monongahela Construction Company, a corporation organized under the law of Pennsylvania, was, in an involuntary proceeding, adjudged a bankrupt in the district court for the western district of Pennsylvania. Upon a petition for review, filed by a judgment creditor, the adjudication was set aside upon the ground that the construction company was not "a corporation engaged principally in manufacturing," as found by the bankrupt court. The opinion of the circuit court of appeals is reported in 87 C. C. A. 23, 158 Fed. 593.

From the agreed statement of facts it appears:

1st. That the Monongahela Construction Company's charter sets out that it was organized "for the purpose of constructing, erecting, and repairing railroads, traction lines, duly incorporated, and streets, roads, buildings, structures, works or improvements of public or private use or utility."

2d. That its principal business had been "making and constructing arches, walls, and abutments, bridges, buildings, etc., out of concrete."

3d. That, "in carrying on its business, it buys and combines together raw materials, such as cement, gravel, and sand in the making of concrete, and supplies labor, machinery, and appliances necessary for the proper

carrying on of said business, of constructing and erecting concrete arches, piers, buildings, and structures, and excavating therefor at such time and place as its contracts call for."

4th. It has no permanent shop or factory, but has a warehouse.

Mr. Alexander J. Barron argued the cause, and, with Mr. Richard A. Ford, filed a brief for petitioners:

A corporation engaged in the erection of concrete walls, piers, abutments, bridges, etc., is, from the very nature of its work, of necessity principally engaged in manufacturing.

Re First Nat. Bank, 81 C. C. A. 260, 152 Fed. 64, 11 A. & E. Ann. Cas. 355; Tide Water Oil Co. v. United States, 171 U. S. 216, 43 L. ed. 140, 18 Sup. Ct. Rep. 837; Kidd v. Pearson, 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Carlin v. Western Assur. Co. 57 Md. 526, 40 Am. Rep. 440; "Manufacturing Corporation," Bouvier's Law Dict.; "Manufacture," Anderson's Law Dict.; 5 Words & Phrases, 4347; Webster (1901); Worcester; Taylor & Thompson, Treatise on Cement, chap. 1; Rice, Concrete, chap. 1; Reinforced Concrete, Taylor, Stone Magazine, February 1, 1909, p. 403.

The bankruptcy act is not limited to those merely engaged in manufacturing commodities.

Re Church Constr. Co. 157 Fed. 298; Re Rutland Realty Co. 157 Fed. 296.

Construction companies are not necessarily excluded from the operation of the bankruptcy act.

Re Garrison, 5 Ben. 430, Fed. Cas. No. 5,254, 7 Nat. Bankr. Reg. 287; People ex rel. Eastern Bermudez Asphalt Paving Co. v. Morgan, 61 App. Div. 373, 70 N. Y. Supp. 516; Com. v. Keystone Bridge Co. 156 Pa. 500, 27 Atl. 1; Com. v. Pittsburgh Bridge Co. 156 Pa. 507, 27 Atl. 4.

The act of 1898, § 4, and its amendment, should receive a liberal construction.

Re Riggs, 214 U. S. 9, 53 L. ed. 887, 29 Sup. Ct. Rep. 598.

Where Congress enacts legislation containing words or phrases which have been judicially construed under other acts upon the same subject, it is presumed to know of such construction, and to have adopted the construction of such words and phrases previously made.

United States v. Cerecedo Hermanos y Compañia, 209 U. S. 337, 339, 52 L. ed. 821, 822, 28 Sup. Ct. Rep. 532; United States v. G. Falk & Bro. 204 U. S. 143, 152, 51 L. ed. 411, 414, 27 Sup. Ct. Rep. 191; The Devonshire, 8 Sawy. 209, 13 Fed. 39.

Acts of Congress should be construed in

view of the history and circumstances surrounding their enactment.

Platt v. Union P. R. Co. 99 U. S. 48, 62, 25 L. ed. 424, 428; *United States v. Laws*, 163 U. S. 258, 262, 264, 41 L. ed. 151, 153, 154, 16 Sup. Ct. Rep. 998; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 502, 38 L. ed. 793, 799, 14 Sup. Ct. Rep. 968; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 463, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; *Bend v. Hoyt*, 13 Pet. 273, 10 L. ed. 159.

In order to determine the purpose of Congress, earlier legislation upon the same subject may be examined to arrive at a proper interpretation of a given act.

Lawrence v. Allen, 7 How. 785, 792, 793, 12 L. ed. 914, 916, 917; *Re Morton Boarding Stables*, 108 Fed. 794.

The legislative intent prevails over the strict wording of the statute.

Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *Oates v. First Nat. Bank*, 100 U. S. 239, 244, 25 L. ed. 580, 582; *Wheeler v. McCormick*, 8 Blatchf. 276, Fed. Cas. No. 17,498.

The history of bankruptcy legislation prior to 1898, and the decisions of the courts, show that it had been the settled policy to make amenable to the provisions of the bankruptcy law all persons who were engaged in trading or purchasing supplies on credit.

Re Garrison, supra; *Re Odell*, 9 Ben. 209, Fed. Cas. No. 10,426, 17 Nat. Bankr. Reg. 73; *Leidigh Carriage Co. v. Stengel*, 37 C. C. A. 210, 95 Fed. 647; *Re Mathews Consol. Slate Co.* 144 Fed. 724; *Collier, Bankr.* 5th ed. p. 71.

The question as to what a corporation is "principally" engaged in is to be determined upon the consideration of what the corporation actually does, rather than what it is authorized to do.

Columbia Ironworks v. National Lead Co. 64 L.R.A. 645, 62 C. C. A. 99, 127 Fed. 101; *Re San Gabriel Sanatorium Co.* 95 Fed. 271; *Re Toledo Portland Cement Co.* 156 Fed. 83.

Mr. George L. Roberts argued the cause, and, with Mr. Eugene H. Baird, filed a brief for respondent:

Manufacturing, in the ordinary acceptation of the term, means the making of articles or commodities that can be transported or sold at some other place than that where they are made.

Loveland, Bankr. p. 147.

The accepted and popular meaning of the term "manufacture" is applied to goods and wares that are capable of being made and transported and sold in places other than those of their manufacture. In no definition given by any lexicographer is the term

"manufacturer" applied to one engaged in the production or construction of an article which must be affixed to the realty, and whose use and value is destroyed the moment it is detached from the real estate to which it is affixed.

Webster, Dict.; *Worcester, Dict.*; *Universal Dict.*; *Standard Dict.* See also *Re Keystone Coal Co.* 109 Fed. 872; *Columbia Ironworks v. National Lead Co.* 64 L.R.A. 645, 62 C. C. A. 99, 127 Fed. 99; *Butt v. C. F. MacNichol Constr. Co.* 72 C. C. A. 252, 140 Fed. 840.

Debates in Congress are not to be considered in the construction of acts passed by it.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

Where the language of a statute is transparent, and its meaning clear, there is no room for the office of construction. There should be no construction where there is nothing to construe.

United States v. Wiltberger, 5 Wheat. 95, 5 L. ed. 42; *The Cherokee Tobacco (Boudinot v. United States)* 11 Wall. 621, 20 L. ed. 229; *United States v. Temple*, 105 U. S. 97, 26 L. ed. 967.

Mr. Justice Lurton, after stating the facts as above, delivered the opinion of the court:

Section 4 of the bankrupt act, as amended by the act of February 5, 1903 [32 Stat. at L. 797, chap. 487, U. S. Comp. Stat. Supp. 1909, p. 1309], reads thus:

"Any natural person, except a wage earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."

The single question is whether the Monongahela Construction Company, upon the facts stated above, was a corporation principally engaged in the business of "manufacturing," within the meaning of the act. If it was, the adjudication should stand.

The corporate powers of the company were very broad. It is possible that it might [454 have so limited its functions as not to have come under any reasonable definition of manufacturing; but at last the question of whether it was principally engaged in manu-

facturing must turn more upon what it was actually doing than upon what it was authorized to do.

It must be conceded that the word "manufacturing," as used in the bankrupt act, has no definite legislative meaning by reason of adoption from other bankrupt acts, as is the case with the words "trader" or "trading," and perhaps other words with well-understood common-law meanings.

Though British bankrupt acts were in existence from the time of Henry VIII.; they applied only to "traders" until 1860, when they were extended to other persons. Our own original act, that of 1800 [2 Stat. at L. 19, chap. 19], applied only to traders, bankers, brokers, and underwriters. The act of 1841 [5 Stat. at L. 440, chap. 9] added "merchants." The act of 1867 [14 Stat. at L. 517, chap. 176] extended practically to all persons and corporations. That of 1898 [30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418] limited the wide application of the act of 1867 to the class of business corporations enumerated. Thus it is that the words "manufacture" and "manufacturing" have no meaning derived from adjudications of any former law.

Undoubtedly Congress intended that that class of business corporations engaged in any class of manufacturing, as its principal business, and not as a mere minor incident to some larger work, should be subject to the law; and this intention should be regarded by giving to doubtful words and terms a liberal rather than a narrow meaning. "Manufacturing" has no technical meaning. It is not limited by the means used in making, nor by the kind of product produced. In *Kidd v. Pearson*, 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, Mr. Justice Lamar said that "manufacture is transformation,—the fashioning of raw materials into a change of form for use."

In *Tide Water Oil Co. v. United States*, 171 U. S. 210, 216, 43 L. ed. 139, 140, 18 Sup. Ct. Rep. 837, Mr. Justice Brown, referring to the expansion of the meaning of the word "manufacture," said that "the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product." 455] *Concrete is an artificial stone. It is a product resulting from a combination of sand or gravel or broken bits of limestone, with water and cement; a combination which requires ordinarily the use of both skill and machinery. It is not denied that if concrete in a shape adapted to use and in finished form is supplied to others for the making of a house, bridge, pier, arch, or abutment, that the corporation making such blocks or shapes would be, in the most

narrow sense, one engaged in manufacture. But it is urged that this corporation made these blocks or shapes at the place where used; and that, as finished, they became a part of a principal structure and affixed to the realty; and that therefore they were not engaged in manufacturing, which, say counsel, is a business confined to those who make articles which may be "transported and sold at some other place than that where made."

The production of concrete arches or piers or abutments is the result of successive steps. The combination of raw material—the sand, the limestone, the cement, and the water—produced a product which undoubtedly was "manufactured." This concrete had then to be given shape. That required the manufacture of moulds, which remain in place until hardening occurs. If the concrete is reinforced, as is the case where great strength is required, then the adjustment of the bars of steel within the moulds was another step. Do all of these steps, each a step in "manufacturing," cease to be "manufacturing" because the moulds into which the concrete is poured, when in a fluid state, are upon the spot where the finished product is to remain? That the operation of making and shaping the concrete is done at the place used seems rather a matter of convenience, due to the quick hardening in moulds and difficulties of transportation. But, as we may take notice, the operation which, in the end, is to produce an arch or abutment or pier or house, is not necessarily a single operation, but one of successive repetitions of the process. The business is not identical with that of a mere builder or constructor who puts together the brick or stone or wood or iron, as [456 finished by another. If the builder made his brick, shaped his timbers, and joined them all together, he would plainly be a manufacturer as well as a builder; and if the former was the principal part of the business, he would be within the definition of the bankrupt act. To say that one who makes, and then gives form and shape to the product made, is not engaged in manufacturing because he makes his product and gives it form and shape in the place where it is to remain, is too narrow a construction.

In a case styled *Re First Nat. Bank*, 81 C. C. A. 260, 152 Fed. 64, 11 A. & E. Ann. Cas. 355, the circuit court of appeals for the eighth circuit, in an opinion by Sanborn, Circuit Judge, sustained an adjudication of bankruptcy against a precisely similar corporation.

In *Columbia Ironworks v. National Lead Co.* 64 L.R.A. 645, 62 C. C. A. 99, 127 Fed. 99, the sixth circuit court of appeals adjudged that a corporation engaged principally in the business of building and repairing

large steel ships for sale and upon order, who prepared and gave shape to much of the raw material, was engaged in manufacturing.

The judgment of the Circuit Court of Appeals must be reversed and that of the District Court affirmed.

SILAS PICKETT, Plff. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 456-462.)

Federal courts — jurisdiction — crime on Indian reservation within territory.

1. The murder of one negro by another within the limits of an Indian reservation in a territory is committed within a place or district under the exclusive jurisdiction of the United States, within the meaning of U. S. Rev. Stat. § 5339, U. S. Comp. Stat. 1901, p. 3627, defining and punishing the crime of murder, as amended by the act of January 15, 1897 (29 Stat. at L. 487, chap. 29, U. S. Comp. Stat. 1901, p. 3620), and extended by § 2145 to the Indian country, when not within the exceptions made by § 2146, which, by reason of the race of the accused and deceased, do not apply.

[For other cases, see Courts, 1459-1467, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — effect of admission of state.

2. The murder of one negro by another within the limits of the Osage Indian reservation subsequent to the Oklahoma enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335), but prior to the admission of that state into the Union, is justiciable, after such admission, in the district court of the United States for the western district of Oklahoma, under § 14 of that act (34 Stat. at L. 275 [U. S. Comp. Stat. Supp. 1909, p. 155]), providing for the transfer of jurisdiction in respect of all crimes against the United States to the Federal courts therein provided.

[For other cases, see Courts, III. b., in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — effect of admission of state.

3. Crimes and offenses committed before and after the admission of Oklahoma into the Union, and not those committed before and after the passage of the enabling act of June 16, 1906, must be deemed meant by the provision of § 14 of that act (34 Stat. at L. 275 [U. S. Comp. Stat. Supp. 1909, p.

155]), for the transfer of jurisdiction in respect of all crimes against the United States to the Federal courts therein provided, since otherwise there would be an indefinite period between the date of the enabling act and the admission of the state, during which such crimes might go unpunished.

[For other cases, see Courts, III. b., in Digest Sup. Ct. 1908.]

Appeal — discretionary matters — new trial.

4. The granting or denying of a new trial is a matter not assignable as error.

[For other cases, see Appeal and Error, 4479-4492, in Digest Sup. Ct. 1908.]

Appeal — discretionary matters — continuance.

5. The refusal of a continuance will not be disturbed by an appellate court when the absence of any bill of exceptions in the record prevents any showing of abuse.

[For other cases, see Appeal and Error, 4405-4412, in Digest Sup. Ct. 1908.]

Appeal — question not raised below — sufficiency of indictment.

6. Objections to the sufficiency of an indictment cannot first be raised upon writ of error.

[For other cases, see Appeal and Error, VII. j, 4, in Digest Sup. Ct. 1908.]

Appeal — necessity of bill of exceptions — matters as to evidence.

7. Assignments of error in admitting or rejecting evidence cannot be considered on writ of error, where no bill of exceptions has been taken.

[For other cases, see Appeal and Error, 3449-3452, in Digest Sup. Ct. 1908.]

[No. 270.]

Submitted January 3, 1910. Decided February 21, 1910.

IN ERROR to the Circuit Court of the United States for the Western District of Oklahoma to review a conviction of murder. Affirmed.

The facts are stated in the opinion.

No appearance for plaintiff in error.

Assistant Attorney General **Harr** submitted the cause for defendant in error:

This offense was committed during the period of transition from territorial to state government in Oklahoma. It was an offense in violation of a general law of the United States, applicable to such crimes by other than Indians or against Indians, committed in the Indian country within the limits of a territory; and, had no steps to form a state government been taken, it would have been cognizable in a district court of the territory, sitting as a court of the United States.

Re *Wilson*, 140 U. S. 575, 35 L. ed. 513, 11 Sup. Ct. Rep. 870; *Brown v. United States*, 77 C. C. A. 173, 146 Fed. 975; *Herd v. United States*, 13 Okla. 512, 75 Pac. 291; *Goodson v. United States*, 7 Okla. 117, 54 Pac. 423.

NOTE. — On jurisdiction to punish crimes committed by or against Indians—see note to *State v. Campbell*, 21 L.R.A. 169.

On review of discretionary action below—see note to *Barrow v. Hill*, 14 L. ed. U. S. 48.

On necessity of bill of exceptions—see note to *Parks v. Turner*, 13 L. ed. U. S. 883.

The offense was committed in a place within the exclusive jurisdiction of the United States, in violation of a general Federal statute, as well as in the Indian country. In a state, under such circumstances, it would have been a subject of Federal jurisdiction. The offense, therefore, is one jurisdiction of which Congress could and should have transferred to the Federal courts in the new state.

Forsyth v. United States, 9 How. 571, 13 L. ed. 262; *Cook v. United States*, 138 U. S. 157, 34 L. ed. 906, 11 Sup. Ct. Rep. 268; *Koenigsberger v. Richmond Silver Min. Co.* 158 U. S. 41, 39 L. ed. 889, 15 Sup. Ct. Rep. 751; *United States v. Baum*, 74 Fed. 43.

Any change in the status of the Osage Reservation consequent upon the admission of the state has no effect upon the jurisdiction of the United States courts over an offense committed when the reservation was Indian country, and under the exclusive jurisdiction of the United States.

United States v. Baum, *supra*; *Great Northern R. Co. v. United States*, 208 U. S. 452, 52 L. ed. 567, 28 Sup. Ct. Rep. 313; *United States v. New York C. & H. R. R. Co.* 153 Fed. 630.

The overruling of a motion for a new trial is not reviewable by an appellate court.

Whceler v. United States, 159 U. S. 523, 40 L. ed. 244, 16 Sup. Ct. Rep. 93; *Bucklin v. United States*, 159 U. S. 682, 40 L. ed. 305, 16 Sup. Ct. Rep. 182.

The second assignment of error is objectionable in that it alleges two separate errors, and does not comply with the requirement that each error assigned must be set out "separately and specifically."

Turnbull v. Payson, 95 U. S. 418, 420, 24 L. ed. 437, 438.

It first alleges that the defendant objected to being tried at Oklahoma City for an offense committed in the Osage Reservation. No such objection appears in the record and would be without merit if properly presented.

Cook v. United States, 138 U. S. 157, 34 L. ed. 906, 11 Sup. Ct. Rep. 268.

The action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court unless it be clearly shown that such discretion has been abused.

Isaacs v. United States, 159 U. S. 487, 489, 40 L. ed. 229, 230, 16 Sup. Ct. Rep. 51.

An assignment of errors cannot be availed of to import questions into a case which the record does not show were raised and passed on in the court below.

Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 576, 40 L. ed. 536, 540, 16 Sup. Ct. Rep. 389; *Harkrader v. Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119; 54 L. ed.

Metropolitan R. Co. v. District of Columbia (Metropolitan R. Co. v. Macfarland) 195 U. S. 322, 49 L. ed. 219, 25 Sup. Ct. Rep. 28.

The overruling of the motion in arrest of judgment, the subject of the eleventh assignment, is a matter resting in the discretion of the lower court, and not subject to review here.

Canal & C. Street R. Co. v. Hart, 114 U. S. 654, 660, 29 L. ed. 226, 228, 5 Sup. Ct. Rep. 1127.

Mr. Justice **Lurton** delivered the opinion of the court:

This is a writ of error to a judgment of the circuit court of the United States for the western district of Oklahoma, upon a conviction in a capital case, sued out by the plaintiff in error, the defendant below, by authority of the 5th section of the act of March 3, 1891 (26 Stat. at L. 826, 827, chap. 517, U. S. Comp. Stat. 1901, p. 549).

The plaintiff in error, Silas Pickett, a negro, was indicted in the district court of the United States for the western district of Oklahoma for the murder of a negro known as Walter the Kid, within the limits of the Osage Indian Reservation. The indictment was remitted to the circuit court for the same district, as required [458 by § 1039, Revised Statutes (U. S. Comp. Stat. 1901, p. 723)]. This murder was charged as having been committed on October 14, 1907. The state of Oklahoma was admitted to the Union on November 16, 1907. The offense was, therefore, committed before its admission as a state, and for that offense the plaintiff in error was, after such admission, both indicted and convicted in a court of the United States for the western district of Oklahoma,—the Osage Indian Reservation being within that district. The jurisdiction of the court was challenged by motion to quash, by demurrer, and by motion in arrest of judgment. Of course, if the offense was not one against the United States, or not committed within the territorial jurisdiction of the district court for the western district of Oklahoma, the indictment would be bad, and the court which tried and convicted the plaintiff in error, without jurisdiction. But the crime charged in this indictment was one against the United States. By § 5339 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3627), as amended by the act of January 15, 1897 (29 Stat. at L. 487, chap. 29, U. S. Comp. Stat. 1901, p. 3620), the crime of murder, when committed within any "place or district or country under the exclusive jurisdiction of the United States," is defined and the punishment provided. This

general law was, by § 2145, Rev. Stat., extended "to the Indian country," when not within one or the other of the exceptions of § 2146.

The averments of the indictment make it plain that the crime charged was committed within a "place or district" at that time exclusively under the jurisdiction of the United States, being Indian country, not within any state. As it also averred that the plaintiff in error was a negro, and not an Indian, and the person slain a negro, and not an Indian, the exceptions made by § 2145, Rev. Stat., do not apply.

The crime was charged to have been committed on October 14, 1907,—a date subsequent to the enabling act of June 16, 1906 [34 Stat. at L. 267, chap. 3335], under which, on November 20, 1907, Oklahoma was admitted to the Union.

The jurisdiction of the district court of the United States, exercised in respect to the indictment and trial of this plaintiff 459] *in error, depends upon the provisions of that enabling act. Such a crime might have been prosecuted in the territorial court for the proper district of the territory, sitting as a court of the United States, and administering the law of the United States in the exercise of its jurisdiction conferred by Congress. *Ex parte Crow Dog* (*Ex parte Kang-Gi-Shun-Ca*) 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; *Brown v. United States*, 77 C. C. A. 173, 146 Fed. 975. But the function and jurisdiction of such territorial courts would naturally terminate upon the territory becoming a state, and therefore render necessary some provision for the transfer of pending business and jurisdiction in respect of local matters to state courts, and of civil and criminal business and jurisdiction arising under the laws of the United States to courts of the United States, when they should come into existence. *Forsyth v. United States*, 9 How. 571, 576, 13 L. ed. 262, 264.

It was therefore altogether competent for Congress to provide, as it did in the 14th section of this enabling act, for the transfer of jurisdiction in respect of all crimes against the United States—for the act must be read as applying to crimes under the general criminal law of the United States,—to the Federal courts provided by the same act. If this could not be done, the change from a territorial condition to that of a state would operate as an automatic amnesty for crimes committed against the general law of the United States within districts exclusively under its jurisdiction, and not within the jurisdiction of any state, for the courts of the state could not be empowered to prosecute crimes against

the laws of another sovereignty. *Martin v. Hunter*, 1 Wheat. 304, 337, 4 L. ed. 97, 105. The power to punish was not lost if the crime was one of the character described, and the enabling act might well provide that such crime, committed either before or after the admission of the state, might be prosecuted in the courts of the United States when established within the new state. The subject is elaborately considered and decided by District Judge Marshall in *United States v. Baum*, 74 Fed. 43.

Section 13 of the enabling act referred to provides "that the state, *when admitted* [italics ours], should be divided into *two judicial districts," for the [460 appointment of a district judge, clerk, and marshal for each, and that the state should be attached to the eighth judicial circuit. It provides also for the holding of regular terms of both the district and circuit courts, with all the powers and jurisdiction of similar courts. The 14th section was in these words:

"That all prosecutions for crimes or offenses hereafter committed in either of said judicial districts as hereby constituted shall be cognizable within the district in which committed, and all prosecutions for crimes or offenses committed before the passage of this act, in which indictments have not yet been found or proceedings instituted, shall be cognizable within the judicial district as hereby constituted in which such crimes or offenses were committed."

There may be some doubt as to whether the section set out should be construed as applying to crimes and offenses committed before and after the passage of the enabling act, or only to such crimes committed before and after the admission of the state. The reference to "the passage of this act," in the second clause, would tend to the first construction. But such a construction would leave out of consideration the fact that neither the courts nor the judicial districts referred to would exist until the admission of the state, by the express terms of the preceding section, which should be read in connection with the 14th section. No construction should be adopted, if another equally admissible can be given, which would result in what might be called a judicial chasm. Under the first interpretation, crimes committed after the passage of this enabling act could not be prosecuted until the admission of the state, and the coming into existence of the courts and judicial districts to which jurisdiction of such crimes was to be transferred. If such crimes could only be prosecuted in courts organized upon the admission of the state, there would be an indefinite period during which such crimes might go unpunished. In fact, there

elapsed seventeen months between the date of this enabling act and the admission of 461] the state, *and a consequent organization of the districts and courts to which jurisdiction over such crimes was to be transferred. A construction which might result in such deplorable consequences should not be adopted if any more sensible meaning can be reasonably given. The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage. Applications of this general rule are shown in *Church of Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *Lau Ow Bew v. United States*, 144 U. S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; *United States v. Corbett*, decided at this term, 215 U. S. 233, ante, 81, 30 Sup. Ct. Rep. 81. The obvious intention was that this, like the preceding section, should become effective upon the state being admitted, and it should be read as applying to crimes and offenses before and after such admission. But if the section be otherwise construed, the district court had, in either case, jurisdiction over this crime, for it was committed after the enabling act, and whether it might have been prosecuted in a territorial court, sitting as a court of the United States, before the admission of the state of Oklahoma, is not here important. It was not so prosecuted, and when the territory ceased to be a territory, and became a state, the jurisdiction of all such courts terminated, and jurisdiction was properly transferred to the courts of the United States having jurisdiction over the place of the crime.

There are a number of errors assigned. The first and tenth are for error in denying a new trial. The granting or denying of a new trial is a matter not assignable as error. *Bucklin v. United States*, 159 U. S. 682, 40 L. ed. 305, 16 Sup. Ct. Rep. 182. The second assignment is double, and therefore bad; but it is without merit. The first error included is for overruling an objection to being tried at Oklahoma City. No such objection is shown by the record. The remainder is for denying a continuance. Continuances are within the discretion of the court, and unless great abuse is shown, the action of the court below will not be disturbed. As no bill of exceptions was taken, we have no showing of abuse upon which the action of this court may be invoked.

462] *The third and fourth errors assigned are for overruling an objection made to the sufficiency of the indictment and to the admission of any evidence because the indictment was bad. No such objection is shown 54 L. ed.

by the record. The indictment is not in form bad nor vague, but charges the crime of murder with great particularity. There seems to have been no reason for doubt as to the crime charged. Besides, objections of this character cannot be made upon writ of error for the first time.

Aside from the question of jurisdiction, considered heretofore, the remaining assignments are for alleged errors in admitting or rejecting evidence. But as no bill of exceptions was taken, these assignments cannot be considered. *Storm v. United States*, 94 U. S. 76, 24 L. ed. 42.

Judgment affirmed.

MOSES HAAS, Appt.,
v.

WILLIAM HENKEL, United States Marshal for the Southern District of New York, et al.

(See S. C. Reporter's ed. 462-483.)

Federal courts — proper district for criminal trial — place of residence.

1. There is no principle of constitutional law which entitles one to be tried for a criminal offense in the district where he resides.

[For other cases, see *Courts*, 979-997, in *Digest Sup. Ct.* 1908.]

Federal courts — proper district for criminal trial — offense committed in several districts.

2. An offense against the United States committed in more than one district is, under U. S. Rev. Stat. § 731, U. S. Comp. Stat. 1901, p. 585, cognizable in either district. [For other cases, see *Courts*, 987-992, in *Digest Sup. Ct.* 1908.]

Criminal law — removal from district of residence.

3. A person indicted for the same offense in two Federal districts, one of which is the district where he resides, may—at least, with the consent of the court of the latter district—be removed, under U. S. Rev. Stat.

NOTE.—On the proper Federal district for suit—see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

On removal to another Federal district for trial of persons there charged with an offense against the United States—see note to *Greene v. Henkel*, 46 L. ed. U. S. 177.

On habeas corpus in the Federal courts—see notes to *Re Reinitz*, 4 L.R.A. 236; *State ex rel. Cochran v. Winters*, 10 L.R.A. 616; *Re Huse*, 25 C. C. A. 4; and *Tinsley v. Anderson*, 43 L. ed. U. S. 91.

As to questions reviewable by habeas corpus—see notes to *State v. Jackson*, 1 L.R.A. 373; *Bion's Appeal*, 11 L.R.A. 694; *Glass v. The Betsey*, 1 L. ed. U. S. 489; *Re Carll*, 27 L. ed. U. S. 288; *Oteiza y Cortes v. Jacobus*, 34 L. ed. U. S. 464; and *Pearce v. Texas*, 39 L. ed. U. S. 164.

§ 1014, U. S. Comp. Stat. 1901, p. 716, to the other district for the trial of the offense committed there.

[For other cases, see Criminal Law, VII. in Digest Sup. Ct. 1908.]

Criminal law—removal to other district for trial—sufficiency of indictment.

4. Allegations charging a conspiracy by which an employee in the Bureau of Statistics in the Department of Agriculture was to give his co-conspirators advance information of the official cotton crop reports, and a conspiracy to bribe such employee for the same purpose, sufficiently show, for the purposes of a removal, under U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, to the District of Columbia for trial, the commission within the District of offenses against the United States.

[For other cases, see Criminal Law, 249-254, in Digest Sup. Ct. 1908.]

Habeas corpus—scope of review—proceedings to remove to another Federal district.

5. Matters in abatement and substantive defenses are not open on habeas corpus to test the validity of proceedings, under U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, to remove to another Federal district for trial a person there charged with an offense against the United States.

[For other cases, see Habeas Corpus, 140-144, in Digest Sup. Ct. 1908.]

Evidence—rebuttal—probable cause for removal to another Federal district.

6. The prima facie case for the removal, under U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, to another Federal district for trial, of a person there charged with an offense against the United States, which is made by the production of certified copies of indictments for conspiracy against the United States, found by the court of that district, is not overcome by the introduction of copies of indictments found by a court of the district where the accused resides, which lay the locus of the conspiracy in that district.

[For other cases, see Evidence, 2393, 2394, in Digest Sup. Ct. 1908.]

[No. 367.]

Argued January 6, 7, 1910. Decided February 21, 1910.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a judgment refusing relief by habeas corpus and certiorari to a person held in custody to await an order of removal to the District of Columbia for the trial of indictments there pending against him. Affirmed.

See same case below, 166 Fed. 621.

The facts are stated in the opinion.

Mr. Nash Rockwood argued the cause, and, with Mr. Max D. Steuer, filed a brief for appellant:

While exclusive jurisdiction has been held

by this court to be primarily a right of the court or sovereignty, it is still held that the court where an offense is alleged by indictment to have been committed is without jurisdiction to order the removal of the defendant to another jurisdiction for trial upon the same offense.

Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

Criminal process must not be made oppressive, and the constitutional and statutory rights of one accused of crime are always to be strictly indulged in his favor.

Beavers v. Henkel, 194 U. S. 73, 48 L. ed. 882, 24 Sup. Ct. Rep. 605; *Hyde v. Shine*, 199 U. S. 62, 87, 50 L. ed. 90, 98, 25 Sup. Ct. Rep. 760; *Tinsley v. Treat*, 205 U. S. 20, 51 L. ed. 689, 27 Sup. Ct. Rep. 430.

Upon the facts as presented to the commissioner there was not sufficient evidence of probable cause to warrant him in committing the defendant for removal to Washington, but there was every reason why such removal should have been denied, and the defendant afforded a speedy trial in the place of his domicile.

United States v. Marx, 122 Fed. 964; *United States v. Sauer*, 31 C. C. A. 521, 60 U. S. App. 20, 88 Fed. 249; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Re Palliser*, 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034; *Horner v. United States*, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407; *Hyde v. Shine*, supra; *Georgia v. Bolton*, 11 Fed. 217; *United States v. Hackett*, 29 Fed. 848; *Re Rosdeitscher*, 33 Fed. 657; *Ex parte Pritchard*, 43 Fed. 915; *Re Kelly*, 46 Fed. 654; *Re King*, 51 Fed. 434; *United States v. Fowkes*, 3 C. C. A. 394, 3 U. S. App. 247, 53 Fed. 13; *United States v. Howell*, 4 Inters. Com. Rep. 818, 56 Fed. 21; *United States v. Peterson*, 64 Fed. 145; *Re Huntington*, 68 Fed. 881; *Ex parte Ballinger*, 5 Hughes, 387, 88 Fed. 781; *United States v. Murphy*, 91 Fed. 120; *Re Belknap*, 96 Fed. 614; *United States v. Alberty*, Hempst. 444, Fed. Cas. No. 14,426; *United States v. Bickford*, 4 Blatchf. 337, Fed. Cas. No. 14,591; *United States v. Bird*, 1 Sprague, 299, Fed. Cas. No. 14,597; *United States v. Jackalow*, 1 Black, 484, 17 L. ed. 225; *United States v. Britton*, 2 Mason, 464, Fed. Cas. No. 14,650.

Only crimes and offenses specifically enumerated by statute are indictable.

United States v. Cook, 17 Wall. 168-174, 21 L. ed. 538, 539; *United States v. Crnikshank*, 92 U. S. 542, 23 L. ed. 588; *United States v. Carll*, 105 U. S. 611, 26 L. ed. 1135; *United States v. Britton*, 108 U. S. 199, 27 L. ed. 698, 2 Sup. Ct. Rep. 531; *United States v. Eaton*, 144 U. S. 677, 36

L. ed. 591, 12 Sup. Ct. Rep. 764; Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; Greene v. Henkel, 183 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218; United States v. Watson, 17 Fed. 145; Re Wolf, 27 Fed. 606; United States v. Wooten, 29 Fed. 702; United States v. Adler, 49 Fed. 736; United States v. Kessel, 62 Fed. 57; Re Dana, 68 Fed. 886; United States v. Benson, 17 C. C. A. 293, 44 U. S. App. 219, 70 Fed. 591; United States v. McCord, 72 Fed. 159; United States v. Sauer, 73 Fed. 671; Drake v. Stewart, 22 C. C. A. 104, 40 U. S. App. 173, 76 Fed. 143; United States v. Taffe, 86 Fed. 113; Peters v. United States, 36 C. C. A. 105, 94 Fed. 127; United States v. Melfi, 118 Fed. 899; United States v. Dietrich, 126 Fed. 676; Conrad v. United States, 62 C. C. A. 478, 127 Fed. 798; Scott v. United States, 64 C. C. A. 631, 130 Fed. 429; United States v. Thomas, 145 Fed. 79; Morris v. United States, 88 C. C. A. 532, 161 Fed. 672.

When the crime charged is conspiracy to do a criminal act, it must be shown that the act which is the purpose and object of the conspiracy is itself a violation of law.

Conrad v. United States, *supra*; United States v. Boyer, 85 Fed. 425.

It is proper to look at the overt acts charged for the purpose of ascertaining the sense in which the terms are used in charging conspiracy.

Stearns v. United States, 82 C. C. A. 48, 152 Fed. 900.

It is not a violation of U. S. Rev. Stat. § 5451, U. S. Comp. Stat. 1901, p. 3680, to make a promise not enforceable.

United States v. Green, 136 Fed. 651; United States v. Crafton, 4 Dill. 145, Fed. Cas. No. 14,881; United States v. Kessel, *supra*.

A conspiracy to do a lawful act is not an illegal conspiracy. A conspiracy to commit an act reprehensible in the forum of good morals is not an indictable conspiracy.

Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 Fed. 500; United States v. Johnson, 26 Fed. 682; United States v. Lancaster, 10 L.R.A. 333, 44 Fed. 896; United States v. Benson, *supra*; Drake v. Stewart, 22 C. C. A. 104, 40 U. S. App. 173, 76 Fed. 142.

The intent is the gravamen of the offense and must be distinctly averred.

United States v. Cruikshank, 92 U. S. 558, 23 L. ed. 593; United States v. Carll, 105 U. S. 612, 26 L. ed. 1135; Bannon v. United States, 156 U. S. 466, 39 L. ed. 495, 15 Sup. Ct. Rep. 467; United States v. Jackson, 25 Fed. 548; United States v. Van Leuven, 62 Fed. 69; McCarty v. United States, 41 C. C. A. 242, 101 Fed. 113; United States v. Post, 113 Fed. 854; United States 54 L. ed.

v. Green, 136 Fed. 658. See also United States v. Hess, 124 U. S. 483-486, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; Pettibone v. United States, 148 U. S. 202, 37 L. ed. 422, 13 Sup. Ct. Rep. 542; United States v. Fox, 95 U. S. 670, 24 L. ed. 538; People v. Lohman, 2 Barb. 218; Conrad v. United States, *supra*; State v. Phelan, 159 Mo. 122, 60 S. W. 74.

The indictments do not allege an illegal conspiracy to defraud the United States in any manner or for any purpose.

Curley v. United States, 64 C. C. A. 369, 130 Fed. 1; United States v. Morse, 161 Fed. 429; United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; United States v. Biggs, 211 U. S. 514, 53 L. ed. 307, 29 Sup. Ct. Rep. 181; Crawford v. United States, 212 U. S. 183, 53 L. ed. 465, 29 Sup. Ct. Rep. 260; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; United States v. Simmons, 96 U. S. 360, 24 L. ed. 819; United States v. Hirsch, 100 U. S. 35, 25 L. ed. 540; Dealy v. United States, 152 U. S. 539, 38 L. ed. 545, 14 Sup. Ct. Rep. 680; France v. United States, 164 U. S. 676, 41 L. ed. 595, 17 Sup. Ct. Rep. 219; Re Wolf, 27 Fed. 611; United States v. Reichert, 32 Fed. 142; United States v. Milner, 36 Fed. 891; United States v. Peuschel, 116 Fed. 642; United States v. Thomas and United States v. Taffe, *supra*; Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760.

The penal laws must be strictly construed, and if there is any doubt concerning the application of a criminal statute, it must be resolved in favor of the defendant.

Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; Hamilton v. United States, 26 App. D. C. 382.

It is not a crime or offense to violate a custom, practice, or regulation of the head of a department of the government, unless such custom, practice, or regulation has been authorized by statute, and its violation made penal by some general or special law.

United States v. Haas, 167 Fed. 211; United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; United States v. Sandefuhr, 145 Fed. 49; Morrill v. Jones, 106 U. S. 466, 467, 27 L. ed. 267, 268, 1 Sup. Ct. Rep. 423; United States v. Boyer, *supra*; Wilkins v. United States, 37 C. C. A. 588, 96 Fed. 837; United States v. Maid, 116 Fed. 650; United States v. Blasingame, 116 Fed. 654; United States v. Matthews, 146 Fed. 306; United States v. Keitel, *supra*. See also Caha v. United States, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513; Williamson v. United States, *supra*; United States v. United Verde Copper Co. 196 U. S. 207, 49 L. ed. 449, 25 Sup.

Ct. Rep. 222; *United States v. Manion*, 44 Fed. 800; *United States v. Hoover*, 133 Fed. 950; *Salla v. United States*, 44 C. C. A. 26, 104 Fed. 544; *Re Kollock*, 165 U. S. 533, 41 L. ed. 815, 17 Sup. Ct. Rep. 444.

Judicial notice is taken of regulations made by an executive department only when they are issued pursuant to authority delegated by Congress.

Wilkins v. United States, supra.

If we assume, for the mere sake of the argument, that a charge of crime may be predicated upon the violation of a custom or practice in a department, it must still remain as one of the essential ingredients of the charge that the accused had knowledge of such custom or practice.

Salla v. United States, supra; *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542.

Conclusions of law cannot be resorted to to determine that the indictments legally charged the commission of prohibited offenses.

United States v. Cruikshank, 92 U. S. 542, 558, 23 L. ed. 588, 593; *United States v. Britton*, 108 U. S. 205, 27 L. ed. 700, 2 Sup. Ct. Rep. 531; *Pettibone v. United States and Conrad v. United States*, supra; *McKenna v. United States*, 62 C. C. A. 88, 127 Fed. 88; *Salla v. United States*, supra.

All material facts and circumstances embraced in the definition of the offense must be stated. And if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication.

Pettibone v. United States, supra; *United States v. Hess*, 124 U. S. 486, 31 L. ed. 517, 8 Sup. Ct. Rep. 571; *Evans v. United States*, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934; *United States v. Britton*; *Conrad v. United States*; and *United States v. Reichert*,—supra; *United States v. Fox*, 95 U. S. 670, 24 L. ed. 538; *People v. Lohman*, supra.

Holmes was not an officer of the United States.

United States v. Germaine, 99 U. S. 508, 25 L. ed. 482; *United States v. Mouat*, 124 U. S. 303, 31 L. ed. 463, 8 Sup. Ct. Rep. 505; *United States v. Smith*, 124 U. S. 525, 31 L. ed. 534, 8 Sup. Ct. Rep. 595; *Auffmordt v. Hedden*, 137 U. S. 310, 34 L. ed. 674, 11 Sup. Ct. Rep. 103; *United States v. McDonald*, 21 C. C. A. 347, 44 U. S. App. 461, 72 Fed. 898; *United States v. McCrory*, 33 C. C. A. 515, 63 U. S. App. 359, 91 Fed. 295; *United States v. Colc*, 130 Fed. 614; *United States v. Schlierholz*, 137 Fed. 616; *United States v. Gibson*, 47 Fed. 833; *People ex rel. Throop v. Langdon*, 40 Mich. 673.

If Holmes was a public officer, as claimed by the government, the indictments in which

he is joined as a defendant are fatally defective, because Holmes could not conspire with himself to bribe himself, or to influence himself, or to induce himself to commit the alleged offense of misconduct in office.

United States v. Dietrich, 126 Fed. 664; 2 McClain, Crim. Law, § 959; *Shannon v. Com.* 14 Pa. 226; *Miles v. State*, 58 Ala. 390; *State v. Butler*, 8 Wash. 194, 25 L.R.A. 434, 40 Am. St. Rep. 900, 35 Pac. 1093; 2 Wharton, Crim. Law, § 1339; *Chadwick v. United States*, 72 C. C. A. 343, 141 Fed. 225; *United States v. New York C. & H. R. R. Co.* 146 Fed. 298. See also *Thomas v. United States*, 17 L.R.A. (N.S.) 720, 84 C. C. A. 477, 156 Fed. 903; *Johnson v. United States*, 85 C. C. A. 399, 158 Fed. 69, 14 A. & E. Ann. Cas. 153.

The proceedings before the commissioner should have conformed to the usual mode of process against offenders in New York state.

United States v. Martin, 9 Sawy. 90, 17 Fed. 150; *United States v. Tureaud*, 20 Fed. 621; *Marvin v. United States*, 44 Fed. 405; *Re Gourdin*, 45 Fed. 842; *United States v. Sauer*, 73 Fed. 671; *United States v. Sapinkow*, 90 Fed. 654; *United States v. Rundlett*, 2 Curt. C. C. 41, Fed. Cas. No. 16,208; *United States v. Horton*, 2 Dill. 94, Fed. Cas. No. 15,393; *Ex parte Burford*, 3 Cranch, 448, 2 L. ed. 495; *United States v. Burr*, 2 Wheeler, C. C. 573; *United States v. Insley*, 4 C. C. A. 296, 12 U. S. App. 125, 54 Fed. 223; *Re Dana*, 68 Fed. 895; *United States v. Collins*, 79 Fed. 65; *Re Price*, 83 Fed. 830; *United States v. Price*, 84 Fed. 636; *Johnston v. United States*, 30 C. C. A. 612, 58 U. S. App. 313, 87 Fed. 187; *People v. Cramer*, 22 App. Div. 189, 47 N. Y. Supp. 1039; *McKelvey v. Marsh*, 63 App. Div. 396, 71 N. Y. Supp. 541; *Comfort v. Fulton*, 13 Abb. Pr. 276; *Blodgett v. Race*, 18 Hun, 132; *Tracy v. Seamen*, 26 N. Y. Week. Dig. 117, 7 N. Y. S. R. 146.

The law of the state of New York requires the issuance of a bench warrant for the arrest of one indicted, and also for the arrest of one sought to be extradited to another jurisdiction.

Soloman's Case, 1 Abb. Pr. N. S. 347; *Re Rutter*, 7 Abb. Pr. N. S. 67.

In cases in the United States courts, bench warrants have always been required.

Greene v. Henkel, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218; *Beavers v. Henkel*, 194 U. S. 73, 48 L. ed. 882, 24 Sup. Ct. Rep. 605; *Beavers v. Haubert*, 198 U. S. 77, 49 L. ed. 950, 25 Sup. Ct. Rep. 573; *United States v. Price*, supra.

The removal complaints did not show that Mr. Dorr was authorized to bring the proceedings, and therefore, in the absence of a bench warrant, did not confer jurisdiction upon the commissioner.

Re Ferrelle, 28 Fed. 878; Re Herris, 32 Fed. 583.

Conspiracy being a misdemeanor and bribery a felony, the punishment for each differing, and the indictment averring that the conspiracy to bribe was actually consummated by giving the money to Holmes, the misdemeanor and the conspiracy therefore merged in the felony and the completed act, so that the conspiracy is gone and the accused should not be removed for trial upon an indictment upon which a conviction could not be sustained.

Berkowitz v. United States, 35 C. C. A. 379, 93 Fed. 452; United States v. Jones, 5 Utah, 552, 18 Pac. 233; 1 Bishop, New Crim. Law, § 787; 1 Wharton, Crim. Law, 27A; United States v. Melfi, 118 Fed. 900; United States v. Scott, 139 Fed. 697; 6 Am. & Eng. Enc. Law, p. 863; Thomas v. United States, supra; Clune v. United States, 159 U. S. 590, 595, 40 L. ed. 269, 271, 16 Sup. Ct. Rep. 125; United States v. Gardner, 42 Fed. 829; United States v. McDonald, 3 Dill. 545, Fed. Cas. No. 15,670; United States v. Martin, 4 Cliff. 166, Fed. Cas. No. 15,728; State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79; Elsey v. State, 47 Ark. 572, 2 S. W. 337; Wright v. State, 5 Ind. 528; State v. Lewis, 48 Iowa, 579, 30 Am. Rep. 407; State v. Mayberry, 48 Me. 238; Com. v. Kingsbury, 5 Mass. 106; People v. Richards, 1 Mich. 222, 51 Am. Dec. 75; People v. McKane, 31 Abb. N. C. 176, 7 Misc. 478, 28 N. Y. Supp. 397; People v. Mather, 4 Wend. 229, 21 Am. Dec. 122.

Mr. Henry E. Davis also argued the cause for appellant.

Mr. Jesse C. Adkins argued the cause, and, with Assistant Attorney General Fowler, filed a brief for appellees:

To defraud the United States within the meaning of U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, is not confined to pecuniary loss, but includes any act which deprives the government of an honest administration of its affairs.

Hyde v. Shine, 199 U. S. 62, 81, 50 L. ed. 90, 96, 25 Sup. Ct. Rep. 760; United States v. Keitel, 211 U. S. 370, 394, 53 L. ed. 230, 243, 29 Sup. Ct. Rep. 123; Curley v. United States, 64 C. C. A. 369, 130 Fed. 1; United States v. Bunting, 82 Fed. 883; Palmer v. Colladay, 18 App. D. C. 426; McGregor v. United States, 134 Fed. 195; Tyner v. United States, 23 App. D. C. 325; United States v. Stone, 135 Fed. 395; United States v. Bradford, 148 Fed. 421; United States v. Morse, 161 Fed. 429; Crawford v. United States, 212 U. S. 183, 53 L. ed. 465, 29 Sup. Ct. Rep. 260.

The property right of the government is 54 L. ed.

of the same nature as that protected in this court in the board of trade quotation cases.

Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 250, 49 L. ed. 1031, 1039, 25 Sup. Ct. Rep. 637.

The commissioner could not consider the technical objections made to the indictments, but if one of them substantially charges a crime, however inartificially, the order of removal was properly made.

Beavers v. Henkel, 194 U. S. 73, 85, 48 L. ed. 882, 886, 24 Sup. Ct. Rep. 605; Benson v. Henkel, 198 U. S. 1, 10, 49 L. ed. 919, 922, 25 Sup. Ct. Rep. 569; Pierce v. Creecy, 210 U. S. 387, 401, 52 L. ed. 1113, 1120, 28 Sup. Ct. Rep. 714.

Holmes, as an associate statistician, was an officer of the United States, within the meaning of U. S. Rev. Stat. § 5451, U. S. Comp. Stat. 1901, p. 3680.

United States v. Germaine, 99 U. S. 508, 25 L. ed. 482.

If not an officer, Holmes was a person acting for and on behalf of the United States in an official function.

United States v. Ingham, 97 Fed. 935.

The matters with reference to which the alleged conspiracy was formed were matters which were pending or brought before him in his official capacity, within the meaning of U. S. Rev. Stat. § 5451.

Benson v. Henkel, supra; United States v. Macdaniel, 7 Pet. 1, 8 L. ed. 587; Tyner v. United States, 23 App. D. C. 324.

In indictments charging conspiracy to commit an offense, the description of the offense need not be so accurate as is required in an indictment charging the crime itself.

Tyner v. United States, supra; Com. v. Raymond, 97 Mass. 567; State v. Mohr, 53 Iowa, 261, 5 N. W. 183.

A conspiracy to commit a crime merges in the crime itself only when the crime is a felony; but if both the conspiracy and the crime itself are misdemeanors, the merger does not occur.

United States v. Scott, 139 Fed. 697; United States v. Melfi, 118 Fed. 900.

A felony, within the meaning of the Federal law, is one which was a felony at common law, or has been so defined by statute.

Bannon v. United States, 156 U. S. 464, 39 L. ed. 494, 15 Sup. Ct. Rep. 467; United States v. Jones, 5 Utah, 552, 18 Pac. 233.

A complaint on removal proceedings may be made on information and belief.

Beavers v. Henkel, 194 U. S. 73, 86, 48 L. ed. 882, 887, 24 Sup. Ct. Rep. 605.

Not only is it unnecessary to allege the issuance of a bench warrant in the complaint before the commissioner, but it is not even necessary to produce it in evidence before the commissioner. If it must be pro-

duced at all, it is time enough to produce it when the application is made to the district judge for the issuance of the warrant of removal.

United States v. Price, 84 Fed. 636, affirmed in 32 C. C. A. 162, 59 U. S. App. 578, 89 Fed. 84; Greene v. Henkel, 183 U. S. 249, 260, 46 L. ed. 177, 189, 22 Sup. Ct. Rep. 218.

The fact that Haas may be subject to prosecution for the offense with which he is charged in the southern district of New York, as well as in the District of Columbia, and that he has heretofore been indicted in said former district, is no defense to these removal proceedings.

Hyde v. Shine, *supra*.

The circuit court for the southern district of New York expressly waived its jurisdiction of defendant's person, which eliminates the question of comity between the courts.

Beavers v. Haubert, 198 U. S. 77, 49 L. ed. 950, 25 Sup. Ct. Rep. 573.

Mr. Justice Lurton delivered the opinion of the court:

On May 29, 1908, four indictments were found in the supreme court of the District of Columbia against Moses Haas and certain others, charging them with having conspired in the District of Columbia to defraud the United States, and with having conspired to commit an offense against the United States, under § 5440, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3676). Bench warrants were issued and returned not found.

On the same day four other indictments were found in the circuit court of the United States for the southern district of New York against the same Moses Haas and the others named in the District of Columbia indictments, charging them with having conspired in the southern district of New York to commit the same offenses covered by the four District of Columbia indictments. Haas appeared in the New York courts and gave bail. Later he was arraigned and pleaded not guilty, then withdrew his plea and entered a motion to quash, which was overruled.

On June 24, 1908, and while this motion to quash was *sub judice*, proceedings were duly begun by the United States district attorney for the southern district of New York before the United States commissioner for the arrest of Haas and his removal to the District of Columbia for trial upon the indictments there pending against him. Pending these removal proceedings, and before any hearing, the United States district attorney moved the circuit court in which the New York indictments were pending

for consent to the prosecution of these removal proceedings, and consent was granted over the objection of Haas. This application was made by direction of the then Attorney General of the United States, who in an official communication, said "that should the trial here [Washington] result in acquittal or conviction, the indictments in New York will be dropped." Among other reasons for desiring the trial in [472 Washington, aside from mere questions of convenience to government officials and witnesses, the Attorney General said:

"1. The indictments charge a conspiracy on the part of the several defendants to cause to be issued at Washington by the Bureau of Statistics for the Department of Agriculture of false cotton crop reports, and that Holmes, who was then associate statistician of the Bureau of Statistics, was to furnish to his co-conspirators, in advance of their official issue, the information to be contained in the reports. While, owing to the commission in your district of acts in pursuance of the conspiracy, the court in your district has jurisdiction of the offense, yet the conspiracy was, in all probability, actually formed in Washington. The false reports were prepared and issued here, and the advance information was given out here. The real situs of the crime, then, is in the District of Columbia, and the trials should therefore be had here.

"2. The defendant Holmes has been arrested and is now awaiting trial on the indictments pending in the District of Columbia. There are two series of these indictments, one against Price, Haas, and Holmes, and the other against Haas, Peckham, and Holmes. It would be a great convenience and a vast saving to the government to try the defendants together. Even this would necessitate two trials, one in each series. If the nonresident defendants are not removed to Washington, four trials would be needed,—two in Washington and two in New York."

Upon the hearing before the commissioner, the government put in evidence certified copies of the four District of Columbia indictments, and proof that bench warrants had issued in that district and returned not found. The defendant admitted his identity, and put in evidence copies of the four New York indictments and of the proceedings had thereunder. The commissioner found probable cause, and directed that Haas be held to await an order of removal by a district judge. Thereupon a petition for writs of habeas corpus and *certiorari was filed in the circuit [473 court, averring that his arrest and detention were illegal and in violation of the Federal Constitution. The circuit court, upon a

full hearing, denied the writs and remanded the petitioner. 166 Fed. 631. This appeal was thereupon taken.

The facts stated present the question as to whether Haas could be lawfully removed under § 1014, Rev. Stat. (U. S. Comp. Stat. 1901, p. 716), over his objection, pending the proceedings against him in the southern district of New York for similar offenses.

Section 1014 provides for the arrest and detention of any person, wherever found, "for trial" before such court of the United States as by law has cognizance of the offense, and that "where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

Haas was arrested upon a warrant duly sworn out, charging him with offenses against the United States, committed within the District of Columbia. Copies of the indictments duly returned by a grand jury were put in evidence. That made a *prima facie* case, requiring detention until an order of removal could be applied for and issued. Haas insisted upon his right to be tried in the district of his residence, and complained, with more or less justice, of the expense and hardship incident to a trial in the District of Columbia. But there is no principle of constitutional law which entitles one to be tried in the place of his residence. The right secured by article 3, § 2, and the 6th Amendment of the Constitution, is the right of trial in the district "where the crime shall have been committed." If, therefore, Haas committed a crime against the United States in the District of Columbia, he had neither legal nor constitutional right to object to removal to the district where the trial was to be had. *Re Palliser*, 136 U. S. 257, 265, 34 L. ed. 514, 517, 10 Sup. Ct. Rep. 1034. 474] *If the only constitutional right secured is the right to a trial by jury in the district where the crime was committed, there is obviously no invasion of either right by the election of the government to prosecute the offense in any district and "court of the United States as by law has cognizance of the offense." If the same accusation has been made by grand juries of different jurisdictions, it would be manifestly the duty of the prosecuting officer of the United States to determine in which the offense was most probably committed, and bring the offender to trial there. Thus, if the place of the formation of the con-

spiracy be doubtful, and there be some facts pointing to one district and some to another, and indictments have been returned in each, it would be the plain duty of the prosecution to take steps to bring the case to trial in that district to which the facts most strongly pointed. This seems to have been the very situation of this case, and the principal motive moving the Attorney General to give the instruction shown by his letter to the district attorney for the southern district of New York. The removal statute is plain, and leaves no room for the court to make an exception when Congress has made none.

Has the United States court for the District of Columbia jurisdiction over the accusation made in that district, and is the case triable there? If so, the duty of the commissioner, assuming a showing of probable cause, was to detain, and of the judge of the district to issue his warrant for the removal of the accused "to the district where the trial is to be had." The case, on principle, must be the same if the offense be one which was committed in more than one district. In such a case, § 731, Rev. Stat. (U. S. Comp. Stat. 1901, p. 585), makes it cognizable in either. But, if indicted in two or more districts, there must be an election as to where the defendant shall be tried. Primarily, this is the right and duty of the Attorney General, or those acting by his authority. If the election require the arrest of the accused in a district other than that in which the trial is to be had, removal proceedings must, of course, be instituted. *The duty of the com- [475] missioner is then limited to the determination of the single question of whether a *prima facie* case is made that the accused has committed an offense against the United States, indictable and triable in the district to which a removal is sought. There is no discretion reposed when such a case is made out. That bail had been given would not prevent removal, for in such a situation the sureties would be exonerated by act of the law. *Beavers v. Haubert*, 198 U. S. 77, 49 L. ed. 950, 25 Sup. Ct. Rep. 573.

But in the case before us, the consent of the circuit court, to which the New York indictments had been returned, was granted. To say that the accused had a right to a speedy trial of the New York cases may be conceded. If unreasonable delay should result from continuances due to an election to try the same accusations in another district, a very different question might arise, calling for relief through habeas corpus. But such a possibility affords no legal reason for denying the right of removal. The precise question has not been

before raised; but in principle the case is within *Re Palliser*, 136 U. S. 257, 267, 34 L. ed. 514, 518, 10 Sup. Ct. Rep. 1034; *Hyde v. Shine*, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760; and *Benson v. Henkel*, 198 U. S. 1, 15, 49 L. ed. 919, 924, 25 Sup. Ct. Rep. 569.

In the *Palliser* Case, a removal from a New York district, the residence of *Palliser*, to a Connecticut district, was objected to because the offense had been committed in New York, and not Connecticut. The court said:

"But there can be no doubt at all that, if any offense was committed in New York, the offense continued to be committed when the letter reached the postmaster in Connecticut; and that, if no offense was committed in New York, an offense was committed in Connecticut; and that, in either aspect, the district court of the United States for the district of Connecticut had jurisdiction of the charge against the petitioner. Whether he might have been indicted in New York is a question not presented by this appeal."

In *Hyde v. Shine*, the fact that the conspiracy charged was one triable in California, the residence of the appellant, was [476] *not considered as an answer to the demand for removal from California to the District of Columbia, the question of distance being the one pressed, and decided as presenting no obstacle to the legal right of removal.

In *Beavers v. Haubert*, *supra*, the appellant objected to removal from the district of his residence to another, to be there tried, because he was, at the time, under indictment in the district of his residence, and under bail for his appearance for a different offense against the United States. But it was held that this fact afforded no reason for denying a removal upon the election to try the one case before the trial of the other.

In *Benson v. Henkel*, 198 U. S. 15, 49 L. ed. 924, 25 Sup. Ct. Rep. 569, objection was made to a removal to the District of Columbia upon the ground that the offense, if any, was committed in California, and that, under the Constitution, the appellant was entitled to a trial in that jurisdiction. In dealing with that question, Mr. Justice Brown said:

"The objection does not appear upon the face of the indictment, which charges the offense to have been committed within this district, but from the testimony of one of those clerks it seems that the money was received by him in certain letters mailed to him from San Francisco and received in Washington. Without intimating whether the question of jurisdiction can be

raised in this way, the case clearly falls within that of *Re Palliser*, 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034, in which it was held that where an offense is begun by the mailing of a letter in one district and completed by the receipt of a letter in another district, the offender may be punished in the latter district, although it may be that he could also be punished in the former."

The next objection is that the District of Columbia indictments do not charge any offense against the United States.

The four District of Columbia indictments charge two sets of conspiracies. One conspiracy, chargea in indictment No. 26,088, is averred to have been formed between Haas, one *Theodore Price, and [477] one Edwin S. Holmes, Jr.; who was an associate statistician in the Department of Agriculture. The charge in certain of these counts is that these three defendants conspired to defraud the United States by secretly obtaining information from Holmes, which he should acquire in his official character as associate statistician, and should, in violation of his official duty, give out secretly to his co-conspirators, as to the probable contents of certain official cotton crop reports in advance of the time when these reports were to be promulgated according to law. In one of the counts it is charged that Holmes was to falsify one of these official cotton crop reports, of which fact his associates were to be advised in advance. All of which information in advance of the publication of the official cotton crop reports was to be used for speculative purposes in the open market.

Indictment No. 26,089 charges that Haas and Price conspired to bribe Holmes to make this false report, and to furnish them in advance information as to its contents.

Indictment No. 26,086 charges that Haas and one Frederick A. Peckham conspired with one Van Riper to bribe Holmes to give them advance information of the June report of 1905, while No. 26,087, charges Haas, Peckham, and Holmes with conspiracy to defraud the United States by Holmes giving his co-conspirators advance information as to that report.

The indictments are of such great length that it is not feasible to set them out in full or to state the substance of their several counts. It is, for the purposes of this case, enough to say that it is averred that the Department of Agriculture includes a Bureau of Statistics, established by law. That one of the governmental functions exercised by that department, particularly through the Statistical Bureau, is the acquirement of detailed information from

time to time in respect to the condition of the cotton crop of the country. That this information comes through thousands of correspondents, some official and others not, through the reports of local agents scattered through the cotton region, and 478] through traveling *representatives of the Department. From these and other sources a report is made estimating acreage, condition, and the probable size of the crop. Comparisons with former reports are made, and every explanation furnished which may throw light upon the present condition and prospect of the growing crop. That the purpose is to complete and promulgate at stated times fair, impartial, and reliable reports, and that said reports are issued about the 3d day of the months of June, July, August, September, October, and December. That the information thus officially acquired and compiled, and the estimates thereon, are of value and do greatly affect the market price of the crop. That such reports are required to be submitted to and approved by the Secretary of Agriculture before publication, and that under the custom, practices, and regulations of the Secretary of Agriculture all officers and employees are required to keep secret the information so gathered, and from in any way divulging same or giving out any information forecasting such report in advance of its official approval and promulgation.

It is averred that the said Holmes was an employee or an official in said department, and in the Bureau of Statistics. That by virtue of his duty as such official and assistant statistician, he acquired much of the information upon which such reports are based, and, as an official, came into knowledge of the probable contents of the regular reports. That neither Haas nor Price had any official connection, and were not authorized to obtain information about such reports in advance of their promulgation. That the conspiracy was to obtain such information from Holmes in advance of general publicity, and to use such information in speculating upon the cotton market, and thereby defraud the United States by defeating, obstructing, and impairing it in the exercise of its governmental function in the regular and official duty of publicly promulgating fair, impartial, and accurate reports concerning the cotton crop. One count charges, in addition, that the conspiracy included the making 479] of a false report, the *facts to be given by Holmes to his co-conspirators in advance of its publication.

The counts charging a conspiracy to commit an offense against the United States in substance charge that this was to be

accomplished by bribing the said Holmes to induce him to do certain acts in violation of his lawful duty not to give out advance information in respect to the condition of the cotton crop, acquired in the performance of his official duty.

Do the counts which charge a conspiracy to defraud the United States charge any offense?

The authority for the indictments charging a conspiracy to defraud is § 5440, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3676). Its language is plain and broad:

"If two or more persons conspire . . . to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable," etc.

These counts do not expressly charge that the conspiracy included any direct pecuniary loss to the United States, but, as it is averred that the acquiring of the information and its intelligent computation, with deductions, comparisons, and explanations, involved great expense, it is clear that practices of this kind would deprive these reports of most of their value to the public, and degrade the department in general estimation, and that there would be a real financial loss. But it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government. Assuming, as we have, for it has not been challenged, that this statistical side of the Department of Agriculture is the exercise of a function within the purview of the Constitution, it must follow that any conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of its operations and reports as fair, impartial, and reasonably accurate, would be to defraud *the United [480 States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation. That it is not essential to charge or prove an actual financial or property loss to make a case under the statute has been more than once ruled. *Hyde v. Shine*, 199 U. S. 62, 81, 50 L. ed. 90, 96, 25 Sup. Ct. Rep. 760; *United States v. Keitel*, 211 U. S. 370, 394, 53 L. ed. 230, 243, 29 Sup. Ct. Rep. 123; *Curley v. United States*, 64 C. C. A. 369, 130 Fed. 1; *McGregor v. United States*, 69 C. C. A. 477, 134 Fed. 195.

The counts charging a conspiracy to commit an offense against the United States,

namely, the offense of bribing Holmes to violate his duty as a public official by giving out advance information about the monthly cotton reports, are said not to charge an offense against the United States, because there is no statute which prohibits the giving out of such official secrets in advance of lawful promulgation.

Section 5451, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3680), makes it a crime to bribe or offer to bribe "any officer of the United States," or "any person acting for or on behalf of the United States, in any official function, under or by authority of any department or office of the government; . . . to induce him to do or omit to do any act in violation of his lawful duty." The head of each department is authorized by § 161, Rev. Stat. (U. S. Comp. Stat. 1901, p. 80), "to prescribe regulations not inconsistent with law for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the . . . preservation of the records, papers, and property appertaining to it." Such regulations need not be promulgated in any set form, nor in writing.

In *United States v. Macdaniel*, 7 Pet. 1, 14, 15, 8 L. ed. 587, 592, it was said of departmental regulations that, "of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits."

In *Benson v. Henkel*, 198 U. S. 1, 11, 49 L. ed. 919, 922, 25 Sup. Ct. Rep. 569, a similar question *arose in an appeal from an order denying a writ of habeas corpus in a removal case. The appellant was charged with a conspiracy to commit an offense by bribing certain clerks of the land office to divulge the contents of certain reports. It was said that these clerks had not been forbidden by any statute to give out such information. Mr. Justice Brown, for the court, said:

"But it is clearly for the court to say whether every duty to be performed by an official must be designated by statute, or whether it may not be within the power of the head of a department to prescribe regulations for the conduct of the business of his office and the custody of its papers, a breach of which may be treated as an act in violation of the lawful duty of an official or clerk. *United States v. Macdaniel*, 7 Pet. 1, 14, 8 L. ed. 587, 592."

We have not dealt with certain minor objections which go to the form of the indictments rather than to the substance. These are matters to be determined in the court where they were found, and are not proper

for consideration upon habeas corpus proceeding.

The exclusion of the evidence taken in *Price v. United States*, and offered in this case upon the petition for writ of habeas corpus in the circuit court, touching the history of the finding of indictment No. 26,088, is not a matter which is proper for review on such an appeal as this. So, also, the defense of the statute of limitations. The one defense is matter in abatement and the other of substantive defense, and both are properly matters for the determination of the court into which the indictments were returned and where the case will be tried.

It is enough to hold, as we do, that the indictments sufficiently charge an offense committed within the District of Columbia to require that the appellant shall be removed to that district for trial. *Benson v. Henkel*, 198 U. S. 1, 49 L. ed. 919, 25 Sup. Ct. Rep. 569.

The introduction of certified copies of the District of Columbia indictments made a prima facie case for removal. That *case [482 was not overcome by the copies of the New York indictments. That they laid the locus of the conspiracy in a different place from that laid in the District of Columbia indictments is true. But if such indictments are evidence for the purpose of showing that the place of the conspiracy was not in the District of Columbia, such evidence was not, as matter of law, sufficient to overcome the probable cause shown by the District of Columbia indictments. They certainly could not be regarded as admissions by the government. They were, at most, evidence of the opinion of the New York grand jury as to the locus of the conspiracy. But if the fact be that the offense charged in both sets of indictments is identical, and that the locus of the conspiracy is laid in one set as in one district and in the other as in a different district, it is still for the government to determine in which of the two districts it will bring the accused to trial, and of the commissioner to determine whether a prima facie case has been shown that the accused had probably committed an offense in the District of Columbia, which was indictable and triable there. This we have dealt with already, and only refer to it now in connection with the use of the New York indictments as evidence that the offense was not committed in the District of Columbia.

Upon the whole case, we conclude that the commissioner had jurisdiction, and that no sufficient reason is shown for discharging the appellant.

Final order denying writ affirmed.

Brewer, J., concurring:

I concur in affirming the orders of re-

removal in these cases, but my concurrence must not be taken as holding that the indictments will stand the final test of validity or sufficiency. Assuming that there is a doubt in respect to these matters, as I think there is, and as seems to be suggested by the opinion in No. 367, I am of the opinion that such doubt should be *settled by direct action in the court in which the indictments were returned, and not in removal proceedings.

Mr. Justice McKenna concurs in the result, but reserves opinion whether the facts alleged in the indictment constitute a conspiracy to defraud the United States.

FREDERICK A. PECKHAM, Appt.,
v.

WILLIAM HENKEL, United States Marshal for the Southern District of New York, et al.

(See S. C. Reporter's ed. 483-487.)

Courts — conflict of jurisdiction — removal of prisoner to other Federal district.

1. The prosecution of proceedings for the removal to another Federal district for trial of a person there charged with an offense against the United States is not an unlawful interference with the jurisdiction of a Federal circuit court for another district, in which an order for the removal of the accused to answer for similar but distinct offenses has been stayed pending the determination of an appeal from such order to a circuit court of appeals.

[For other cases, see Courts, 1481, 1611, 1612, in Digest Sup. Ct. 1908.]

Habeas corpus — scope of review — proceedings to remove to another Federal district.

2. The error, if any, in prosecuting proceedings for the removal to another Federal district for trial of a person there charged with an offense against the United States, while similar proceedings in a Federal circuit court for another district are pending, cannot be corrected on a writ of habeas corpus.

[For other cases, see Habeas Corpus, 140-144, in Digest Sup. Ct. 1908.]

[No. 366.]

NOTE. — As to the exercise by courts of powers which bring them into collision—see notes to Carson v. Dunham, 3 L.R.A. 203, and Tefft W. & Co. v. Sternberg, 5 L.R.A. 221.

On removal to another Federal district for trial of persons there charged with an offense against the United States—see note to Greene v. Henkel, 46 L. ed. U. S. 177.

On habeas corpus in the Federal courts—see notes to Re Reinitz, 4 L.R.A. 236; State 54 L. ed.

Argued January 6, 7, 1910. Decided February 21, 1910.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a judgment refusing relief by habeas corpus to a person held in custody to await an order for his removal to the District of Columbia for the trial of indictments there pending against him. Affirmed.

See same case below, 166 Fed. 627.

The facts are stated in the opinion.

Messrs. Nash Rockwood and Henry E. Davis argued the cause, and, with Mr. Max D. Steuer, filed a brief for appellant:

The petitioner, Peckham, is legally in the custody of his surety, and, in theory of law, is actually in the jurisdiction to which removal is sought.

Re Beavers, 125 Fed. 988.

The rule that where jurisdiction has attached to a person or thing it is exclusive in effect until it has wrought its function is primarily the right of the court or sovereignty itself.

Beavers v. Haubert, 198 U. S. 77, 49 L. ed. 950, 25 Sup. Ct. Rep. 573.

Mr. Jesse C. Adkins argued the cause, and, with Assistant Attorney General Fowler, filed a brief for appellees:

The present proceeding is not illegal, because appellant's appeal in the circuit court of appeals has not yet been decided.

Beavers v. Haubert, 198 U. S. 77, 49 L. ed. 950, 25 Sup. Ct. Rep. 573.

Mr. Justice Lurton delivered the opinion of the court:

This is an appeal from a judgment of the circuit court, denying the application of the appellant to be discharged from arrest on a writ of habeas corpus, and remanding him to the custody of the marshal.

The case differs from the case of Haas v. Henkel, just disposed of [216 U. S. 462, ante, 569, 30 Sup. Ct. Rep. 249], only in certain particulars; otherwise it is governed by the opinion in that case.

1. Peckham is included in only two of the indictments against Haas, namely, Nos. 26,086 and 26,087. The first charges a conspiracy with Edwin S. Holmes, Jr., and Moses Haas to defraud the United States;

ex rel. Cochran v. Winters, 10 L.R.A. 616; Re Huse, 25 C. C. A. 4; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

As to questions reviewable by habeas corpus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; Glass v. The Betsey, 1 L. ed. U. S. 489; United States v. Hamilton, 1 L. ed. U. S. 490; Ex parte Carll, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; and Pearce v. Texas, 39 L. ed. U. S. 164.

the other with a conspiracy with Haas, and others unknown, to commit an offense against the United States,—that of bribing Holmes, an assistant statistician in the Department of Agriculture, to do an act in violation of his official duty.

Neither of the indictments found in the District of Columbia against Peckham includes the count charging a conspiracy to bribe Holmes to falsify one of the official cotton crop reports.

In all other matters this appeal is controlled by the opinion and judgment in the Haas Case, unless a different result must follow from the facts now to be stated.

In 1905, three indictments were returned against Peckham, Holmes, and Haas in the supreme court for the District of Columbia, charging them with conspiring to defraud the United States and to commit an offense against the United States. A warrant for Peckham's arrest was issued in the northern district of New York upon a complaint filed with the commissioner for his removal to the District of Columbia for trial. Peckham appeared and waived examination, and gave bail for his appearance in the District of Columbia court to answer the indictments there pending. Subsequently his [485] *sureties surrendered him, pursuant to § 1018, Rev. Stat., U. S. Comp. Stat. 1901, p. 719, whereupon the commissioner issued a warrant recommitting him to the custody of the United States marshal for the northern district of New York. Thereupon he applied to District Judge Ray, of that district, for a writ of habeas corpus, alleging, upon the facts stated, that his detention was contrary to law and in violation of the Constitution of the United States, for that the aforesaid indictments did not charge any crime or offense against the United States. Upon a hearing before Judge Ray, the petition was dismissed, the writ denied, and Peckham remanded to the custody of the marshal, and an order made at the same time for his removal to the District of Columbia. From this judgment an appeal was at once allowed to the circuit court of appeals for the second circuit. In consequence of this, Judge Ray directed that the execution of the removal order made by him be stayed until the appeal should be disposed of. That stay order was made January 10, 1906, and was still in force when, in November, 1908, the proceedings for his removal to answer the 1908 indictments were had. The pendency of the proceedings for his removal from the northern district of New York to answer the District of Columbia indictments found in 1905, and of his appeal from the judgment of the circuit court for that district, and the order made staying the re-

moval order made in the proceedings referred to, were shown in evidence before the commissioner in the proceedings under review in the present appeal, as a legal obstacle to any order of removal to answer the 1908 indictments, and also as evidence bearing upon the defense of the statute of limitations as a bar to those indictments. The 1905 indictments are for similar offenses to those charged in the later indictments of 1908; but they are not for the same offenses. They charge conspiracy at a different time and with respect of different cotton reports, and were, therefore, offenses distinct from those included in the later indictments.

But it is said that while the removal proceedings in the northern district of New York are pending, appellant cannot *be [486 removed under the later complaint without disregarding the jurisdiction over his person which first attached by virtue of the prior effort to remove him to the District of Columbia. That Peckham is under bond to appear and comply with the order of removal made by Judge Ray, and, therefore, constructively in the custody of his sureties, must be conceded. But if the performance of the condition of that bail bond is rendered impossible by his removal in these subsequent proceedings, at the instance of the United States, the effect may be to exonerate his sureties. *Taylor v. Taintor*, 16 Wall. 371, 21 L. ed. 290; *Beavers v. Haubert*, 198 U. S. 77, 85, 49 L. ed. 950, 953, 25 Sup. Ct. Rep. 573. But it is said that removal to the District of Columbia is forbidden under Judge Ray's order of January 10, 1906, and that a removal under the order made by the commissioner in the proceedings now under review will invalidate the order of Judge Ray.

This is a fanciful claim. He will not be removed under or in pursuance of the original order of removal, execution of which has been stayed, but under an order made in an altogether distinct and subsequent proceeding to answer distinct offenses.

Finally, it is said that the jurisdiction of the court for the northern district of New York, having attached to the person of appellant, must be respected as exclusive until its jurisdiction is exhausted.

The rule is one of comity only, and has a wide application in civil cases, but a limited one in criminal cases. See *Re Johnson*, 167 U. S. 120, 125, 42 L. ed. 103, 104, 17 Sup. Ct. Rep. 735, and *Beavers v. Haubert*, 198 U. S. 77, 84, 49 L. ed. 950, 953, 25 Sup. Ct. Rep. 573. But when, as here, the subsequent proceedings for the removal of appellant are to answer indictments later found for other and distinct offenses,

the question is quite a different one, for the "cases" are not the same. That they are "cases" against the same offender is not of itself sufficient to constitute the second proceedings void as an unlawful interference with the jurisdiction of the circuit court for the northern district of New York. The present case differs upon this point from that of *Beavers v. Haubert*, in that the consent of the court of prior jurisdiction was not obtained as in that. In 487] that case *the court reserved the question as to "whether the government had the right of election, without such consent," to proceed in either of the two districts in which indictments were pending. But there is here no question of electing whether to try in the northern district of New York or in the District of Columbia, but whether it would elect between the two removal proceedings, the object of each being to remove the appellant to the same place for trial. The institution of the second removal proceeding without the consent of the circuit court for the northern district of New York may very well be regarded as an election by the United States, the plaintiff in both cases, to abandon the first complaint. But aside from this, and assuming, without deciding, that the removal proceedings were in disregard of the prior proceedings, and therefore erroneous, the jurisdiction of the commissioner was not affected. No constitutional right of the appellant was invaded. A petition for a writ of habeas corpus is not a writ of error. The error, if any, was a mere disregard of a rule of comity, which is not reversible in a proceeding of this character.

In principle, the case is governed by *Beavers v. Haubert*, and the final order of the Circuit Court is affirmed.

Brewer, J., concurring:

I concur in affirming the orders of removal in these cases, but my concurrence must not be taken as holding that the indictments will stand the final test of validity or sufficiency. Assuming that there is a doubt in respect to these matters, as I think there is, and as seems to be suggested by the opinion in No. 367, I am of the opinion that such doubt should be settled by direct action in the court in which the indictments were returned, and not in removal proceedings.

Mr. Justice McKenna concurs in the result, but reserves opinion whether the facts alleged in the indictment constitute a conspiracy to defraud the United States.

*THEODORE H. PRICE, Appt., [488
v.

WILLIAM HENKEL, United States Marshal for the Southern District of New York, et al.

(See S. C. Reporter's ed. 488-494.)

Habeas corpus—sufficiency of indictment in removal proceedings.

1. One good count in an indictment under which a trial might be had in the Federal district to which a removal under U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, is sought, is enough to support an order for such removal in a habeas corpus proceeding.

[For other cases, see Habeas Corpus, 140-144, in Digest Sup. Ct. 1908.]

Criminal law—removal from district of residence.

2. A person indicted for the same offense in two Federal districts, one of which is the district where he resides, may—at least, with the consent of the court of the latter district—be removed, under U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, to the other district for the trial of the offense committed there.

[For other cases, see Criminal Law, VII. in Digest Sup. Ct. 1908.]

Criminal law—removal to other district for trial—sufficiency of indictment.

3. Allegations charging a conspiracy by which an employee in the Bureau of Statistics in the Department of Agriculture was to give his co-conspirators advance information of the official cotton crop reports, and a conspiracy to bribe such employee for the same purpose, sufficiently show, for the purposes of a removal, under U. S. Rev. Stat. § 1014, U. S. Comp. Stat. 1901, p. 716, to the District of Columbia for trial, the commission within the District of offenses against the United States.

[For other cases, see Criminal Law, 249-254, in Digest Sup. Ct. 1908.]

Habeas corpus—scope of review—proceedings to remove to another Federal district.

4. A finding of probable cause for the removal to the District of Columbia of a person there charged with an offense against

NOTE.—On removal to another Federal district for trial of persons there charged with an offense against the United States—see note to *Greene v. Henkel*, 46 J. ed. U. S. 177.

On habeas corpus in the Federal courts—see notes to *Re Reinitz*, 4 L.R.A. 236; *State ex rel. Cochran v. Winters*, 10 L.R.A. 616; *Re Huse*, 25 C. C. A. 4; and *Tinsley v. Anderson*, 43 L. ed. U. S. 91.

As to questions reviewable by habeas corpus—see notes to *State v. Jackson*, 1 L.R.A. 373; *Bion's Appeal*, 11 L.R.A. 694; *Glass v. The Betsey*, 1 L. ed. U. S. 489; *United States v. Hamilton*, 1 L. ed. U. S. 490; *Ex parte Carll*, 27 L. ed. U. S. 288; *Oteiza y Cortes v. Jacobus*, 34 L. ed. U. S. 464; and *Pearce v. Texas*, 39 L. ed. U. S. 164.

the United States will not be disturbed on habeas corpus as being wholly without any evidence to support it, where certified copies of indictments for conspiring against the United States, found in the District of Columbia, were produced before the commissioner, although copies of indictments found by a Federal court of the district where the accused resides, laying the locus of the conspiracy in that district, were also offered in evidence, together with testimony tending to show that the accused had not been in the District of Columbia at any of the times when the conspiracy was said to have been formed.

[For other cases, see Habeas Corpus, 140-144, in Digest Sup. Ct. 1908.]

[No. 385.]

Argued January 7, 1910. Decided February 21, 1910.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a judgment refusing relief by habeas corpus to a person held in custody to await an order for his removal to the District of Columbia for the trial of indictments there pending against him. Affirmed.

The facts are stated in the opinion.

Mr. De Lancey Nicoll argued the cause, and, with Messrs. John D. Lindsay, Howard S. Gans, and Thomas Staples Fuller, filed a brief for appellant:

Jurisdiction of the offense exists whenever the offense was committed in whole or in part in a particular Federal district. Jurisdiction to try the offender exists only after he has been brought into court.

Hyatt v. New York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456.

The principle that a man is not to be removed from the place where he was when he is alleged to have done the act of which he stands accused, when he can be tried in that place, for trial in another locality, was asserted long before the Revolution, and to prevent its encroachment, this principle was made a part of our organic law.

3 N. Y. Colonial Documents, p. 368; 4 N. Y. Colonial Documents, 2-5, 8, 9; 1 Pitkin, Political & Civil History of U. S. pp. 236, 237; Select Charters, pp. 334, 335; 7 Bigelow, Cambridge Modern History, p. 187; 3 Elliot, Debates, 2d ed. p. 168; 2 Story, Const. 5th ed. p. 560; Cooley, Const. Lim. 7th ed. p. 459.

It would be a singular result of a revolution where one of the grievances complained of was the assertion of the right to send parties abroad for trial, if it should be found that a person who, at his home, had committed an offense against the United States, triable at that place, might be re-

moved, as a fugitive criminal, for trial in any district of the United States in which his offense may also be cognizable.

Re Dana, 7 Ben. 1, Fed. Cas. No. 3,554; Cooley, Const. Lim. p. 459, note.

So far from extending the operation of U. S. Rev. Stat. § 1014, in the manner urged by the government, this court will limit its application to the purposes it was intended to serve.

United States v. Kirby, 7 Wall. 486, 19 L. ed. 280; Varick v. Briggs, 6 Paige, 323; 2 Bacon, Essays, 1824, pp. 383, 384.

To justify the defendant's removal to the District of Columbia it was incumbent upon the government to establish by competent legal evidence the fact that there was probable cause for believing him to have been guilty of a crime in that District.

Tinsley v. Treat, 205 U. S. 32, 51 L. ed. 695, 27 Sup. Ct. Rep. 430.

The indictments are merely secondary evidence of the facts which they allege.

United States v. Greene, 100 Fed. 943; Re Dana, 68 Fed. 886.

Even if we admit that the Washington indictments establish prima facie that the offense was committed in the District of Columbia, judging them by the rules applicable to conflicting affidavits, their effect is neutralized by the New York indictments, and the prima facie case of probable cause established by the government is overcome; and this being the result, the presumption of the defendant's innocence, to which he is entitled at all stages of the proceedings, enures to his protection, so that there remains no evidence whatever before the commissioner upon which to base a finding of probable cause.

22 Am. & Eng. Enc. Law, 2d ed. p. 1282.

Not only was the prima facie case of the government completely overcome, but the government itself introduced affirmative and conclusive evidence showing that the defendant had committed no crime in the District of Columbia. This consisted of the affidavit made by the defendant in opposition to the circuit court's consent to the removal proceeding. This affidavit must be taken in its entirety as part of the government's case.

People ex rel. Perkins v. Moss, 187 N. Y. 410, 11 L.R.A.(N.S.) 528, 80 N. E. 383, 10 A. & E. Ann. Cas. 309.

It shows conclusively that the petitioner was not in the District of Columbia at any of the times mentioned in the various indictments, and therefore could not be guilty of the crime therein charged.

Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760.

Where the jurisdiction to order removal is based upon an indictment alone, the re-

removal may not be ordered unless the indictment sets forth facts constituting a crime.

Tinsley v. Treat, 205 U. S. 20, 29, 51 L. ed. 689, 694, 27 Sup. Ct. Rep. 430; *Greene v. Henkel*, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218.

In removal proceedings it has been the almost uniform practice of the court to examine the indictment for the purpose of determining whether the facts alleged therein establish a crime.

United States v. Green, 136 Fed. 660; *United States v. Black*, 87 C. C. A. 383, 160 Fed. 433; *Pereles v. Weil*, 157 Fed. 421; *Stewart v. United States*, 55 C. C. A. 641, 119 Fed. 93; *United States v. Connors*, 111 Fed. 734; *Re Belknap*, 96 Fed. 615; *United States v. Lee*, 84 Fed. 627; *Re Dana*, 68 Fed. 890; *Re Corning*, 51 Fed. 206; *Re Terrell*, 51 Fed. 213; *Re Greene*, 52 Fed. 106; *Re Buell*, 3 Dill. 120, Fed. Cas. No. 2,102; *Re Doig*, 4 Fed. 194.

In order to constitute a fraud, some property, or right or interest therein, must be sought.

Wharton, Crim. Law, 10th ed. § 124; *Cooley*, Torts, 2d ed. 555; *Burdick v. Post*, 12 Barb. 168; *United States v. Lee*, 12 Fed. 819; *Bradley v. Fuller*, 118 Mass. 239; *Dudley v. Briggs*, 141 Mass. 585, 55 Am. Rep. 494, 6 N. E. 717.

In order to constitute a fraud there must be a resort to deceptive practices.

Lord v. Goddard, 13 How. 198, 211, 14 L. ed. 111, 116; *Union P. R. Co. v. Barnes*, 12 C. C. A. 48, 27 U. S. App. 421, 64 Fed. 83.

In order to sustain this removal proceeding, the court is asked to substitute a presumption of guilt for the presumption of innocence; to hold that in criminal cases inference may supply the place of proof; and that that which the grand jury did not charge, and which is in no way established, a court may assume to be true, in order to spell out a crime. Certainly, in the light of the authorities, such a contention seems little short of ridiculous.

Pettibone v. United States, 148 U. S. 197, 202, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; *United States v. Hess*, 124 U. S. 483, 486, 31 L. ed. 516, 517, 8 Sup. Ct. Rep. 571; *The Bothnea*, 2 Wheat. 169, 177, 4 L. ed. 211, 213; *United States v. Simmons*, 96 U. S. 360, 363, 24 L. ed. 819, 820; *Blitz v. United States*, 153 U. S. 308, 313, 38 L. ed. 725, 727, 14 Sup. Ct. Rep. 924.

In order to charge an offense it was necessary to set forth an agreement which contemplated that the information was to be given to Price and Haas at a time when they would be unauthorized to receive it; and the averment that they were not so

authorized when the agreement was made cannot be construed so as to justify an inference that it was intended they would not be so authorized when the disclosures were to be made, or an inference that the conspirators intended that the disclosures should be made to them if, at that time, they should be thus unauthorized to receive them.

United States v. Green, 136 Fed. 659; *Salla v. United States*, 44 C. C. A. 26, 104 Fed. 544; *United States v. Britton*, 108 U. S. 199, 204, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531; *Stokes v. United States*, 157 U. S. 187, 188, 39 L. ed. 667, 668, 15 Sup. Ct. Rep. 617; *Pettibone v. United States*, supra; *Conrad v. United States*, 62 C. C. A. 478, 127 Fed. 800; *Dalton v. United States*, 62 C. C. A. 238, 127 Fed. 546; *McKenna v. United States*, 62 C. C. A. 88, 127 Fed. 90; *Johnson v. United States*, 85 C. C. A. 399, 158 Fed. 73, 14 A. & E. Ann. Cas. 153.

Where a series of acts constitutes an offense only in the event that a certain condition exists, it is settled that the existence of that condition must be pleaded, whether it is in form negative or positive.

United States v. McCormick, 1 Cranch, C. C. 593, Fed. Cas. No. 15,663; *Ledbetter v. United States*, 170 U. S. 606, 42 L. ed. 1162, 18 Sup. Ct. Rep. 774.

The failure of proof cannot be supplied by allegations setting forth the pleader's conclusion.

United States v. Cruikshank, 92 U. S. 542, 558, 23 L. ed. 588, 593; *United States v. Britton*, 108 U. S. 199, 205, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531; *Pettibone v. United States*, 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; *Conrad v. United States*, supra; *McKenna v. United States*, 62 C. C. A. 88, 127 Fed. 91; *Salla v. United States*, 44 C. C. A. 26, 104 Fed. 547.

Since the rule of the Department of Agriculture which regulates the disclosure of official information permitted that information to be disclosed with the permission of the chief of a bureau, and since it is alleged that Holmes, who was to give it out, might exercise the powers of the chief of a bureau, the indictment affirmatively disclosed that the information was not to be given in violation of any rule of the Department.

Johnson v. United States, 85 C. C. A. 399, 158 Fed. 69, 14 A. & E. Ann. Cas. 153.

An indictment attempting to charge a conspiracy to commit a crime must set forth all the elements of the crime which is charged as its object, and may not be sustained on the theory that some other crime can be spelled out.

United States v. Britton, 108 U. S. 199, 207, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531.

Not only must the person to whom a bribe is offered be an officer of the United States or a person performing an official function, but the bribe must be offered to him for the purpose of affecting his decision or action on a question or matter which is before him in his official capacity.

United States v. Gibson, 47 Fed. 833.

Assistant Attorney General Fowler argued the cause, and, with Mr. Jessé C. Adkins, filed a brief for appellees:

If the additional evidence relied on by appellant tends to prove a want of probable cause, yet it involves a weighing of evidence, which will not be done in these collateral proceedings.

Greene v. Henkel, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218.

The verbal testimony is entitled to no weight in determining whether or not Price entered into the conspiracy alleged in the indictment, (1) because he could have entered into the conspiracy in Washington and yet have remained in the city of New York, by either telegraph, by telephone, or by letter (United States v. Thayer, 209 U. S. 39, 52 L. ed. 673, 28 Sup. Ct. Rep. 436; Armour Packing Co. v. United States, 209 U. S. 56, 74, 77, 52 L. ed. 631, 691, 693, 28 Sup. Ct. Rep. 428); and there is no intimation in the record that he was not, on the 31st of May, 1905, in communication with his codefendants in the city of Washington; (2) the allegations of the indictments may be sustained as well by proof of a conspiracy entered into upon any other date which is not barred by the statutes of limitations, as upon the 31st day of May, 1905 (Ledbetter v. United States, 170 U. S. 606, 612, 42 L. ed. 1162, 1164, 18 Sup. Ct. Rep. 774).

The accused's place of residence, and his location when the alleged offense was committed, have nothing to do with the forum before which the trial is to be had.

Re Palliser, 136 U. S. 265, 34 L. ed. 517, 10 Sup. Ct. Rep. 1034; Armour Packing Co. v. United States, 209 U. S. 76, 52 L. ed. 692, 28 Sup. Ct. Rep. 428; Burton v. United States, 202 U. S. 387, 50 L. ed. 1073, 26 Sup. Ct. Rep. 688, 6 A. & E. Ann. Cas. 362.

The statutes clearly contemplate that where one is indictable for an offense in either of two or more districts, he may be removed from one of such districts to another for trial.

Re Palliser, *supra*.

This is a collateral attack on the proceedings before the commissioner, and the only

thing now to be determined is whether or not the commissioner has jurisdiction to order a removal.

Greene v. Henkel, 183 U. S. 261, 46 L. ed. 189, 22 Sup. Ct. Rep. 218; Bryant v. United States, 167 U. S. 104, 42 L. ed. 94, 17 Sup. Ct. Rep. 744.

The court will not consider whether the Department had the power to adopt rules.

Benson v. Henkel, 198 U. S. 1, 9, 13, 49 L. ed. 919, 921, 923, 25 Sup. Ct. Rep. 569.

Questions as to the sufficiency of the indictment as a pleading cannot be considered in these proceedings. The indictment is not here introduced as a pleading, but solely as evidence of probable cause.

Benson v. Henkel, 198 U. S. 12, 49 L. ed. 922, 25 Sup. Ct. Rep. 569.

With reference to the amount of the evidence necessary to sustain in a habeas corpus proceeding the order of removal, the rule is substantially the same as with reference to the finding of facts by a jury; that is, that the evidence will not be weighed by the court, but the order will be sustained if there is any evidence upon which it can rest.

Hyde v. Shine, 199 U. S. 84, 50 L. ed. 97, 25 Sup. Ct. Rep. 760.

Mr. Justice Lurton, delivered the opinion of the court:

The appellant, Theodore H. Price, was, on March 1, 1909, *committed by a United [489 States commissioner for the southern district of New York to the custody of the appellee, as marshal for that district, to await an order of removal to the District of Columbia, for trial upon two indictments, numbered respectively 26,088 and 26,089, being two of the indictments considered in the case of Haas v. Henkel, just disposed of. [216 U. S. 462, ante, 569, 30 Sup. Ct. Rep. 249]. Price thereupon filed his petition in the circuit court of the United States for the southern district of New York, alleging that his imprisonment was unlawful and in violation of the Constitution of the United States, and praying for a writ of habeas corpus and certiorari, and that he might be discharged from such arrest. Upon a hearing, his petition was dismissed and he was remanded to the custody of the marshal. From this order he has prayed this appeal.

This appeal and that of Haas were argued together, the difference between the two being slight. The two New York indictments against Price which he had been held to answer when these removal proceedings were begun were numbered 307 and 308. The first charged him with having entered into a conspiracy with Moses Haas, Edwin S. Holmes, Jr., and other persons unknown, to defraud the United States, and the other

charged him with having conspired with Haas to bribe Holmes, an official in the Statistical Bureau of the Department of Agriculture, to violate his duty. These indictments allege the conspiracy to have been formed in the southern district of New York. They are in all respects similar to the two District of Columbia indictments against the same persons, which lay the locus of the conspiracy in the District of Columbia, except that certain counts in the latter indictments charge particular offenses not charged in either of the New York indictments.

It is now insisted that the order of the commissioner, committing appellant to the custody of the marshal to wait a removal, is void:

1. Because § 1014, Rev. Stat. (U. S. Comp. Stat. 1901, p. 716), does not authorize a removal from the district where an [490] accused is found when he *is there under bail to answer local indictments for the same offense.

2. That the commitment to await an order of removal was illegal and an abuse of power, because the District of Columbia indictments did not substantially charge any offense against the United States.

3. That the record certified by the commissioner under the certiorari issued by the circuit court does not show any evidence justifying a conclusion that there was probable cause to believe that the appellant had committed any crime in the District of Columbia.

As two of the counts included in one of the District of Columbia indictments are for particular offenses, similar in character, but not identical with those covered by either of the two New York indictments, it is apparent that appellant has not been held in New York to answer all of the offenses which he is charged with having committed in the District of Columbia, and could not be brought to trial under the New York indictments for the offenses charged by the fifth and seventh counts of one of the District of Columbia indictments. This alone serves to take the case out of the precise situation presented by the first objection against the order made by the commissioner. If there is one good count under which a trial might be had in the district to which the removal is sought, it is enough to support an order in a habeas corpus proceeding. *Horner v. United States*, 143 U. S. 207, 214, 36 L. ed. 126, 130, 12 Sup. Ct. Rep. 407.

But for the reasons already stated in the opinion in the Haas Case, just handed down, we are of opinion that absolute identity in the two sets of indictments does not operate to defeat a removal, if the gov-

ernment elect to try in another district, and that the only function of a commissioner before whom a removal complaint is made in such a situation is to be satisfied that there is probable cause to believe that the accused is guilty of an offense charged to have been committed in the district to which the removal is sought. This case, upon this point, as well as upon the point that the two indictments here *involved do not suf- [491] ficiently charge an offense against the United States, is governed by the opinion and judgment in the Haas Case.

This brings us to the only question which is not necessarily concluded by the opinion in the Haas Case; namely, whether there was any substantial evidence before the commissioner upon which he might, in the exercise of his jurisdiction, decide that there was probable cause for believing that appellant had committed, within the District of Columbia, the offenses charged in the indictments against him found in that district.

That at least a prima facie case for the removal was made by the introduction of the indictments returned against him in the District of Columbia is not disputable. That much efficacy is attributed to a certified copy of an indictment found in a competent court of another district, when put in evidence in a removal proceeding. *Bryant v. United States*, 167 U. S. 104, 42 L. ed. 94, 17 Sup. Ct. Rep. 744; *Greene v. Henkel*, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218; *Hyde v. Shine*, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760; *Beavers v. Henkel*, 194 U. S. 73, 48 L. ed. 882, 24 Sup. Ct. Rep. 605. But the evidence of probable cause afforded by the indictment is not conclusive. For this reason it has been held that the refusal of a commissioner to hear evidence offered for the purpose of showing that no offense had been committed, triable in the district to which removal was sought, would be a denial of a right secured under the Constitution. *Tinsley v. Treat*, 205 U. S. 20, 51 L. ed. 689, 27 Sup. Ct. Rep. 430. But in this case there was no closing of the door to evidence offered to show a want of probable cause. Copies of the New York indictments against appellant for many of the same offenses were received in evidence, as tending to show that the conspiring, if any there was, had been done in New York, and not in the District of Columbia. Some evidence tending to show that Price was not in the District of Columbia at the time when the conspiracies are charged to have been formed was also introduced. There was also some evidence offered, questioning the identity of the appellant with the person accused by the District of Columbia indictments. The probative weight of certified

copies of the New York indictments is necessarily *limited to such counts as are identical in the two sets of indictments. This would leave counts five and seven of indictment No. 26,088 unaffected as evidence of probable cause, and justify the order of commitment, although there might be conclusive evidence that the offense charged in the other counts had not been committed in the District of Columbia, as charged. *Horner v. United States*, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407.

But it cannot be conceded that the introduction of copies of the New York indictments operated to destroy the evidential effect of the indictments found in the District of Columbia, even as to the identical counts. In the case of *Haas v. Henkel*, we held that such evidence did not so conclusively destroy the evidence afforded by copies of the District of Columbia indictments as to leave no testimony upon which the commissioner might, upon the whole case, decide that there was proof of probable cause.

The commissioner had before him competent evidence in the certified copies of the District of Columbia indictments upon which he might base a conclusion of probable cause. At most, the New York indictments, together with the evidence tending to prove that appellant had not been in the District of Columbia at any of the times when the conspiracy was said to have been formed, only made an issue which the commissioner had jurisdiction to decide, and when we find from the proceedings before him that he did hear such evidence upon which he might base his decision, that decision is not open for review upon a petition for a writ of habeas corpus. *Re Oteiza y Cortes*, 136 U. S. 330, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031; *Bryant v. United States*, supra; *Greene v. Henkel*, 183 U. S. 249, 261, 46 L. ed. 177, 189, 22 Sup. Ct. Rep. 218; *Hyde v. Shine*, 199 U. S. 62, 84, 50 L. ed. 90, 97, 25 Sup. Ct. Rep. 760. This is the rule, as stated by Mr. Justice Brown, speaking for the court in *Hyde v. Shine*, cited above, where it was said:

"In the Federal courts, however, it is well settled that, upon habeas corpus, the court will not weigh the evidence, although, if there is an entire lack of evidence to support the accusation, the court may order his discharge. In this case, however, the 493] *production of the indictment made at least a prima facie case against the accused, and if the commissioner received evidence on his behalf, it was for him to say whether, upon the whole testimony, there was proof of probable cause. *Re Oteiza y Cortes* and *Bryant v. United States*, supra. The requirement that the usual mode of process

adopted in the state shall be pursued refers to the proceedings for the arrest and examination of the accused before the commissioner, but it has no bearing upon the subsequent independent proceeding before the circuit court upon habeas corpus. In this case the commissioner did receive evidence on behalf of the appellants, and upon such evidence found the existence of probable cause and committed the defendants, and, upon application to the district judge for the warrant of removal, he reviewed his action, but did not pass upon the weight of the evidence."

The evidence, independent of that afforded by the New York indictments, relied upon to show that appellant was not in the District of Columbia when the conspiracy is charged to have been formed, has been examined. It cannot be said to be at all conclusive. First, it leaves out of consideration the fact that the indictments may be sustained by evidence of a conspiracy formed at dates before the finding of the indictment, other than those named, if not barred by the statute of limitations. *Ledbetter v. United States*, 170 U. S. 606, 612, 42 L. ed. 1162, 1164, 18 Sup. Ct. Rep. 774. Second, it does not exclude the possibility that the conspiracy may have been formed in the District of Columbia without appellant being physically present when the conspiracy was formed. *Re Palliser*, 136 U. S. 257, 265, 34 L. ed. 514, 517, 10 Sup. Ct. Rep. 1034; *Burton v. United States*, 202 U. S. 344, 387, 50 L. ed. 1057, 1073, 26 Sup. Ct. Rep. 688, 6 A. & E. Ann. Cas. 362; *United States v. Thayer*, 209 U. S. 39, 43, 52 L. ed. 673, 675, 28 Sup. Ct. Rep. 426. In *Burton v. United States*, cited above, it was said by this court that "the constitutional requirement is that the crime shall be tried in the state or district where committed; not necessarily in the state or district where the party happened to be at the time."

Upon the whole case, we are satisfied that there is not shown that entire absence of evidence which, upon an appeal *like [494 this, would require us to hold that the decision that there was probable cause was void as not based upon any evidence.

Final order affirmed.

Brewer, J., concurring:

I concur in affirming the orders of removal in these cases, but my concurrence must not be taken as holding that the indictments will stand the final test of validity or sufficiency. Assuming that there is a doubt in respect to these matters, as I think there is, and as seems to be suggested by the opinion in No. 367, I am of the opinion that such doubt should be settled by direct action in the court in which

the indictments were returned, and not in removal proceedings.

Mr. Justice McKenna concurs in the result, but reserves opinion whether the facts alleged in the indictment constitute a conspiracy to defraud the United States.

WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY, Appt.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 494-504.)

Release — construction — what claims included.

1. Claims for unliquidated damages on account of extra work caused by the Federal government are not included in a release given to the United States by the builders of a battleship, of all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of the vessel under the contract, provided that the release shall not be taken to include claims arising under the contract other than those which the Secretary of the Navy has jurisdiction to entertain, although the release, if in the form specified in the contract, would have extinguished all claims against the United States growing out of such contract.

[For other cases, see Release, 11-13, in Digest Sup. Ct. 1908.]

Executive departments — powers — settling claims for unliquidated damages.

2. Executive officers are not authorized to entertain and settle claims for unliquidated damages.

[For other cases, see Executive Departments, 6-9, in Digest Sup. Ct. 1908.]

War Department — powers — release.

3. The Secretary of the Navy has the power to accept a release to the Federal government from the builders of a battleship, which leaves for determination in the courts claims for unliquidated damages growing out of the contract.

[For other cases, see Executive Departments, 34-38, in Digest Sup. Ct. 1908.]

[No. 92.]

Argued January 19, 20, 1910. Decided February 28, 1910.

APPEAL from the Court of Claims to review a judgment in favor of the United States on a claim by the builders of a battleship for unliquidated damages on account of extra work caused by the United States. Reversed and remanded with instructions to enter judgment for the amount due.

See same case below, 43 Ct. Cl. 202.

The facts are stated in the opinion.

54 L. ed.

Mr. James H. Hayden argued the cause, and, with Mr. Robert C. Hayden, filed a brief for appellant:

The elaborate and tautologous expressions contained in the fifth paragraph of the release do not overcome the particular words of limitation contained in the proviso, which limited the operation of the release to claims which the Secretary of the Navy had jurisdiction to entertain.

Texas & P. R. Co. v. Dashiell, 198 U. S. 521, 49 L. ed. 1150, 25 Sup. Ct. Rep. 737.

The head of an executive department is not authorized to entertain and settle claims for unliquidated damages, even where they grow out of contracts made by him.

Ops. Atty. Gen. 1841, p. 882; McKee v. United States, 12 Ct. Cl. 555; Power v. United States, 18 Ct. Cl. 263; McClure v. United States, 19 Ct. Cl. 28; Brannen v. United States, 20 Ct. Cl. 223; Pneumatic Gun-Carriage & Power Co. v. United States, 36 Ct. Cl. 71; 4 Ops. Atty. Gen. 327; 4 Ops. Atty. Gen. 627.

To give the release or the claimant's acceptance of the last payments the effect claimed for them by the government, and given them by the court below, would be to use them in a way not justified by the terms of the release or intended by the parties, and would allow the government to commit a fraud.

Parmelee v. Lawrence, 44 Ill. 409; Fire Ins. Asso. v. Wickham, 141 U. S. 564, 576-582, 35 L. ed. 860, 865-868, 12 Sup. Ct. Rep. 84.

If the terms of the release were obscure,—which they are not,—it would have to be interpreted in such a way as to carry out the intent of the parties, to be ascertained from the correspondence which passed between them.

Fire Ins. Asso. v. Wickham, supra; United States v. Peck, 102 U. S. 64, 26 L. ed. 46; Merriam v. United States, 107 U. S. 437, 441, 442, 27 L. ed. 531, 533, 2 Sup. Ct. Rep. 536; United States v. Gibbons, 109 U. S. 200, 203, 204, 27 L. ed. 906, 907, 3 Sup. Ct. Rep. 117; Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co. 143 U. S. 596, 609, 610, 36 L. ed. 277, 281, 12 Sup. Ct. Rep. 479; Nash v. Towne, 5 Wall. 689, 699, 18 L. ed. 527, 529.

The Secretary was not precluded from paying the special reserve without requiring the claimant to execute an unconditional release.

United States v. Barlow, 184 U. S. 123, 46 L. ed. 463, 22 Sup. Ct. Rep. 468; Salomon v. United States, 19 Wall. 17, 22 L. ed. 46; United States ex rel. Redfield v. Windom, 137 U. S. 636, 34 L. ed. 811, 11 Sup. Ct. Rep. 197.

The acceptance by the claimant of payments made after final acceptance of the vessel, with the understanding, acquiesced in by the Secretary, that the payments should not bar the claim in suit, certainly did not create such a bar.

Weeks v. Trinity Church, 56 App. Div. 195, 67 N. Y. Supp. 670.

The government broke the contract, and in consequence of that the claimant suffered damage, and is entitled to recover an amount equal to that damage.

2 *Parsons*, Contr. 679; *Clark v. United States*, 6 Wall. 543, 18 L. ed. 916; *United States v. Speed*, 8 Wall. 77, 19 L. ed. 449; *United States v. Behan*, 110 U. S. 338, 344, 28 L. ed. 168, 170, 4 Sup. Ct. Rep. 81; *Figh v. United States*, 8 Ct. Cl. 319; *Myerle v. United States*, 33 Ct. Cl. 1; 1 *Hudson*, Bldg. Contr. 1907, p. 303; *W. H. Stubbings Co. v. World's Columbian Exposition Co.* 110 Ill. App. 210; *Nelson v. Pickwick Associated Co.* 30 Ill. App. 333; *Del Genovese v. Third Ave. R. Co.* 13 App. Div. 412, 43 N. Y. Supp. 8; *Cornwall v. Henson* [1910] 2 Ch. 298.

Assistant Attorney General **John Q. Thompson** and Mr. **Franklin W. Collins** argued the cause, and filed a brief for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

On September 24, 1896, the appellant entered into a contract with the United States for the building of an ironclad, afterwards known as the *Alabama*. The contract was authorized by act of Congress of June 10, 1896 (29 Stat. at L. 378, chap. 399). Under this act and that of August 3, 1886 (24 Stat. at L. 215, chap. 849, U. S. Comp. Stat. 1901, p. 1056), to which it refers, the Secretary of the Navy was charged with the duty of supervising the contract on behalf of the United States. After the completion of the vessel and the payment of the stipulated amount, there was something asserted to be due to the building company as unliquidated damages on account of extra work caused by the United States, for which it brought suit 499] in the court of claims. That court found the amount to be \$49,792.66. Relying upon the decision of this court in a case between the same parties for also the building of an ironclad, the *Indiana* (206 U. S. 118, 51 L. ed. 983, 27 Sup. Ct. Rep. 676), the court of claims rendered judgment for the defendant. The controversy in this, as in the prior case, turns upon the effect of a release. In that it was in this form:

"The William Cramp & Sons Ship & Engine Building Company, represented by me,

Charles H. Cramp, president of said corporation, does hereby, for itself and its successors and assigns, and its legal representative, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid."

Here the same terms of release are used, but they are followed by this proviso:

"Provided, That this release shall not be taken to include claims arising under the said contract other than those which the Secretary of the Navy had jurisdiction to entertain."

That release was executed on May 18, 1896; this on April 19, 1901. We held that the former release settled all disputes between the parties as to claims "under or by virtue" of the contract. Evidently the proviso was incorporated with the purpose of accomplishing some change in the effect of the release. That purpose is disclosed by prior correspondence. On February 13, 1901, the Secretary of the Navy, answering a letter inclosing a claim for extra work of \$66,973.23, writes:

"I have to state that while, from a casual consideration of the matter, it might seem proper that the papers should be referred to the bureaus concerned for examination and report, it appears, after a careful consideration of the subject, that the claim, being for unliquidated damages, is of a kind the Department has no authority under the law to entertain."

To which the company replied, suggesting this proviso:

"Provided, That nothing herein [500 shall operate as a waiver of this company's right to sue for and recover judgment in the court of claims for damages incurred or losses sustained by the company in the prosecution of the contract work which were occasioned by delays or defaults on the part of the United States,"—

and adding, in response to the statement of the Secretary "that the claim, being for unliquidated damages, is of a kind the Department has no authority under the law to entertain," that the act of March 3, 1887 (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752), known as the "Tucker act," vests the court of claims with jurisdiction to hear and determine such claims. Some further correspondence followed between the parties, which culminated in a letter from the company, inclosing the release as finally executed, and saying:

"This (release) contains a clause which excepts from the operation of the release

claims arising under the contract, which you, as Secretary of the Navy, had not jurisdiction to entertain."

It is well understood that executive officers are not authorized to entertain and settle claims for unliquidated damages. Opinion of Attorney General Taney, in which he says:

"If the Navy commissioners have refused to take the bread from Mr. Stiles, according to their contract, when he had prepared it of the quality called for by the agreement, it is not in the power of the executive branch of the government to liquidate and pay the damages he may have sustained. If he has been damnified by the officers of the government, Congress alone can redress the injury." (Ops. Atty. Gen. 1841, ed. p. 882.) *McKee v. United States*, 12 Ct. Cl. 504, 555-558.

In *Power v. United States*, 18 Ct. Cl. 263, 274, 275, the court thus discussed the matter:

"The Secretary of the Interior concurred in the opinion that the claimant was equitably entitled to damages, and that he should be invited to furnish proof of the extent of his injury; but did not agree that the 501] damages should be adjusted in *the Department. He proposed to submit the case to Congress.

"In this conclusion, that the Department had no authority to settle such a claim, the Secretary was right. The laws regulating the payment of money from the Treasury, in the current business of the government, are viewed at length by our brother Richardson in his opinion in *McKee's Case* (12 Ct. Cl. 555). He shows clearly that the laws provide only for the settlement and payment of accounts. An account is something which may be adjusted and liquidated by an arithmetical computation. One set of Treasury officers examine and audit the accounts. Another set is intrusted with the power of reviewing that examination, and with the further power of determining whether the laws authorize the payment of the account when liquidated. But no law authorizes Treasury officials to allow and pass in accounts a number not the result of arithmetical computation, upon a subject within the operation of the mutual part of a contract.

"Claims for unliquidated damages require for their settlement the application of the qualities of judgment and discretion. They are frequently, perhaps generally, sustained by extraneous proof, having no relation to the subjects of the contract, which are common to both parties; as, for instance, proof concerning the number of horses and the number of wagons, and the length of time that would have been required in perform-

ing a given amount of transportation. The results to be reached in such cases can, in no just sense, be called an account, and are not committed by law to the control and decision of Treasury accounting officers.

"As is well said by Judge Richardson, in the opinion already referred to (12 Ct. Cl. 556), this construction 'would exclude claims for unliquidated damages, founded on neglect or breach of obligations or otherwise, and so, by the well-defined and accepted meaning of the word "account" and the sense in which the same and the words "accounting" and "accounting officers" appear to be used in the numerous sections of the *numerous acts of Congress wherein [502 they occur, it would seem that the accounting officers have no jurisdiction of such claims except in special and exceptional cases, in which it has been expressly conferred upon them by special or private acts. And such has been the opinion of five Attorneys General,—all who have officially advised the executive officers on the subject. Attorney General Taney, in 1832, whose opinion is referred to by his successors in office; Attorney General Nelson, in 1844 (4 Ops. Atty. Gen. 327); Attorney General Clifford, in 1847 (4 Ops. Atty. Gen. 627); Attorney General Cushing, in 1854 (6 Ops. Atty. Gen. 524); and Attorney General Williams, in 1872 (14 Ops. Atty. Gen. 24). And the same views were expressed by this court in 1866 (*Carmick v. United States*, 2 Ct. Cl. 126, 140).'" *McClure v. United States*, 19 Ct. Cl. 28, 29; *Brannen v. United States*, 20 Ct. Cl. 219, 223, 224; 4 Ops. Atty. Gen. 327, 328, 626, 630.

But it is contended that the contract, independently of the release, provided for a settlement of all matters growing out of the delay in the completion of the vessel, although this is in apparent conflict with the opening statement of the government in its brief, for there it says: "The issue here is whether the proviso in that release saves the contractor from the final and complete surrender of his right to recover on the claims set out in the petition." But this, although it indicates the views of the government of the question at issue, does not preclude it from presenting other matters, and it insists that by the third clause in the contract, the vessel, when completed without the armor, was to be subjected to a trial provided for in a subsequent clause of the contract, and a board of naval officers appointed by the Secretary of the Navy was to determine the deduction from the total price of the vessel under the contract if completed with armor. It further contends that, by the ninth clause of the contract, the matter of possible delay was recognized by

the Secretary of the Navy, and his determination as to the effect thereof was to be conclusive. Now it may be said that both the contractor and the government had the 503] right to insist upon the *delivery of the vessel when it was completed without the armor, and that the deduction in price should then be settled by the board of officers appointed by the Secretary. It may also be conceded that the government could have insisted upon a release in the form specified in the contract, but neither the company nor the government insisted on the delivery of the vessel at the time it was launched and before it was armored. The government left the vessel with the company, waiting for armor to be put on,—armor which it had not then been able to secure and tender to the company; and when the question arose as to a settlement, it did not insist upon a release as specified in the contract. This contract was plainly treated by both parties as impracticable, and therefore waived. Evidently from his letter of February 13, 1901, the Secretary was of the opinion that, equitably, there was something due to the company, and yet, realizing that that question was not one for his determination, in order that full justice might be done, he consented to a change in the terms of the release, and this he had power to do. *Salomon v. United States*, 19 Wall. 17, 22 L. ed. 46; *United States ex rel. Redfield v. Windom*, 137 U. S. 636, 34 L. ed. 811, 11 Sup. Ct. Rep. 197; *United States v. Barlow*, 184 U. S. 123, 135, 46 L. ed. 463, 469, 22 Sup. Ct. Rep. 468.

By the "Tucker act" jurisdiction is conferred upon the court of claims "to hear and determine . . . all claims . . . for damages, liquidated or unliquidated, in cases not sounding in tort."

It results therefrom that a release executed in accordance with the terms of the contract would have extinguished all claims of the company against the United States, growing out of the contract (206 U. S. 118, 51 L. ed. 983, 27 Sup. Ct. Rep. 676); that the Secretary of the Navy had no power to pass upon and adjudicate claims for unliquidated damages; that he had power to accept a release such as was given, and that the proviso left for determination in the courts claims for unliquidated damages growing out of the contract; that, under the Tucker act, the court of claims had jurisdiction to inquire into and determine claims for unliquidated damages, and that 504] upon the facts found there *is due to the company from the United States, for extra work caused by the United States, the sum of \$49,792.66.

The judgment of the Court of Claims is

reversed and the case remanded to that court, with instructions to enter judgment for that amount.

J. J. McCASKILL COMPANY, Appt.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 504-517.)

Pleading—allegations of fraud.

1. A bill filed by the United States to cancel a patent sufficiently alleges the facts upon which are based the charge of fraud in procuring and commuting the homestead entry on which the patent was founded, where it avers that the patentee deceived the land office by false testimony as to the extent of his improvements, cultivation, and residence, and secured his patent by that deception.

[For other cases, see Pleading, 536-553, in Digest Sup. Ct. 1908.]

Appeal—review of facts—fraud—concurrent findings below.

2. Concurrent findings of the two lower courts that a patentee deceived the land office by false testimony as to the extent of his improvements, cultivation, and residence, and secured his patent by that deception, are sustained by the evidence, where his statement and proof on final hearing were both to the effect that his improvement consisted of a dwelling house fit for habitation and a garden cultivated two seasons, and that, after making his settlement, he was absent only two or three times on account of his health, the longest absence being not over three months, and the evidence in the case at bar shows that the house was unfit for habitation, that the patentee never moved his family there, that he did not stay there more than one night in a week, and that he had admitted to a government agent that he had not lived on the homestead entry, and thought he was going to lose it.

[For other cases, see Appeal and Error, 4931-4959, in Digest Sup. Ct. 1908.]

Imputed notice—knowledge of corporate officer.

3. Knowledge on the part of the president of a corporation of the fraud committed by an entryman in procuring and commuting a homestead entry is imputed to the corporation, so as to deprive it of the position of a bona fide purchaser under a conveyance from the president, who had taken a deed of the property from the patentee, where the president was one of the incorporators, and, together with the secretary, owned a large majority of the capital stock, and was intrusted with the entire management and control of the corporate business, since his interest and that of the corporation are identical, and not adverse.

[For other cases, see Notice, 34-39, in Digest Sup. Ct. 1908.]

NOTE.—On setting aside land patent for fraud—see note to *Miller v. Kerr*, 5 L. ed. U. S. 381.

Appeal — prejudicial error — admitting evidence.

4. The admission in evidence in a suit in equity to cancel a patent for fraud in procuring and commuting a homestead entry, of a statement made by the entryman to a government agent, and made the basis of the latter's report to the land office, is not prejudicial error, where the attention of the entryman, when testifying, was drawn to such statement, and he himself testified that it was made at his home, and was signed by him, and the facts were testified to by the agent to whom the statement was made. [For other cases, see Appeal and Error, 5048-5050, in Digest Sup. Ct. 1908.]

Appeal — prejudicial error — admitting evidence.

5. Prejudicial error is not committed in admitting in evidence, in a suit in equity to cancel a patent and the deeds founded thereon, for the fraud of the homestead entryman, testimony showing the purchase of other homestead claims by the grantee, because it was not accompanied by evidence showing that such other transactions were false and fraudulent, since it will be presumed that, under such circumstances, the court gave to the testimony admitted no value or probative strength.

[For other cases, see Appeal and Error, 5048-5050, in Digest Sup. Ct. 1908.]

[No. 103.]

Argued January 25, 1910. Decided February 28, 1910.

APPPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of Florida, canceling a patent and the deeds based thereon, for fraud in procuring and commuting the homestead entry on which the patent was founded. Affirmed.

The facts are stated in the opinion.

Mr. W. W. Flourney argued the cause and filed a brief for appellant:

The bill of complaint should have averred not only facts from which the court might judge that fraud existed and was the inducing cause of the issuing of the patent, but also that it was fraud which was not in issue before the Department.

20 Cyc. Law & Proc. p. 734; 12 Enc. Pl. & Pr. p. 942; Maxwell Land Grant Case, 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398; United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; United States v. Tichenor, 8 Sawy. 142, 12 Fed. 415; Story, Eq. Pl. § 251; Oakland v. Carpentier, 21 Cal. 663; Semple v. Hagar, 27 Cal. 166; Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800; Vance v. Burbank, 101 U. S. 514, 25 L. ed. 929; Marquez v. Fris-
54 L. ed.

bie, 101 U. S. 473, 25 L. ed. 800; 2 Pom. Eq. Jur. 3d ed. § 832.

The facts proven by the government do not sustain the averment that the final proof of the entryman was false and untrue.

Maxwell Land Grant Case, *supra*; Atlantic Delaine Co. v. James, 94 U. S. 207, 24 L. ed. 112; United States v. Stone, 2 Wall. 525, 17 L. ed. 765; United States v. Throckmorton, *supra*; Story, Eq. Jur. § 157; United States v. American Bell Teleph. Co. 167 U. S. 224, 42 L. ed. 144, 17 Sup. Ct. Rep. 809; United States v. Budd, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575; Hunter v. Blodgett, 20 Land Dec. 455; 2 Pom. Eq. Jur. 3d ed. § 898; Colorado Coal & I. Co. v. United States, 123 U. S. 307, 320, 31 L. ed. 182, 188, 8 Sup. Ct. Rep. 131; United States v. White, 9 Sawy. 125, 17 Fed. 561.

The action of the land office in issuing a patent on controverted facts for any of the public lands is conclusive, not only in the Land Department, but in all courts and everywhere else, except for fraud, and it is only when the Land Department has misconstrued the law that the courts have power to relieve.

Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; Diller v. Hawley, 26 C. C. A. 514, 58 U. S. App. 462, 81 Fed. 651; Iron Silver Min. Co. v. Campbell, 135 U. S. 303, 34 L. ed. 161, 10 Sup. Ct. Rep. 765.

After the government has issued and delivered the patent, the legal title passes to the patentee, and bona fide purchasers without notice of mistake or fraud get a perfect title. The defense of a bona fide purchaser, for value, without notice, to a bill in equity brought to cancel a patent, is perfect. His title rests upon the strongest presumption of fact, to rebut which requires clear, full, convincing, and unambiguous proof.

Colorado Coal & I. Co. v. United States, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; United States v. Burlington & M. River R. Co. 98 U. S. 342, 25 L. ed. 200; United States v. California & O. Land Co. 148 U. S. 47, 37 L. ed. 362, 13 Sup. Ct. Rep. 458; United States v. Dalles Military Road Co. 148 U. S. 49, 37 L. ed. 362, 13 Sup. Ct. Rep. 465.

The question of whether the entryman had or had not complied with the statute is not a question of fact, but a question of law equally with the question of whether or not a person is or is not a resident of a particular locality.

12 Enc. Pl. & Pr. pp. 1030, 1033, and note, pp. 1028, 1038.

It is true that the acts of the agent within the scope of his authority, whether for a general or special purpose, bind the

principal, and notice to the agent in a matter about which he was employed, and within the scope of his employment, is constructive notice to the principal. But the exception to the rule is that if the agent is acting in a matter in which he has a personal interest, or in connection with which he is interested with a third person, the presumption is that he will not communicate the fact in controversy. And the rule should be more rigidly applied in case of fraud or torts.

1 Am. & Eng. Enc. Law, 2d ed. pp. 990, 1145, 1146, 1148; *Clark v. Metropolitan Bank*, 3 Duer, 241; *Frenkel v. Hudson*, 82 Ala. 162, 60 Am. Rep. 736, 2 So. 758; *Allen v. South Boston R. Co.* 150 Mass. 206, 5 L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 917; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282.

The rule applies to corporations where the officer is personally interested.

Innerarity v. Merchants' Nat. Bank, supra; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; *Loring v. Brodie*, 134 Mass. 453; *First Nat. Bank v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 262.

This court ought to do nothing further than to let the opinion below be merely advisory or persuasive.

Quinby v. Conlan and Johnson v. Towseley, supra; *Shepley v. Cowan*, 91 U. S. 330-340, 23 L. ed. 424-428; *Moore v. Robbins*, 96 U. S. 535, 24 L. ed. 850.

The value of improvements must not figure in this case. Indeed, if that were made the basis of good faith, the poorer settler would have no show whatever with one of ample means.

Hunter v. Blodgett, 20 Land Dec. 452; *Howden v. Piper*, 3 Land Dec. 163.

Whatever may be the purpose or intent of the homesteader, however grave may be his fraud perpetrated on the government, such, in the absence of fictitious parties, at least, does not cut off the right of the bona fide purchaser.

Colorado Coal & I. Co. v. United States, supra; *United States v. Minor*, 114 U. S. 233, 242, 29 L. ed. 110, 114, 5 Sup. Ct. Rep. 836.

Even if there were fraud, and even if McCaskill had such a notice as would charge him constructively, he being the grantor of the corporation, and therefore having an adverse interest, could not transmit that constructive fraud to the corporation. That he was the grantor of the corporation cannot be denied.

Barnes v. Trenton Gaslight Co. 27 N. J. Eq. 33; *Frenkel v. Hudson*; *Allen v. South Boston R. Co.*; and *Innerarity v. Merchants' Nat. Bank*,—supra.

Assistant Attorney General Russell argued the cause and filed a brief for appellee:

Parties should not be allowed to hope for a successful appeal by reason of mere differences of opinion about a conclusion of fact as between two lower tribunals and this court. There must be manifest a gross mistake.

Furrer v. Ferris, 145 U. S. 134, 36 L. ed. 651, 12 Sup. Ct. Rep. 821.

Mr. Justice McKenna delivered the opinion of the court:

This suit was brought by the United States to cancel a patent issued to one William Josiah Ward, and a deed made by him and his wife to J. J. McCaskill & Company, and by the latter to the J. J. McCaskill Company, the appellant. The allegations of the bill are that the N. $\frac{1}{2}$ of the N.E. $\frac{1}{4}$, S.W. $\frac{1}{4}$ of the N.E. $\frac{1}{4}$, and S.E. $\frac{1}{4}$ of N.W. $\frac{1}{4}$ of section 8, township 1 N., 17 W., in the county of Walton, state of Florida, being public lands of the United States, William Josiah Ward, on the 18th of September, 1900, filed his application upon them for a homestead in the land office in Gainesville, Florida. That he subsequently commuted the entry by paying the government price therefor, making proof of settlement, cultivation, and improvement for the period of time required by law, and that on January 13, 1903, a cash entry certificate No. 18,026 was issued to him and a patent on the 3d of June, 1903. It is alleged, with detail of circumstances, that the statement of Ward and the proof presented by him on the hearing for final proof were false, fraudulent, and untrue. The allegations will be given later. The bill further alleges that the land embraced in the patent was conveyed by Ward to J. J. McCaskill & Company (the bill as originally filed alleged that the conveyance had been made to the McCaskill Company), a copartnership composed of J. J. McCaskill and E. L. McCaskill, then engaged in the manufacture of lumber at Freeport, Florida. That they afterward incorporated by the corporate name of the J. J. McCaskill Company, with the said J. J. McCaskill as president and Robert E. L. McCaskill as secretary, owning a large majority of the stock of the corporation, with the entire management and control of its business and [506] affairs. That the company took over from the said J. J. McCaskill or J. J. McCaskill & Company the homestead entry of Ward, with full knowledge of its president and secretary of the negotiations between the company and the entryman by Warren Ward, an agent of the company, "and with all the knowledge and notice of the said Mc-

Caskill & Company of the fraud and duplicity practised by William Josiah Ward in obtaining the patent from the United States."

The answer of the company alleged that conveyance was made by William Josiah Ward to J. J. McCaskill after the patent was issued for the sum of \$425; that McCaskill, for a valuable consideration, sold and conveyed the same to the McCaskill Company; that the conveyance was made in good faith, without notice or knowledge of any kind whatsoever of any irregularity or fraud upon the part of Ward, if any there was, and that he was a bona fide purchaser of the property; and that the company was a bona fide purchaser, for a valuable consideration, from J. J. McCaskill, and without knowledge or notice of any irregularity or fraud practised by Ward. The usual replication was filed and an examiner was appointed to take the proofs on the issues made.

Upon report to the court, a decree was entered overruling the objections of the company to the evidence and the motion to strike it out, and adjudged and decreed that the patent be declared null and void, and that it be surrendered by the company, the decree finding it to be in its possession, to the clerk of the court, to be inscribed by him "null and void." It was further adjudged and decreed that the deed from William Josiah Ward to J. J. McCaskill & Company, and the deed from the latter to the J. J. McCaskill Company, be vacated and annulled, and the company be enjoined forever from setting up or claiming title to the land by reason of the patent or any of the conveyances from Ward. The decree was affirmed by the circuit court of appeals.

507] "There are twenty-three assignments of errors, eighteen of which are addressed to rulings on evidence and five attack, in general terms, the decree canceling the patent and the conveyance by Ward. These five were alone discussed in the oral argument and in the brief on file under the following divisions:

"1. Are the averments of the bill of complaint sufficient to give the court of equity jurisdiction?

"2. Do the facts proved by the government sustain the averment that the final proof of the entryman was false, fraudulent, and untrue?

"3. Will this court review decisions by the land office officials upon questions of fact?

"4. Does the appellant occupy the position of an innocent purchaser, and is the government precluded because of his rights as such?"

1. To support the first proposition it is urged that the bill does not allege the facts upon which the charge of fraud in obtaining the patent was based, and therefore "presents no issue for trial, and should fail upon demurrer." But there was no demurrer filed to the bill. The only answer to paragraphs 4 and 5 (set out below) was that, as to the facts of the former, the company was not advised; that, as to the facts of the latter, it had "no knowledge," and denied, therefore, that they were true, and demanded strict proof of them. The first and only explicit objection to the bill for insufficiency is made in the brief filed in this court. But, conceding it covered by the assignments of error discussed by counsel, and entertaining it, we think that it is without foundation. The following are its averments:

"Your orator shows unto your honor that the said William Josiah Ward, in the commutation proof taken on the 29th day of December, 1902, alleged himself, and made it appear by the testimony of others, that he had established a residence upon said land on March 10th, 1901, and that he continuously resided thereon from that date until and up to the date of submission of final proof, except for absences on two or three *occasions of not exceeding three [508 months, due to the illness of his wife; that he had improved the tract by erection of a house thereon and by cultivating $\frac{1}{2}$ acre for two seasons, and the whole amount of improvements being alleged to be of the value of forty (\$40) dollars, and that he had complied with the law entitling him to a patent to said lands.

"Your orator further shows unto the court that the statement of the said Ward and the proof presented by him on the hearing for final proof was false, fraudulent, and untrue; that he did not have the improvements that he alleged that he had on said premises, and had not cultivated the said land; that the improvements accomplished on said entry consisted of nothing more than a pine-pole cabin, never completed, without floor, door, or chimney; that there was absolutely no means of entrance or exit thereto or therefrom, unless through the uninclosed gable ends of said cabin; that the interstices between the poles of said cabin were never closed in any fashion; that the only ground on said entry which had undergone cultivation was a space within an inclosure of 30 by 35 feet; that the said Ward never resided upon said land, but during the period allowed for residence on the homestead entry, entryman actually resided at his home, where for a long time he had maintained his residence, $3\frac{1}{2}$ miles distant from said entry."

Appellant relies for its contention upon *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Vance v. Burbank*, 101 U. S. 514, 25 L. ed. 929; *Maxwell Land-Grant Case*, 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; and other cases of like kind. We will not take the time to review them. It is enough to say that it was pointed out in *United States v. Minor*, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836, that they do not apply to a case like that at bar, where the charge is that there was fraud and perjury in *ex parte* proceedings before the land office. See also *United States v. San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; *Moffat v. United States*, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10; *United States v. Iron Silver Min. Co.* 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195; *Colorado Coal & I. Co. v. United States*, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; *United States v. Beebe*, 509] 127 *U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083; *United States v. Budd*, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575; *United States v. American Bell Teleph. Co.* 167 U. S. 224, 42 L. ed. 144, 17 Sup. Ct. Rep. 809.

2. This division involves the sufficiency of the evidence to sustain the decree. The argument at bar has not kept this division separate from the first or the first from it. They are manifestly different. The first concerns the sufficiency of the bill, this the sufficiency of the evidence. In other words, whether the evidence has established the averments of the bill, assuming them to be sufficiently specific, by clear and satisfactory proof. And it may be conceded that that is the degree of proof that the cases require. It was said in *Maxwell Land-Grant Case*, *supra*, that when a court of equity is asked to set aside a patent "for fraud or mistake . . . the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."

Does the case at bar fill the measure of proof required by the cases? In this inquiry we start with the finding of the two lower courts in the affirmative. Appellant attacks the finding, but, as we have said, does not keep the discussion of this inquiry separate from the consideration of the sufficiency of the bill. In both, stress is put upon the same proposition. It is contended that the allegations of the bill that the proofs submitted by Ward to the land office were fraudulent and untrue was a mere legal conclusion, and that, besides, it was solely the province of the land office officials to determine such matter, and "thus may, in their discretion, issue patents to persons

upon evidence of improvement and cultivation of greater or less value and extent, the extent in value of the improvement being solely in their discretion." It is further argued that "the statutes governing the disposition of the public lands required neither a limited amount of improvement nor an absolute continuous residence;" and "that when an entryman has clearly set forth the amount of the improvements, however small, and the Department has issued a patent thereupon, then the question of the amount or extent is forever *put at [510 rest." The purpose of the law, it is further argued, "is to give a part of the public domain to the poor man, and that therefore temporary abandonment, for the purpose of earning a livelihood or support his family, or to secure funds with which to make improvements, or on account of sickness, as in the case at bar, is permissible." The value and amount of improvement, it is finally urged, is immaterial except to detract from the good faith of the entryman, "and then only when accompanied with evidence of the ability of the entryman to make more improvements than in fact were made." These tests may be accepted, *arguendo*, and the fraud of Ward is established.

The averment of the bill is that he deceived the land office by false testimony of the extent of his improvements, cultivation, and residence, and secured his patent by that deception. In other words, that the judgment and discretion of the land office were invoked, not upon the actual extent of his improvements, cultivation, and residence, but upon a misrepresentation of their extent. See *United States v. Minor*, *supra*.

It may be well here to consider what the law requires. It gives the right of entry of 160 acres of land as a homestead, upon the condition, however, which must be established by affidavit, that the "application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person." That applicant will honestly endeavor to comply with the requirements of settlement and cultivation, and does not apply to enter the same for the purpose of speculation. The purpose of the law, therefore, is to give a *home*, and, to secure the gift, the applicant must show that he has made the land a home. Five years of residence and cultivation for the term of five years he must show by two credible witnesses.

Residence and cultivation of the land are the price that is exacted for its payment. It is in the power of the settler to modify the terms somewhat. He may substitute for a residence and cultivation for five

511] years a residence and cultivation *for not less than fourteen months; but he must make "proof of settlement and of residence and cultivation for such period of fourteen months," and pay the price provided by law for the land entered. This is known as the "commutation" of his homestead entry.

In view of these provisions of law, we may judge of what Ward did. He entered the land as a homestead, and on the 8th of September, 1900, filed the affidavit required, stating that he made his application honestly and in good faith, for the purpose of actual cultivation and settlement, and not for the benefit of any other person. On the 29th of December, 1902, he produced two witnesses to establish his residence, cultivation, and character of his improvements, one of whom testified that he was well acquainted with Ward and the land embraced in Ward's claim; that it was "low, piney woods land, very wet in rainy seasons." His testimony as to Ward's residence and cultivation of the land is best exhibited by the following questions and answers:

Q. 5. When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

A. About the 9th of March, 1901.

Q. 6. Have claimant and family resided continuously on the homestead since first establishing residence thereon?

A. I don't think they have continuously. I have seen them absent from it a time or two.

Q. 7. For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and, if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

A. I have known of their being absent a time or two, but he has not been off of it over three months at the longest period. His wife is very feeble, and the land is so low and wet that, on account of her health, as well as to make a support, he was compelled to be absent. I presume he has been on it nearly every week.

512] *The other witness was even more definite. Answering a question as to the continuity of the residence of Ward and his family on the land, he said that he could not say "whether continuous or not, have not been there all the time; they were there every time I have been there, but on one or two occasions have seen them off the land." And further, as to the absence of Ward and his family, he said: "I don't know exactly how long, but am satisfied they have not been absent over six months at the longest

for the purpose of making a support, and on account of the land being so low and wet and unfit for cultivation." Both witnesses gave the extent of cultivation to be $\frac{1}{2}$ acre for two years, and the improvement to consist of a house and garden of the value of forty or fifty dollars.

Ward himself testified that he established his residence on the 10th of March, 1901, and that his improvement consisted of a small dwelling house and a garden of about $\frac{1}{2}$ acre of land, worth about \$40. He testified further as follows:

Q. 5. Of whom does your family consist? and have you and your family resided continuously on the land since first establishing residence thereon?

A. Myself and wife. No, not continuously; that is, not every day and night.

Q. 6. For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and, if temporarily absent, did your family reside upon and cultivate the land during such absence?

A. Was absent two or three times, not over three months at longest period, on account of my wife's health. She is very feeble, and the land is so low and wet that it was impossible to keep her on the place all the time.

And he further testified that he had not sold, conveyed, or mortgaged any portion of the land. This testimony would have established, if true, that Ward, with his family, took up *his residence on the [513 land on the 10th of March, 1901; that his improvement consisted of a small dwelling house, fit for habitation, and a garden of $\frac{1}{2}$ acre, cultivated two seasons, and that, after making his settlement, he was absent only "two or three times, not over three months," at longest, "on account of his (witness') health." This was the testimony upon which the Land Department acted. What is the evidence in this case? His two sons never saw him on the land, but always saw him at his residence, 4 or 5 miles from the land. He testifies himself that he never moved his family there; that the house was built of pine poles, was 12 by 14 in dimensions, had no floor, no chimney, no "ceiling or boards on between the poles or the interstices;" that he fenced and cultivated "a small piece, not larger than the house," and this was inclosed by rails and poles and planted two years. His residence upon the land is described in the following questions and answers:

Q. Did you ever have your family there

on any night? Ever spend any night with your family there?

A. I stayed there at night myself. My wife did not go there. She was very sickly.

Q. About how many nights in the week did you spend there?

A. I do not think I stayed in the same week more than one night in the week.

And there is other testimony showing that the house was unfit for habitation. A special agent of the General Land Office inspected the place. He found, he said, "a little pole cabin, 11 x 13, not completed, and there was no door to go in and out of. There was no window, no chimney, the openings between the poles were not closed, the gable ends were not closed." He further testified that there was no evidence of any residence or habitation there at all. And further, "there was a little inclosure, 30 x 35 feet, a little amount that was about a quarter of a mile from the house." This witness also testified to the conversation with 514] Ward, in which the latter told *him that he (Ward) had not lived on the homestead entry, and that he thought that he was going to lose it. We think that this testimony sustains the averments of the bill that the patent was obtained by fraud. This is not a case where the courts are undertaking to review the decisions of the land office officials on questions of fact, nor to reverse their discretion, properly exercised. It is a case of fraud upon them, and obtaining a patent by means of that fraud.

Does appellant occupy the position of the innocent purchaser, and is the government precluded from receiving the relief prayed for in the bill because of such fact? The answer to the question depends upon a proposition of law, and whether J. J. McCaskill had knowledge of the fraudulent acts of Ward. This knowledge was, in effect, found by both the lower courts, and giving to their finding the strength that should be accorded to it, we pass to the consideration of the proposition of law that the knowledge of J. J. McCaskill, though president of the McCaskill Company, cannot be imputed to it, because, as appellant, the argument is that while knowledge of an agent is the knowledge of the principal, an "exception to the rule is that, if the agent is acting in a matter in which he has a personal interest, or in connection with which he is interested with a third person, the presumption is that he will not communicate the facts in controversy." And it is urged that "the rule should be more rigidly applied in cases of fraud or torts." For these propositions appellant cites *Clark v. Metropolitan Bank*, 3 Duer, 241; *Frenkel*

v. Hudson, 82 Ala. 162, 60 Am. Rep. 736, 2 So. 758; *Allen v. South Boston R. Co.* 150 Mass. 206, 5 L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 917; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; *Loring v. Brodie*, 134 Mass. 453; *First Nat. Bank v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 262.

Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen *against [515 the presumption that their knowledge is its knowledge, the counter presumption that, in transactions with it, when their interest is adverse, their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporation, it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it, and to the officers who are identified with that purpose. Illustrations are given of this in *Cook on Corporations*, §§ 663, 664, and 727. The principle was enforced in this court in *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. Rep. 239. In that case a corporation claimed title to land through a deed of its corporators, one of whom became its president. Of the effect of this the court said: "Associated together to carry forward a common enterprise, the knowledge or actual notice of all these corporators and the president was the knowledge or notice of the company; and, if constructive notice bound them, it bound the company."

The case at bar is within the principle. The bill alleges that J. J. McCaskill and Robert E. L. McCaskill were copartners and engaged in the manufacture of lumber at Freeport, Florida. They incorporated this business, it is alleged, under the laws of Florida, "by the corporate name of J. J. McCaskill Company, with the said J. J. McCaskill as president and the said Robert E. L. McCaskill as secretary, owning a large majority of the stock of said corporation, with the entire management and control of the business and affairs of said corporation." There is no denial of this allegation. The interest of the corporators and the corporation thus shown to be identical, not adverse, we think the ruling in *Simmons Creek Coal Co. v. Doran* is applicable.

This discussion disposes of the five assignments of error which were presented at

the oral argument. The other assignments of error are based on rulings upon the admission of evidence.

516] *These assignments are grouped by counsel in two classes: (1) one to three being based upon the action of the trial court in admitting the testimony of Antoine Paul, which we have given; (2) four to eighteen attack the ruling of the court in admitting testimony of the purchase by the company of other homestead claims.

To support the contention that the court erred in its ruling admitting the testimony of Paul, it is urged that no foundation had been laid for it by an indication of time, place, and circumstances. The record shows that these conditions were satisfied. The witness's attention was drawn to the statement by him to Paul, and he himself testified that it was made at his dwelling house, and testified that he signed the statement.

It is clear, therefore, that the witness was given opportunity to explain. The circumstances and occasion of making the statement were drawn to his attention and the person to whom it was made. He knew that Paul was a government agent, seeking the exact facts as to his, the witness's, settlement upon the land. He could not have underrated the importance of the relation of the statement to his testimony, and the necessity of a clear explanation of it.

The statement was made the basis of a report to the land office, and was introduced in evidence over the objection of the company's counsel. This seems more to have been done for a connected statement of the facts than for proof of them. The facts were testified to by Paul. We cannot see that there was prejudicial error in the ruling of the court.

The assignments of error in the second class are also without merit. The purpose of the testimony of other transactions, counsel say, was "to show a systematic course of dealing by McCaskill, such as would support a contention that he had guilty knowledge of whatever fraud might exist in the procurement of the patent in litigation." It is admitted that the testimony was competent for such purpose, but it is contended it should have been accompanied by evidence showing that such other transactions were false and fraudulent. **517]** lent, and this, *it is insisted, was not done. If so, the testimony was harmless. In other words, if the testimony was not followed up by other testimony which was necessary to give it effect, we may assume that the court below gave to it no value or probative strength. It must be kept in mind that the case was tried by the court.

Decree affirmed.

BOARD OF ASSESSORS OF THE PARISH OF ORLEANS, the City of New Orleans, et al., Appts.,

v.

NEW YORK LIFE INSURANCE COMPANY.

(See S. C. Reporter's ed. 517-523.)

Constitutional law — due process of law — taxation of property of nonresidents.

1. Loans made by a foreign life insurance company to its policy holders, which, though represented by notes, are in fact charged against the reserve value of the borrowers' policies, under an agreement for the extinguishment of the debt by deducting the amount of the loans, with interest, from the amount of any claim under the policies, cannot be subjected to taxation by the state in which the borrowing policy holders reside. [For other cases, see Taxes, 322-329, in Digest Sup. Ct. 1908.]

Taxes — situs — property of nonresidents.

2. The Louisiana tax laws will not be construed by the Federal courts as taxing bank deposits of a foreign life insurance company, made solely for transmission to its home office, and not used or drawn against by anyone in Louisiana, in the absence of any decision of the Louisiana supreme court to that effect.

[For other cases, see Taxes, I. c. 6, in Digest Sup. Ct. 1908.]

[No. 112.]

Argued January 27, 1910. Decided February 28, 1910.

A PPEAL from the Circuit Court of the United States for the Eastern District of Louisiana to review a decree enjoining the collection of taxes from a foreign life insurance company on credits alleged to arise

NOTE. — On the situs for purposes of taxation of debts evidenced by notes and mortgages—see note to *Boyd v. Selma*, 16 L.R.A. 729.

On situs for taxation of debts evidenced by notes or mortgages held by agent residing in different state from principal—see note to *New Orleans v. Stempel*, 44 L. ed. U. S. 174.

As to taxation of intangible property of nonresidents—see note to *Walker v. Jack*, 31 C. C. A. 467.

As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gammon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On due process of law in revenue proceedings—see note to *Read v. Dingess*, 8 C. C. A. 398.

out of policy loans and premium lien note loans, and on bank deposits made solely for transmission to its home office. Affirmed.

See same case below, 158 Fed. 462.

The facts are stated in the opinion.

Messrs. **George H. Terriberry, H. Garland Dupre, and Harry P. Sneed** argued the cause and filed a brief for appellants:

The transactions here in question contain every element necessary to constitute a loan.

Freeman v. Brittin, 17 N. J. L. 231; *Omaha Nat. Bank v. Mutual Ben. L. Ins. Co.* 81 Fed. 938; *New York L. Ins. Co. v. Curry*, 115 Ky. 100, 61 L.R.A. 270, 103 Am. St. Rep. 297, 72 S. W. 736; *Union Cent. L. Ins. Co. v. Buxer*, 62 Ohio St. 385, 49 L.R.A. 747, 57 N. E. 66; *New York L. Ins. Co. v. Pope*, 24 Ky. L. Rep. 485, 68 S. W. 853; *Hatch v. Hatch*, 35 Tex. Civ. App. 373, 80 S. W. 412; *Steele v. Connecticut General L. Ins. Co.* 31 App. Div. 389, 52 N. Y. Supp. 373; *Rodman v. Munson*, 13 Barb. 75; *McCulloch's Com. Dict.* 96; *Webster's Dict.*; 2 Bl. Com. 454; *Standard Dict.* "Loan;" *Webster's International Dict.* "Advance;" *March's Thesaurus*, p. 619, "Loan;" *Standard Dict.* "Interest;" *Bouvier's Law Dict.* "Loan;" *Nichols v. Fearson*, 7 Pet. 107, 8 L. ed. 624.

Under the laws of Louisiana this property is taxable.

Alabama Gold L. Ins. Co. v. Lott, 54 Ala. 499; *Travelers' Ins. Co. v. Board of Assessors*, 122 La. 129, 24 L.R.A.(N.S.) 388, 47 So. 439; *General Electric Co. v. Board of Assessors*, 121 La. 116, 46 So. 122; *National F. Ins. Co. v. Board of Assessors*, 121 La. 108, 126 Am. St. Rep. 313, 46 So. 117; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 122 La. 98, 47 So. 415; *New England Mut. L. Ins. Co. v. Board of Assessors*, 121 La. 1068, 47 So. 27; *United States Fidelity & G. Co. v. Board of Assessors*, 122 La. 139, 47 So. 442; *Standard M. Ins. Co. v. Board of Assessors*, 123 La. 717, 49 So. 483; *Orient Ins. Co. v. Board of Assessors*, 124 La. 872, 50 So. 778.

The state may control the admission of foreign corporations to do business in the state by prescribing conditions, especially by taxation.

13 Am. & Eng. Enc. Law, 2d ed. p. 860, note 1, p. 861; 1 Cooley, Taxn. 3d ed. pp. 94, 95, notes 1-3; 6 Thomp. Corp. §§ 7900, 8087; 2 Cook, Corp. 4th ed. p. 1080; *Burroughs*, Taxn. p. 151; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Liverpool & L. Life & F. Ins. Co. v. Massachusetts*, 10 Wall. 573, 19 L. ed. 1031; *Oliver v. Liverpool & L. Life & F. Ins. Co.* 100 Mass. 531; *Atty. Gen. v. Bay State Min. Co.* 99 Mass. 148, 96

Am. Dec. 717; *Ducat v. Chicago*, 10 Wall. 415, 19 L. ed. 973; *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; *Carter v. Burr*, 113 U. S. 739, 28 L. ed. 1148, 5 Sup. Ct. Rep. 713; *Horn Silver Min. Co. v. New York*, 143 U. S. 314, 36 L. ed. 168, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 154, 41 L. ed. 954, 17 Sup. Ct. Rep. 532; *New York v. Roberts*, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58; 1 *Desty*, Taxn. p. 344, note 14; *Metropolitan L. Ins. Co. v. Board of Assessors*, 115 La. 708, 9 L.R.A. (N.S.) 1240, 116 Am. St. Rep. 179, 39 So. 846; *Beale*, Foreign Corp. p. 654; *Allgeyer v. Louisiana*, 165 U. S. 583, 41 L. ed. 833, 17 Sup. Ct. Rep. 427.

The New York Life Insurance Company was doing business in Louisiana.

Gray, Limitations of Taxing Power, § 133, p. 103; *Paul v. Virginia*, 8 Wall. 185, 19 L. ed. 361; 13 Am. & Eng. Enc. Law, pp. 873, 874; *Wall v. Equitable Life Assur. Soc.* 32 Fed. 273; *White v. Connecticut Mut. L. Ins. Co.* 4 Dill. 177, Fed. Cas. No. 17,545; *Fletcher v. New York L. Ins. Co.* 4 McCrary, 440, 13 Fed. 526; *Ehrman v. Teutonia Ins. Co.* 1 McCrary, 123, 1 Fed. 471; *Re Insurance Co.* 22 Fed. 109; *People ex rel. Badische Anilin & Soda Fabrik v. Roberts*, 152 N. Y. 59, 36 L.R.A. 758, 46 N. E. 161; *New Orleans v. Virginia F. & M. Ins. Co.* 33 La. Ann. 10; *State v. Woods*, 40 La. Ann. 177, 3 So. 543; *State v. New England Mut. Ins. Co.* 43 La. Ann. 139, 8 So. 888; *Welty*, Assessments, pp. 112, 114, § 49; *Dubuque v. Illinois C. R. Co.* 39 Iowa, 85; *Berry v. Knights Templars' & M. Life Indemnity Co.* 46 Fed. 440; *Beale*, Foreign Corp. pp. 231, 333, §§ 205, 206.

Credits, notes, etc., of foreign corporations doing business in Louisiana under the Louisiana laws are taxable in Louisiana.

Oliver v. Liverpool & L. Life & F. Ins. Co. and Liverpool & L. Life & F. Ins. Co. v. Massachusetts, supra; *Gray*, Limitations of Taxing Power, p. 70, § 89; *Armour Packing Co. v. Savannah*, 115 Ga. 140, 41 S. E. 237; *Armour Packing Co. v. Augusta*, 118 Ga. 552, 98 Am. St. Rep. 128, 45 S. E. 424; *People ex rel. Yellow Pine Co. v. Barker*, 23 App. Div. 524, 48 N. Y. Supp. 553, affirmed in 155 N. Y. 665, 49 N. E. 1103; *Hammond*, Taxn. of Business Corp. ¶ 29, p. 22; *Beale*, Foreign Corp. p. 647, § 488; *Monongahela River Consol. Coal & Coke Co. v. Board of Assessors*, 115 La. 567, 2 L.R.A.(N.S.) 637, 112 Am. St. Rep. 275, 39 So. 601; *State v. Hammond Packing Co.* 110 La. 186, 98 Am. St. Rep. 459, 34 So. 368; 1 Cooley, Taxn. 3d ed. pp. 92, 658, note 2.

The general principle of *mobilia sequuntur personam* will not be allowed to prevail where there is positive law conflicting with the laws of the domicile, and the principle would injure or act detrimentally to the interests of the citizens of the state where the doctrine is invoked.

Story, Conf. L. 8th ed. chap. 9; Wharton, Conf. L. 2d ed. p. 414, § 334, note a, p. 543; Norris v. Mumford, 4 Mart. (La.) 20; Ramsey v. Stevenson, 5 Mart. (La.) 23, 12 Am. Dec. 468; Fisk v. Chandler, 7 Mart. (La.) 24; Agaisse v. Guedron, 2 Mart. N. S. 79; Beirne v. Patton, 17 La. 590; United States v. Bank of United States, 8 Rob. (La.) 414; State ex rel. Public School v. New Orleans, 42 La. Ann. 93, 7 So. 674; Freret v. Freret, 31 La. Ann. 509.

The same principle prevails in public law as in private law.

State v. Martin, 2 La. Ann. 667; State v. Poydras, 9 La. Ann. 166; Dufour's Succession, 10 La. Ann. 391; Prevost's Succession, 12 La. Ann. 577; Schaffer's Succession, 13 La. Ann. 113; Alvany v. Powell, 55 N. C. (2 Jones, Eq.) 51; Catlin v. Hull, 21 Vt. 161; State ex rel. Taylor v. St. Louis County Ct. 47 Mo. 600; People v. Home Ins. Co. 29 Cal. 533; St. Louis v. Wiggins Ferry Co. 40 Mo. 580; Wilcox v. Ellis, 14 Kan. 602, 19 Am. Rep. 107; Tazewell County v. Davenport, 40 Ill. 198; Douglas v. New York, 2 Duer, 110; Brunswick v. Winters, 3 N. M. 390, 5 Pac. 706; State ex rel. Mechanics' & T. Ins. Co. v. Board of Assessors, 47 La. Ann. 1544, 18 So. 519.

Even as to individual nonresidents the doctrine of *mobilia sequuntur personam* yields to positive Federal and state legislation in questions of taxation. The principle becomes much stronger when applied to foreign corporations.

Henderson Bridge Co. v. Kentucky and New York v. Roberts, supra; Bluefields Banana Co. v. Board of Assessors, 49 La. Ann. 48, 21 So. 627; Parker v. Strauss, 49 La. Ann. 1175, 22 So. 329; Metropolitan L. Ins. Co. v. Board of Assessors, 115 La. 707, 9 L.R.A.(N.S.) 1240, 116 Am. St. Rep. 179, 39 So. 846; Monongahela River Consol. Coal & Coke Co. v. Board of Assessors, supra; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; State Assessors v. Comptoir National D'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Comptoir National D'Escompte v. Board of Assessors, 52 La. Ann. 1331, 27 So. 801.

54 L. ed.

Mr. James H. McIntosh argued the cause, and, with Messrs. Charles S. Rice and Richard B. Montgomery, filed a brief for appellee:

This is a property tax, not a franchise, business, or license tax.

Liverpool & L. & G. Ins. Co. v. Board of Assessors, 51 La. Ann. 1028, 45 L.R.A. 524, 72 Am. St. Rep. 483, 25 So. 970; Railcy v. Board of Assessors, 44 La. Ann. 766, 11 So. 93.

Property not within the territorial jurisdiction of the state is not subject to taxation therein.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 A. & E. Ann. Cas. 732; St. Louis v. Wiggins Ferry Co. 11 Wall. 423, 20 L. ed. 192; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Liverpool & L. & G. Ins. Co. v. Board of Assessors, supra; State Tax on Foreign-held bonds, 15 Wall. 300, 21 L. ed. 179; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Augusta v. Kimball, 91 Me. 605, 41 L.R.A. 475, 40 Atl. 666; Grundy County v. Tennessee Coal, Iron, & R. Co. 94 Tenn. 295, 29 S. W. 116; Bacon v. State Tax. Comrs. 126 Mich. 22, 60 L.R.A. 321, 86 Am. St. Rep. 524, 85 N. W. 307.

Credits and choses in action can be taxed only at the domicile of the owner, unless there is something peculiar about the transaction to take it out of this rule.

State Tax on Foreign-held Bonds and Buck v. Beach, supra; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; Meyer v. Pleasant, 41 La. Ann. 645, 6 So. 258; Liverpool & L. & G. Ins. Co. v. Board of Assessors and Grundy County v. Tennessee Coal, Iron, & R. Co. supra; Worthington v. Sebastian, 25 Ohio St. 1; Barber v. Farr, 54 Iowa, 57, 6 N. W. 134.

Within certain limitations the state may, by legislation, fix the situs of credits and choses in action for taxation; but the state cannot, by legislation or otherwise, give credits or choses in action owned by nonresidents a situs for taxation within the state if such credits and choses in action never have been within the state.

Tappan v. Merchants' Nat. Bank, supra; Savings & L. Soc. v. Multnomah County,

169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; *Union Refrigerator Transit Co. v. Kentucky and Louisville & J. Ferry Co. v. Kentucky*, supra; *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; *State Assessors v. Comptoir National D'Escompte*, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Newark City Bank v. Fourth Ward Assessor*, 30 N. J. L. 13; *Great Barrington v. Berkshire County*, 16 Pick. 572; *Whitesell v. Northampton County*, 49 Pa. 526; *Seward v. Rising Sun*, 79 Ind. 351.

Where an agent within the state, representing a nonresident principal, is clothed with power and authority to create credits or to loan money for his principal within the state, and, in the exercise of a discretion and choice which his principal has reposed in him for this purpose, does so, such credits and choses in action having been by him negotiated, made, and the consideration passed within the state, the agent holding an actual and effective control over the business, retaining in his own possession within the state the evidences of such debts, or procuring their return to him when due for collection and return or reinvestment, the course of business being general and amounting more or less to a permanent business, then, and only then, may the state by legislation separate the situs of such property for taxation from the domicile of the owner, and give it a situs within the state for purposes of taxation.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Buck v. Beach*; *Metropolitan L. Ins. Co. v. New Orleans*; and *State Assessors v. Comptoir National D'Escompte*,—supra; *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576; *Liverpool & L. & G. Ins. Co. v. Board of Assessors and Railey v. Board of Assessors*, supra; *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134, 62 N. E. 546; *Re Jefferson*, 35 Minn. 215, 28 N. W. 256; *State v. Smith*, 68 Miss. 79, 8 So. 294; *Goldgart v. People*, 106 Ill. 25; *Billinghurst v. Spink County*, 5 S. D. 84, 58 N. W. 272; *Finch v. York County*, 19 Neb. 50, 56 Am. Rep. 741, 26 N. W. 589; *Catlin v. Hull*, 21 Vt. 152; *Herron v. Keeran*, 59 Ind. 472, 26 Am. Rep. 87.

Securities may be sent into the state for collection, inspection, safe-keeping or the like, and yet not be subject to taxation therein.

Buck v. Miller, 147 Ind. 586, 37 L.R.A.

384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8.

If they have been reduced to concrete form, such as promissory notes, or are merely in the hands of an agent for the purpose of collecting the principal and interest and remitting the same to his employer, or if the agent does not occupy the position of a trustee clothed with discretion and choice as to instruments to be made, but acts merely under the special direction of a non-resident owner of the property, the state does not acquire jurisdiction for purposes of taxation.

Buck v. Beach, supra; *Myers v. Seaburger*, 45 Ohio St. 232, 12 N. E. 396; *Boardman v. Tompkins County*, 85 N. Y. 359; *Herron v. Keeran*, supra.

Collection by seizure and sale is the whole theory of taxation within the state.

Liverpool & L. & G. Ins. Co. v. Board of Assessors, supra.

Taxation is justified upon the ground that the property owner receives an equivalent in the protection of his property, and in the remedies afforded by the laws of the state for the collection of the taxes when due.

Union Refrigerator Transit Co. v. Kentucky, supra; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *Re Jefferson*, supra; *Redmond v. Rutherford*, 87 N. C. 122; *Fisher v. Rush County*, 19 Kan. 414.

Taxation without protection or without some benefit in return therefor is spoliation or confiscation.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 211, 50 L. ed. 156, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493.

Money deposited in a bank in one state, solely for transmission through such bank to another state, is not taxable in the state in which the bank is located.

State, Metropolitan L. Ins. Co., Prosecutor, v. Newark, 62 N. J. L. 74, 40 Atl. 573; *Railey v. Board of Assessors*, 44 La. Ann. 766, 11 So. 93; *Clason v. New Orleans*, 46 La. Ann. 1, 14 So. 306; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 51 La. Ann. 1028, 45 L.R.A. 524, 72 Am. St. Rep. 483, 25 So. 970; *Thompson v. Riggs*, 5 Wall. 663, 18 L. ed. 704; *National Bank v. Millard*, 10 Wall. 152, 19 L. ed. 897; *Leather Mfrs. Nat. Bank v. Merchants' Nat. Bank*, 128 U. S. 26, 32 L. ed. 342, 9 Sup. Ct. Rep. 3; *Bluefields Banana Co. v. Board of Assessors*, 49 La. Ann. 43, 21 So. 627; *Parker v. Strauss*, 49 La. Ann. 1173, 22 So. 329.

This tax deprives the company of its property without due process of law and denies to it the equal protection of the law.

Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 A. & E. Ann.

Cas. 732; Delaware, L. & W. R. Co. v. Pennsylvania Co. 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity to restrain the collection of a tax from the plaintiff, the appellee, on the ground that the tax is contrary to the 14th Amendment. The plaintiff had a decree and the defendants appeal to this court. 158 Fed. 462. The tax is based upon an assessment of the plaintiff for credits amounting to \$568,900, whereas the plaintiff says that it has no credits in the state; and for money on deposit, distinct from what the plaintiff admits to be taxable, amounting to \$50,700. There is no dispute about the facts, and the issue as to each sum is upon matter of law.

The so-called credits arise out of transactions denominated policy loans and premium lien note loans, which are explained at length by the judge below, but which may be summed up more shortly here. When the plaintiff's policies have run a certain length of time and the premiums have been paid as due, the plaintiff becomes bound ultimately to pay what is called their reserve value, whether the payment of premiums is kept up or not; and this reserve value increases as the payments of premiums go on. A policy holder desiring to keep his policy on foot, and yet to profit by the reserve value that it has acquired, 522] may be allowed, at the plaintiff's *discretion, to receive a sum not exceeding that present value, on the terms that, on the settlement of any claim under the policy, the sum so received shall be deducted with interest (the interest representing what it is estimated that the sum would have earned if retained by the plaintiff); and that, on failure to pay any premium or the above-mentioned interest, the sum received shall be deducted from the reserve value at once.

This is called a loan. It is represented by what is called a note, which contains a promise to pay the money. But as the plaintiff never advances more than it already is absolutely bound for under the policy, it has no interest in creating a personal liability, and therefore the contract on the face of the note goes on to provide that if the note is not paid when due, it shall be extinguished automatically by the counter credit for what we have called the reserve value of the policy. In short, the claim of the policy holder on the one side and of the company on the other

are brought into an account current by the very act that creates the latter. The so-called liability of the policy holder never exists as a personal liability, it never is a debt, but is merely a deduction in account from the sum that the plaintiffs ultimately must pay. In settling that account, interest will be computed on the item for the reason that we have mentioned; but the item never could be sued for, any more than any other single item of a mutual account that always shows a balance against the would-be plaintiff. In form it subsists as an item until the settlement, because interest must be charged on it. In substance it is extinct from the beginning, because, as was said by the judge below, it is a payment, not a loan. A collateral illustration of the principle will be found in *Starratt v. Mullen*, 148 Mass. 570, 2 L.R.A. 697, 20 N. E. 178, and cases there cited.

Instead of receiving an advance, the policy holder may draw upon the reserve value for a premium due, again giving a note; but the transaction is similar in legal characteristics to that which we have described. It is unnecessary to set out the documents at length, because, although the same language *is not used in all, there [523 is no nice question of construction, no doubt possible as to the effect and import of the contracts. In none of the cases is there a loan, and therefore there are no credits to be taxed. In *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499, so far as appeared, the insurance company made loans, properly so called, to its policy holders, and the question now before the court was not raised or disensed.

What we have said disposes of the item of \$568,900. The other consists of a bank account of \$50,700, kept separate from a small account for current expenses, admitted to be taxable. The account in question consists of deposits made solely for transmission to New York, and not used or drawn against by anyone in Louisiana. We shall not inquire whether it would or would not be within the constitutional possibilities for a state to tax a person outside its jurisdiction for a bank deposit that only became his or came into existence as property at the moment of beginning a transit to him, and that thereafter left the state forthwith. It is enough to say we should not readily believe that the supreme court of the state would interpret the statutes of Louisiana as having that intent. See *State, Metropolitan L. Ins. Co., Prosecutor, v. Newark*, 62 N. J. L. 74, 40 Atl. 573. The Louisiana cases cited as contrary, and as showing the purpose of the legislature to reach such a deposit as this, do not seem

to us to sustain the appellant's point. *Bluefields Banana Co. v. Board of Assessors*, 49 La. Ann. 43, 21 So. 627; *Parker v. Strauss*, 49 La. Ann. 1173, 22 So. 329. The statute purports to levy a tax upon all property within the state, and enumerates different kinds. Act 170 of 1898. We see no indication that it intended to include under that head property that becomes such only to leave the state at once.

Decree affirmed.

Mr. Justice **Brewer** dissents, believing that the case is controlled by the decision in *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499.

524] ***GEORGE B. STARKWEATHER**,
Appt.,
v.

HERBERT W. T. JENNER et al.

(See S. C. Reporter's ed. 524-531.)

Cotenancy — purchase by tenant in common at sale under trust deed.

1. A tenant in common is not forbidden by his relation to his cotenants, from purchasing the common property at public sale under a power in a trust deed, if he takes no undue or unfair advantage of his co-owners. [For other cases, see *Cotenancy*, III., in *Digest Sup. Ct. 1908.*]

Mortgage — sale under power — agreement by cotenants for joint bid.

2. An agreement between two or more tenants in common to buy in jointly the common property at a public sale under a power in a deed of trust is not a fraud upon the rights of the remaining cotenants, provided there is no resort to any artifice to deter others from bidding.

[For other cases, see *Judicial Sale*, I. c, in *Digest Sup. Ct. 1908.*]

Laches — setting aside sale under trust deed.

3. A delay of four years, during which there has been a large appreciation in the value of the property, is fatal to any right

NOTE.—On the right of one cotenant to purchase the property in his own right at a sale under an encumbrance created by one through whom the cotenants derived title—see note to *Jackson v. Baird*, 19 L.R.A. (N.S.) 591.

On contracts restraining competition in bidding—see note to *Hoffman v. McMullen*, 28 C. C. A. 192.

As to laches as a defense—see notes to *Middletown v. Newport Hospital*, 1 L.R.A. 191; *Calhoun v. Delhi & M. R. Co.* 8 L.R.A. 248; *Coffey v. Emigh*, 10 L.R.A. 125; *Pratt v. Carroll*, 3 L. ed. U. S. 627; *Hammond v. Hopkins*, 36 L. ed. U. S. 135; *Pelix v. Patrick*, 36 L. ed. U. S. 720; and *Abraham v. Ordway*, 39 L. ed. U. S. 1037.

to require a tenant in common to give his cotenants the benefit of his purchase of the common property at a public sale under a power in a trust deed.

[For other cases, see *Limitation of Actions*, 159-166, in *Digest Sup. Ct. 1908.*]

[No. 114.]

Argued January 28, 1910. Decided February 28, 1910.

APPEAL from the Court of Appeals for the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, dismissing the bill in a suit to require a tenant in common to give his cotenants the benefit of his purchase of the common property at a public sale under a power in a trust deed. Affirmed.

See same case below, 27 App. D. C. 348.

The facts are stated in the opinion.

Mr. **Richard P. Evans** argued the cause and filed a brief for appellant:

The court below erred in its judgment of affirmance on the ground of appellant's laches.

Harwood v. Cincinnati & C. Air Line R. Co. 17 Wall. 79, 21 L. ed. 558; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328; *Veazie v. Williams*, 8 How. 134, 12 L. ed. 1018.

Where there is a community of interest in property or lands there is a community of right and duty attached thereto, incumbent upon all the members of a syndicate or association like the one in question.

Clark v. Sidway, 142 U. S. 682, 35 L. ed. 1157, 12 Sup. Ct. Rep. 327; *Rothwell v. Dewees*, 2 Black, 615, 17 L. ed. 310; *Holridge v. Gillespie*, 2 Johns. Ch. 30; *Aultman's Appeal*, 98 Pa. 505; *Keech v. Sandford*, White & T. Lead. Cas. in Eq. (Hare & W. Notes) 4th Am. ed. pt. 1, pp. 49 et seq.; *Lee v. Fox*, 6 Dana, 176; *Greenlaw v. King*, 3 Beav. 49; *Bispham*, Eq. 6th ed. pp. 143 et seq.

The law will not tolerate any influence likely to prevent competition at a judicial sale, and it accords to every debtor a fair chance to have a fair sale and a full price; and if he fails to get these, in consequence of a wrongful interference of another party who has purchased his property at a price grossly disproportionate to its value, equity will step in and afford a redress, either by setting aside the proceedings under the sale, or by holding the purchaser to account.

1 Story, Eq. Jur. § 293; *Phippen v. Stickney*, 3 Met. 387; *Peck v. List*, 23 W. Va. 338, 48 Am. Rep. 398; *Cocks v. Izard*, 7 Wall. 559, 562, 19 L. ed. 275, 276.

In the case at bar there appears much more than "only slight circumstances of unfairness in the conduct of the party ben-

effited by the sale," which has been held by this court to raise the presumption of fraud.

1 Story, Eq. Jur. 13th ed. § 190; Graffam v. Burgess, 117 U. S. 186, 192, 29 L. ed. 841, 843, 6 Sup. Ct. Rep. 686; Castle v. Bullard, 23 How. 172, 187, 16 L. ed. 424, 428; Rea v. Missouri, 17 Wall. 543, 21 L. ed. 709.

Mr. B. F. Leighton argued the cause, and, with Mr. Golden Donaldson, filed a brief for appellees:

Two highly respectable courts have decided that there was no fraud, actual or constructive, on the part of the appellees or either of them, connected with the purchase of the real estate in controversy. This finding this court ought not to disturb, unless some obvious error has intervened in the application of the law, or some important mistake has been made in the evidence, which the appellant has clearly pointed out and made manifest.

Richardson v. Van Auker, 5 App. D. C. 209; Tilghman v. Proctor, 125 U. S. 136, 31 L. ed. 664, 8 Sup. Ct. Rep. 894; Evans v. State Nat. Bank, 141 U. S. 107, 35 L. ed. 654, 11 Sup. Ct. Rep. 885.

A trustee may purchase the trust property at a judicial sale, brought about by a third party, which he had no part in procuring, and over which he could not have had control.

Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 329; Allen v. Gillette, 127 U. S. 589, 32 L. ed. 271, 8 Sup. Ct. Rep. 1331; Pewabic Min. Co. v. Mason, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887.

Plaintiff delayed too long in bringing his suit.

Twin-Lick Oil Co. v. Marbury, supra; Brittin v. Handy, 20 Ark. 400, 73 Am. Dec. 497; Burr v. Mueller, 65 Ill. 258; Lomax, Dig. p. 262.

Mr. Justice Lurton delivered the opinion of the court:

The appellant, George B. Starkweather, was the owner of a parcel of unimproved land known as the Crescent Heights, in Washington, District of Columbia, composed of two contiguous lots, one of 7 and the other of 3 acres. In January, 1892, pursuant to a plan arranged between himself and certain persons associated with him, 525] and styled herein the syndicate, *he conveyed this tract to defendant Croissant and Johnson, as trustees, for the benefit of the persons who should contribute to the purchase price, as tenants in common, in the share and proportion in which they respectively contributed, with power to control, manage, lease, sell, and convey, in their discretion, as should be desirable or advantageous to the parties interested. Those 54 L. ed.

contributing or proposing to contribute agreed among themselves, by a separate paper, that the price, including the discharge of encumbrances resting upon the property, should be \$75,000, divided into shares of \$2,500 each, and each person accordingly subscribed for such number of shares as they elected to take, agreeing that Croissant and Johnson should represent them as trustees in the purchase, with full power to manage, sell, and convey, receiving a commission for their service. Among those so contributing originally, or by substitution, were the trustees Croissant and Johnson, the appellant Starkweather, who was to receive, and did take, eleven shares, fully paid up, as and for part of the purchase price, and the appellee Jenner, who ultimately came to own four of such shares. The full number of thirty shares contemplated were never subscribed, six remaining unsold in the hands of the trustees. This fact, from whatever cause, seems to have led to the inability of the syndicate to pay off the encumbrances which were to be assumed and paid off as part of the price. Among these encumbrances were several deeds in trust or mortgages securing obligations of the vendor appellant.

The certificates to subscribers were issued by Croissant and Johnson, and recited, among other things, that they held the property in trust, and that the holder was a contributor to the purchase price to the extent of \$2,500, and the owner of an undivided one-thirtieth interest, and that such interest "shall at all times be subject to assessment for its proportionate part of money necessary to pay expenses incurred in the execution of the trusts as provided in the deed to said trustee, . . . and in default of such payment the said *trustees [526 . . . are hereby authorized to sell the interest of such person so in default," etc.

Out of the money paid in by the subscribers, a part was used by the trustees in paying off encumbrances, keeping down interest, and in other expenses, but something like \$11,000 was paid over in money to or on account of the vendor, Starkweather.

Among the trusts upon the property was a deed in trust upon the 7-acre parcel to the appellees Duval and Cole, as trustees, to secure an obligation created by Starkweather for \$7,553.34 to a Mr. Gaither, executed January 29, 1889, and maturing in four years. In 1893 this debt matured. By agreement, the enforcement of the trust was postponed upon payment of interest. But, finally, there was a default and a sale directed by Gaither. The property was, accordingly, advertised by the trustees and sold at public outcry in 1897 and bid in by one Ricker, acting for and as agent of the

appellant. The time for complying with the sale by Ricker was extended upon the payment by appellant of \$300 for each of two extensions. Default in complying with the terms of sale was, however, again made, and the property readvertised. Appellant attempted to forbid such resale, and filed a bill for that purpose, which was not dismissed until February, 1898, when the property was again advertised and offered for sale by Duval and Cole, the trustees, and knocked down to one Silver, acting as an agent for Starkweather. The terms of this second sale were not complied with, and the property was at once recried and sold to the appellee Jenner for \$17,100, acting, as it turned out, for himself and certain others, who, like Jenner, were members of the original purchasing syndicate, or holders of certificates acquired later from those who were. Jenner complied with the terms of sale and paid the full purchase money and accepted a deed from the trustees. After paying off the Gaither debt, the remainder of the price paid by Jenner was distributed to other lienors, under a bill in equity filed for that [527] purpose, under which final *decrees have long since been made and the trustees exonerated.

The object of the present bill is to set aside this deed by Duval and Cole to the appellee Jenner, and revest the title in Croissant and Johnson as trustees for the syndicate; or, in the alternative, declare Jenner a trustee holding the 7-acre parcel, after his reimbursement, for the benefit of the syndicate subscribers.

The charges of the bill abound in accusations of fraudulent collusion between Jenner and the other appellees to bring this 7-acre lot to sale under the Duval and Cole trust, and thereby the elimination of appellant as the largest holder of certificates in the syndicate. It is among other things said that Croissant and Johnson wilfully suffered a default. That they had certificates unsold and money in their hands and power to assess the members of the syndicate to raise means to pay off the encumbrance and thus save the property for the benefit of all concerned; but had wilfully and collusively let the property be brought to sale, and in fact, persuaded Gaither or his trustees to proceed under the trust. These charges of collusion or fraudulent conduct upon the part of either Gaither, the creditor, or his trustees, Duval and Cole, are utterly unsupported. Their course was, from beginning to end, so far as this record shows, dictated by prudent business conduct, and great consideration for appellant in his natural desire to prevent an enforcement of the trust. So far as Croissant and Johnson are concerned, it is not shown that they had

in any way colluded with either the creditor, his trustees, or with the purchaser at the Duval and Cole sale, or that they had the slightest interest in the acquisition of this 7-acre tract by Jenner or his associates. They are not shown to have misapplied the funds of the syndicate, or to have had any funds with which to meet and pay off either the principal or interest of the Gaither debt. That they did not assess the shareholders, as they might have done under the terms of the trust, to raise money to *pay off this and other encumbrances, [528] is true. Their excuse is that most of the members could not pay or be made to pay, and that all were unwilling to pay. That a sale of their certificates would have been unavailing, as it would have been only to sell the property subject to heavy encumbrances, and a sale of a mere equity. But whether they were derelict or not, they are not shown to have acted in collusion with either Gaither, his trustees, or with Jenner and his purchasing associates.

But it is said that Jenner's relation as tenant in common to appellant and those associated with him as owner of the property sold to pay off this paramount lien, forbade his purchase. That there is such a community of interest between those who hold a common title as to forbid one such cotenant from acquiring any benefit from the acquisition of an outstanding superior title is undeniable. That a court of equity, upon timely application, will convert such a purchasing tenant into a trustee for the common benefit, is true. The doctrine is considered and applied in *Rothwell v. Dewees*, 2 Black, 613, 17 L. ed. 309, and *Turner v. Sawyer*, 150 U. S. 578, 37 L. ed. 1189, 14 Sup. Ct. Rep. 192. For much the same reason, one tenant may not hold adversely the common property against another, though he may do so, if he act openly, and, in that event, the statute will run in his favor. *Elder v. McClaskey*, 17 C. C. A. 251, 37 U. S. App. 199, 70 Fed. 542.

But it is plain that the principle which turns a cotenant into a trustee who buys for himself a hostile outstanding title can have no proper application to a public sale of the common property, either under legal process or a power in a trust deed. In such a situation, the sale not being in any wise the result of collusion, nor subject to the control of such a bidder, he is as free, all deceit and fraud out of the way, as any one of the general public.

Even a trustee has been held competent to purchase the trust property at a judicial sale which he has no interest in, nor any part in bringing about, and which sale he in no way controls. *Twin-Lick Oil Co. v.*

Marbury, 91 U. S. 587, 23 L. ed. 329; *Allen v. Gillette*, 127 U. S. 589, 32 L. ed. 271, 8 Sup. Ct. Rep. 1331.

529] *But it is said that if there is no absolute prohibition upon one co-owner buying at an open sale of the common property to satisfy a mortgage or other encumbrance thereon, that at least the fiduciary character and common interest due to such a cotenancy require of one who buys the utmost fairness of conduct. Concede this. It is then said that Jenner, at the bidding, held a power of attorney from three others of the syndicate members, by which he was to bid the property in for their mutual benefit at the lowest price possible, and at a price not exceeding \$24,000. That he held this power of attorney, and had undertaken to buy at as low a price as possible, was not known to appellant, and that this "secret combination," as it is styled and designated, was a fraud upon him. It is plain from the facts of this case that the scheme for exploiting this Creseent Heights property, according to the agreement exhibited by the share certificates, had practically collapsed, and that for the want of means and harmony among the owners there was no practical way of clearing the property from encumbrances, which had turned out to be about \$39,000,—a sum larger than seems to have been originally supposed. There was nothing left but for the members of the syndicate to put their hands into their own pockets and put in a large additional sum or let the encumbrances be enforced. This latter is just what happened. In such circumstances it was plainly the right of each one to take care of himself, and, if he saw fit to buy at the trust sale on the chance of making something, he was free to do so, provided only he took no undue or unfair advantage of his co-owners, and observed the rules concerning fairness at such a sale, which prevail in any circumstances. If two or more of those who had been concerned should choose to unite their fortune in a new purchase, there was no principle of law or morals to forbid. That they should agree to buy at the best price obtainable was their right, if they might buy at all, provided they resorted to no artifice to deter others from bidding. *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. 530] Rep. 887. *Mr. Jenner's attitude at the sale was that of an open bidder, acting in his own interest, and necessarily in opposition to that of the appellant and other cotenants. There were others present at the sale, bidding against him, and chief among them was the appellant himself, who, although he says he intended to give the syndicate the benefit of his purchase, said nothing of it, 54 L. ed.

and seemingly sought to secure himself as best he could in the apparent wreck of the joint enterprise. It was the misfortune of the appellant that he forced the bidding beyond the maximum price to which Jenner was authorized to go, and then was unable to comply with the terms of the sale. This resulted in an immediate reoffering of the property, as was to be expected. That in this second sale the property was knocked down for much less only shows that the former price had been inflated by the competition between these cotenants, each trying to save himself in the same way. That the price at which Jenner bought was probably several thousand dollars less than its then estimated market value may be true. But it is also true that the property was of a speculative character, and at that time and for some time later was difficult of sale and much depressed. But this price was not so grossly inadequate as of itself to justify relief, even if the bill had been promptly filed. That sale was in February, 1898. This bill was filed in the spring of 1903. That appellant did not, at the sale, know that Jenner was buying for himself and certain others of the syndicate, may be true; but he, confessedly, learned that fact when Jenner and his associates fell out and the fact came to light in a bill filed in December, 1898. At most, the sale was voidable, not void, and he who would complain must seasonably elect whether he will avoid it or not. *Twin-Liek Oil Co. v. Marbury*, supra.

Appellant did not act with that degree of promptness which equity demands. He has slumbered over the question of whether he should elect to let Jenner hold on to his purchase or require him to give the benefit of his bargain to his cotenants. *A delay [531 of not less than four years, during which there has been a large appreciation in the value of the property, is unreasonable. Two courts in succession have failed to find ground for relief, and we see no good reason for reversing the decree from which the appellant has appealed.

It is therefore affirmed.

INTERSTATE COMMERCE COMMISSION,
Appt.,
v.
DELAWARE, LACKAWANNA, & WEST-
ERN RAILROAD COMPANY.

(See S. C. Reporter's ed. 531-538.)

**Interstate Commerce Commission —
compelling switch connection — ship-
per's remedy exclusive.**

The remedy given by the act of February 4, 1887 (24 Stat. at L. 584, chap. 3591, U. S.

Comp. Stat. Supp. 1909, p. 1152), as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1152), § 1, on complaint by the shipper to the Interstate Commerce Commission when an interstate railway carrier refuses to establish a switch connection with a lateral branch line, is exclusive and the general powers given by other sections of the statute cannot be deemed to authorize a complaint to the Commission by the lateral branch railway company.

[Powers of Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

[No. 362.]

Argued February 21 and 23, 1910. Decided March 7, 1910.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a decree enjoining the enforcement of an order made by the Interstate Commerce Commission, requiring the establishment of a switch connection. Affirmed.

See same case below, 166 Fed. 498.

The facts are stated in the opinion.

Solicitor General **Bowers** argued the cause and filed a brief for appellant.

Mr. **William S. Jenney** argued the cause and filed a brief for appellee:

The remedy provided for the enforcement of the right created by the clause is confined to a proceeding before the Commission, instituted by a shipper, and that remedy is exclusive.

Pollard v. Bailey, 20 Wall. 520, 22 L. ed. 376; *Dollar Sav. Bank v. United States*, 19 Wall. 227, 22 L. ed. 80; *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055; *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196; *United States v. Perryman*, 100 U. S. 235, 25 L. ed. 645; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; *Thompson v. Hubbard*, 131 U. S. 123, 33 L. ed. 76, 9 Sup. Ct. Rep. 710; *Durant v. Albany County*, 26 Wend. 65; *Janney v. Buell*, 55 Ala. 408; *Fari-bault v. Misener*, 20 Minn. 396, Gil. 347; *Banks v. Manchester*, 128 U. S. 244, 32 L. ed. 425, 9 Sup. Ct. Rep. 36.

When a statute in language clear, positive, and direct, and leading to no absurdity, gives a suitable remedy for an existing evil, though an inadequate one, a construction which, upon the ground of a supposed intention of the legislature to give a more effectual one, would undertake to enlarge the terms of the act, would be unwarranted.

Endlich, *Interpretation of Statutes*, p. 10.

The courts will not be inclined to ascribe

error or mistake to a co-ordinate branch of the government. The presumption must be that the legislature acted advisedly, if not wisely. It must be presumed to have intended to omit just what it did in fact omit; as it is presumed to say and mean just what it does in fact say.

R. v. Treasury, 20 L. J. Q. B. N. S. 312; *Jones v. Smart*, 1 T. R. 44; *United States v. Goldenberg*, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3.

It is the general policy and intent of Congress not to compel one carrier to make a physical connection with another carrier in order to promote the interests of the latter carrier alone.

Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* 4 Inters. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 158; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 4 Inters. Com. Rep. 537, 59 Fed. 400, 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; *St. Louis Drayage Co. v. Louisville & N. R. Co.* 5 Inters. Com. Rep. 137, 65 Fed. 39; *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.* 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; *Central Stock Yards Co. v. Louisville & N. R. Co.* 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity, brought by the plaintiff, appellee, to prevent the enforcement of an order made by the appellant, requiring the plaintiff to establish a switch connection with the Rahway Valley Railroad Company's road. 14 Inters. Com. Rep. 191. The order was made on June 24, 1908, under the act to regulate commerce, February 4, 1887, chap. 104, § 1, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154, as amended by the act of June 29, 1906, chap. 3591, § 1, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1909, p. 1149. Then this bill was brought; the attorney general filed a certificate that the case was of general public importance; act of June 29, 1906, chap. 3591, § 5, 34 Stat. at L. 590; act of February 11, 1903, chap. 544, § 1, 32 Stat. at L. 823, U. S. Comp. Stat. Supp. 1909, p. 1211; the Interstate Commerce Commission demurred; the case was brought up before three circuit judges; a preliminary injunction was issued on the ground that the appellant, the Interstate Commerce Commission, had exceeded its power, and an appeal was taken at once and directly to this court,

as allowed by the act of 1906. 166 Fed. 498.

The Rahway Valley road is about 10 miles long. It runs southeasterly from Summit through Kenilworth to Roselle, its terminus on the Lehigh Valley Railroad, and also southwesterly from Kenilworth to Aldene, its terminus on the Central Railroad of New Jersey, all the places named 536] being *in New Jersey. The Delaware, Lackawanna, & Western Railroad Company, the appellee, is a common carrier subject to the acts of Congress regulating commerce. Between Denville, New Jersey, and Hoboken, it has two branches or lines, the northerly, the Boonton branch, being devoted specially to freight, the southerly, the Morris & Essex line, devoted as exclusively as may be to passenger traffic. This southerly branch passes through Summit, and the Rahway Valley Railroad Company petitioned for and got an order requiring the appellee to make a switch connection with its road at that place. As the order interferes with the just-stated policy of the appellee as to its southerly line, it resisted the petition and brought this suit.

The material part of the act of Congress upon which the Commission relies is as follows:

"Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate, upon reasonable terms, a switch connection with any such lateral branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable, and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability, without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection, as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in § 13 of this act, and the Commission shall hear and investigate the same, and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in § 15 of this act, directing the common carrier to comply with the 537] provisions *of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Com- 54 L. ed.

mission, other than orders for the payment of money." [34 Stat. at L. 584, chap. 3591, § 1, U. S. Comp. Stat. Supp. 1909, p. 1152.]

The question is raised whether the Rahway road is a "lateral branch line of railroad" relatively to the appellee. There certainly is force in the contention that the words of the statute mean a railroad naturally tributary to the line of the common carrier ordered to make the connection, and dependent upon it for an outlet to the markets of the country, which, according to the bill, the Rahway road is not. There is force in the argument that a road already having connection with the roads of two carriers subject to the act, and having joint routes and through rates with them, cannot be regarded as a lateral branch line of railroad of another road situated like the appellee. On the other hand, it would be going far to lay down the universal proposition that a feeder might not be a lateral branch road of one line at one end, and of another at the other. We leave this doubtful question on one side, because we agree with the circuit judges in the considerations upon which they decided the case.

The statute creates a new right not existing outside of it. Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 296, 45 L. ed. 194, 199, 21 Sup. Ct. Rep. 115. It is plain from the provisions of the act, the history of the amendments, and justice, that the object was not to give a roving commission to every road that might see fit to make a descent upon a main line, but primarily, at least, to provide for shippers seeking an outlet either by a private road or a branch. The remedy given by the section creating the right is given only on complaint by the shipper. We are of opinion that the remedy is exclusive, on familiar principles, and that the general powers given by other sections cannot be taken to authorize a complaint to the Commission by a branch railroad company under § 1. If they were applicable to a branch road, they would have been equally applicable to shippers, and there was no more reason to mention *com- [538] plaints by shippers than by others. The argument that shippers were mentioned to insure their rights in case of a refusal to connect with a lateral line is excluded by the form of the statute, which obviously is providing the only remedy that Congress has in mind. It may or may not be true that the distinction is not very effective, but it stands in the law, and must be accepted as the limit of the Commission's power.

Decree affirmed.

INTERSTATE COMMERCE COMMISSION,
Appt.,
v.
NORTHERN PACIFIC RAILWAY COM-
PANY.

(See S. C. Reporter's ed. 538-545).

**Interstate Commerce Commission — re-
view of decision — existence of satis-
factory through route.**

1. The courts may review the determination of the Interstate Commerce Commission upon the question whether "no reasonable or satisfactory through route exists" within the meaning of the act of June 29, 1906 (34 Stat. at L. 589, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1158), § 4, conditioning the authority of the Commission to establish through routes and joint rates upon the nonexistence of such route.

[For other cases, see Interstate Commerce Commission, 8-14, in Digest Sup. Ct. 1908.]

**Interstate Commerce Commission —
powers — establishing through routes
and joint rates.**

2. The personal preferences of many travelers for a southern route between eastern points and points on the Northern Pacific Railway between Portland and Seattle do not make the through route *via* the Northern Pacific Railway unreasonable or unsatisfactory, so as to justify the Interstate Commerce Commission in the exercise of its power under the act of June 29, 1906, § 4, to establish through routes and joint rates where "no reasonable or satisfactory through route exists," in ordering the establishment of through routes and joint rates between those points *via* the Union Pacific Railway, so as to put the latter road on an equal footing with the Northern Pacific Railway Company in the use for through travel of the road belonging to the latter between Portland and Seattle.

[For other cases, see Interstate Commerce Commission, 15-19, in Digest Sup. Ct. 1908.]

[No. 570.]

Argued February 23 and 24, 1910. Decided
March 7, 1910.

APPEAL from the Circuit Court of the United States for the District of Minnesota to review a decree enjoining the enforcement of an order of the Interstate Commerce Commission, establishing through routes and joint rates between eastern points and points on the Northern Pacific Railway between Portland and Seattle *via* the Union Pacific Railway. Affirmed.

The facts are stated in the opinion.

Assistant to the Attorney General Ellis and Mr. P. J. Farrell argued the cause, and, with Mr. Edwin P. Grosvenor, filed a brief for appellant:

The order of the Commission cannot be

set aside by the court merely for the reason that the court, if placed in the position of the Commission, would not have ordered the through route.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, ante, 280, 30 Sup. Ct. Rep. 155.

In determining whether an existing passenger route is reasonable and satisfactory, the first inquiry necessary must be whether that route fairly meets the requirements of the traveling public. In this case the facts show that the public interests demanded the establishment of another route to Puget sound points *via* the Portland gateway.

Enterprise Transp. Co. v. Pennsylvania R. Co. 12 Inters. Com. Rep. 326; Loup Creek Colliery Co. v. Virginian R. Co. 12 Inters. Com. Rep. 471; Chicago & M. Electric R. Co. v. Illinois C. R. Co. 13 Inters. Com. Rep. 20; Cedar Rapids & I. City R. & Light Co. v. Chicago & N. W. R. Co. 13 Inters. Com. Rep. 250; Cardiff Coal Co. v. Chicago, M. & St. P. R. Co. 13 Inters. Com. Rep. 460; Stedman v. Chicago & N. W. R. Co. 13 Inters. Com. Rep. 167; Pacific Coast Lumber Mfrs. Asso. v. Northern P. R. Co. 14 Inters. Com. Rep. 51; Star Grain & Lumber Co. v. Atehison, T. & S. F. R. Co. 14 Inters. Com. Rep. 364; Chamber of Commerce v. Chicago, R. I. & P. R. Co. 15 Inters. Com. Rep. 460; E. & W. Junction R. Co. v. Great Western R. Co. 1 Ry. & Canal Cas. 331; Caledonian R. Co. v. North British R. Co. 3 Ry. & Canal Cas. 403; Swindon, M. & A. R. Co. v. Great Western R. Co. 4 Ry. & Canal Cas. 352.

Mr. Charles W. Bunn argued the cause and filed a brief for appellee.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill to restrain the enforcement of an order of the Interstate Commerce Commission. 16 Inters. Com. Rep. 300. A preliminary injunction was granted by four circuit judges, on the ground that the Commission had exceeded its powers, and the case was brought here by appeal. The order was made in a proceeding instituted by the Commission upon its own motion, and required the establishment of through routes and joint rates for passengers and their baggage, east and west, from and to [543 points on the Chicago & Northwestern Railway between Chicago and Council Bluffs, Iowa, inclusive; and from and to points on the Union Pacific Railroad between Colorado common points and Omaha, Nebraska, and Kansas City, Missouri, inclusive; *via* Portland, Oregon; to and from points on the

Northern Pacific Railway between Portland and Seattle. The joint rates are to be the same as the present rates between the same points *via* the Northern Pacific road and its connections. This order concerns passenger travel in one direction only. It does not affect round trips, and it does not deal with freight.

The points between Portland and Seattle can be reached from the places mentioned at the other end of the route, by way of the Northern Pacific alone from St. Paul, or by way of the Chicago, Burlington, & Quincy to Billings, Montana, and then by the Northern Pacific for the last thousand miles; the Chicago, Burlington, & Quincy being jointly owned and controlled by the Northern Pacific and the Great Northern roads. But an average of 8,000 persons a year go by way of the Union Pacific to Portland, where, to go further, passengers have to change to the Northern Pacific line. Under present arrangements, the Union Pacific issues a coupon with its tickets, entitling the holder to a first-class passage on from Portland, but he has to exchange the coupon for a ticket, to recheck his baggage, and to pay the additional Pullman fare. The effect of the order is to put the Union Pacific on an equal footing with the Northern Pacific in the use, for through travel, of the road belonging to the latter between Portland and Seattle. It is said that this road, with the expensive terminals of the Northern Pacific at Tacoma and Seattle, would not be supported by local business, but depends on the traffic of the whole Northern Pacific system. Therefore, the Northern Pacific objects to the order and brings this bill.

The authority of the Commission to establish through routes and joint rates is conditioned by the proviso that "no reasonable or satisfactory through route exists." Act of June 29, 1906, chap. 3591, § 4. 34 Stat. at L. 589, U. S. Comp. Stat. Supp. 1909, p. 1158. It is urged that this condition is addressed only to the opinion of the Commission, and cannot be re-examined by the courts as a jurisdictional fact. The difficulty of distinguishing between a rule of law for the guidance of a court and a limit set to its power is sometimes considerable. Words that might seem to concern jurisdiction may be read as simply imposing a rule of decision, and often will be read in that way when dealing with a court of general powers. *Fauntleroy v. Lum*, 210 U. S. 230, 235, 52 L. ed. 1039, 1041, 28 Sup. Ct. Rep. 641. But even in such a case there may be a difference of opinion (*id.* 245), and when we are dealing

with an administrative order that seriously affects property rights, and does so by way rather of fiat than of adjudication, there seems to be no reason for not taking the proviso of the statute in its natural sense. See *Interstate Commerce Commission v. Illinois C. R. Co.* 215 U. S. 452, 470, ante, 280, 287, 30 Sup. Ct. Rep. 155.

We are of opinion, then, that the Commission had no power to make the order if a reasonable and satisfactory through route already existed, and that the existence of such a route may be inquired into by the courts. How far the courts should go in that inquiry we need not now decide. No doubt, in complex and delicate cases great weight, at least, would be attached to the judgment of the Commission. But in the present instance there is no room for difference as to the facts, and the majority of the Commission plainly could not and would not have made the declaration in their order that there was no such through route, but for a view of the law upon which this court must pass. It is admitted that the Northern Pacific route is shorter than that of the Union Pacific by way of Portland, and the running time somewhat less; and it is added by the majority that the "passenger goes in as good a car and is provided with as good a berth and as good a meal."

There is some suggestion that at times the northern route may not be as good as the southern, although at other times *it [545] may be better; but the ground of the order avowedly was that the personal preferences of many travelers is to go by the southern way. If they do, it is said, they can select from a great variety of routes as far as Ogden, Utah; they can visit cities not reached by the northern lines; they can search over a wide area for homesteads; they can behold the natural beauties that may be rivaled but not repeated on the other roads. It appears to us that these grounds do not justify the order. The most that can be said of them is that they are reasons for desiring a second through route, but they are not reasons warranting the declaration that "no reasonable or satisfactory through route exists." Obviously, that is not true, except by an artificial use of words. It cannot be said that there is no such route, because the public would prefer two. The condition in the statute is not to be trifled away. Except in case of a need such as the statute implies, the injustice pointed out by the chairman in his dissent is not permitted by the law.

Decree affirmed.

K. K. KNAPP, as Trustee under Certain Deeds of Trust of Standard Telephone & Electric Company, Bankrupt, Appt.,
v.

MILWAUKEE TRUST COMPANY, Trustee of the Estate of Standard Telephone & Electric Company, Bankrupt, Bank of Wisconsin, and Standard Telephone & Electric Company.

(See S. C. Reporter's ed. 545-559.)

Appeal— from circuit court of appeals — bankruptcy case — special finding.

1. The special finding of fact requisite under general order in bankruptcy No. 36, on an appeal to the Federal Supreme Court, under the bankruptcy act of July 1, 1898 (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432), § 25b, from a final decision of a circuit court of appeals allowing or rejecting a claim under that act, is not required where the decision below is one denying the right invoked by a petition in intervention to have the lien of a chattel mortgage established as a first lien on the property of the bankrupt, and satisfied out of the proceeds of a proposed sale by the trustee in bankruptcy, since such a contention presents a controversy arising in bankruptcy proceedings over which the circuit courts of appeals, under § 24a of the bankrupt act, exercise appellate jurisdiction as in other cases, and the circuit court of appeals act of March 3, 1891, governs the manner of review in the Supreme Court.

[For other cases, see Appeal and Error. 804, 805, 3342-3370, in Digest Sup. Ct. 1908.]

Fraudulent conveyances — chattel mortgage — change of possession.

2. A chattel mortgage is invalid as to the creditors of the mortgagor under the Wisconsin statutes, as construed by the highest court of that state, where it permits the mortgagor to remain in possession of the property, applying the proceeds thereof to its own use, except that no dividend shall be declared or paid without first making provision for a sinking fund and for interest on its bonds, unless the trustee shall waive the sinking fund payment, in which case the moneys which would otherwise go into such fund may be applied for the benefit of the mortgagor, either as dividends or for the benefit of its business and property.

[For other cases, see Fraudulent Conveyances, 79-99, in Digest Sup. Ct. 1908.]

NOTE.— On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

On appeal and review in bankruptcy cases—see note to Re Eggert, 43 C. C. A. 9.

On the validity of chattel mortgages allowing possession and sale of goods—see notes to Robinson v. Elliott, 22 L. ed. U. S. 758, and Hagen v. Hachmeister, 5 L.R.A. 137.

As to whether the presumption of fraud arising from vendor's retention of chattel may be overcome—see note to Wilson v. Walworth, 24 L.R.A. (N.S.) 1127.

610

Bankruptcy— validity of chattel mortgage as against trustee.

3. A chattel mortgage which, under the Wisconsin laws and decisions, is void as to the creditors of the mortgagor, for want of change of possession, is invalid as to the trustee in bankruptcy of such mortgagor, since, under the bankrupt act of July 1, 1898, § 70a, the trustee in bankruptcy takes title to the property of the bankrupt which could have been levied upon and sold under judicial process against the bankrupt at the time of the adjudication in bankruptcy.

[For other cases, see Bankruptcy, 193-201, in Digest Sup. Ct. 1908.]

Bankruptcy— avoidance of fraudulent conveyance — sufficiency of bankrupt estate.

4. The possibility that the trustee in bankruptcy may recover against directors and officers of the bankrupt corporation for dereliction of duty, and against stockholders for unpaid subscriptions and additional liability, does not prevent the trustee from successfully resisting an attempt to establish a lien upon all the bankrupt's property in his hands under a chattel mortgage void as to creditors at the time of the adjudication in bankruptcy, even conceding that ordinarily the trustee seeking to set aside a fraudulent conveyance must aver and prove that the estate has not sufficient assets in his hands to satisfy the claims filed against the bankrupt.

[For other cases, see Bankruptcy, VI. b, in Digest Sup. Ct. 1908.]

[No. 206.]

Submitted January 10, 1910. Decided March 7, 1910.

A PPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Wisconsin, denying the right invoked by a petition in intervention to have the lien of a chattel mortgage established as the first claim on the property of a bankrupt, and satisfied out of the proceeds of a proposed sale by the trustee in bankruptcy. Affirmed.

See same case below, 89 C. C. A. 467, 162 Fed. 675.

The facts are stated in the opinion.

Mr. William Duff Haynie submitted the cause for appellant:

This case presents a controversy arising in bankruptcy proceedings under § 24a of the bankruptcy act, and not a bankruptcy proceeding under § 25a; therefore the mode of procedure adopted by appellant was the correct one.

Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Security

216 U. S.

Warehousing Co. v. Hand, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 A. & E. Ann. Cas. 789; Gazley v. Williams, 210 U. S. 41, 52 L. ed. 950, 28 Sup. Ct. Rep. 687; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436.

In a controversy arising in bankruptcy proceedings, under § 24a, an appeal lies to the Supreme Court of the United States under § 6 of the act of March 3, 1891.

Hewit v. Berlin Mach. Works; York Mfg. Co. v. Cassell; Security Warehousing Co. v. Hand; Gazlay v. Williams; and Coder v. Arts,—supra. See also Whitney v. Wenman, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778; Murphy v. John Hofman Co. 211 U. S. 562, 53 L. ed. 327, 29 Sup. Ct. Rep. 154.

The mortgages were good against the bankrupt at the date of adjudication.

Illinois Trust & Sav. Bank v. Alexander Stewart Lumber Co. 119 Wis. 54, 44 N. W. 777; Smith v. Konst, 50 Wis. 360, 7 N. W. 293; Frisbee v. Langworthy, 11 Wis. 376; Saxton v. Williams, 15 Wis. 293; Humphrey v. Tatman, 198 U. S. 91, 94, 49 L. ed. 956, 958, 25 Sup. Ct. Rep. 567; Fisher v. Zollinger, 79 C. C. A. 76, 149 Fed. 54; Re Coffin, 81 C. C. A. 507, 152 Fed. 381.

At the date of adjudication these creditors, under the law of Wisconsin, were not entitled to have these conveyances set aside as fraudulent.

North Hudson Mut. Bldg. & L. Asso. v. Childs, 86 Wis. 292, 56 N. W. 870; Hyde v. Chapman, 33 Wis. 391; Weber v. Weber, 90 Wis. 467, 63 N. W. 757; Turner v. Pierce, 34 Wis. 665.

The chattel mortgage statute of Wisconsin does not apply to telephone companies.

Hammöck v. Farmers' Loan & T. Co. 105 U. S. 77, 26 L. ed. 1111; Southern California Motor-Road Co. v. Union Loan & T. Co. 12 C. C. A. 215, 29 U. S. App. 110, 64 Fed. 450; Farmers' Loan & T. Co. v. Detroit, B. C. & A. R. Co. 71 Fed. 29.

The chattel mortgage statute of Wisconsin refers to personal property capable of manual delivery, and not to choses in action. The assignment of choses in action creates a valid lien against the trustee in bankruptcy, the assignment being made in good faith, although no notice of the same was given to creditors, and although the same remained in the possession of the assignor until its bankruptcy.

Livingston v. Littell, 15 Wis. 218; Romerdahl v. Jackson, 102 Wis. 444, 78 N. W. 742; Carrington v. Eastman, 1 Pinney (Wis.) 650; Union Trust Co. v. Bulkeley, 80 C. C. A. 328, 150 Fed. 510; Roundy v. Converse, 71 Wis. 524, 5 Am. St. Rep. 240, 37 N. W. 811; Place v. Langworthy, 13 Wis. 630, 80 Am. Dec. 758; Norris v. Persons, 54 L. ed.

49 Wis. 101, 5 N. W. 224; H. B. Claflin Co. v. Grashorn, 99 Wis. 356, 74 N. W. 783; Koch v. Peters, 97 Wis. 492, 73 N. W. 25; German American Bank v. Magill, 102 Wis. 582, 78 N. W. 782.

These mortgages did not grant to this corporation any use of its property which it was not authorized by its charter to make, and they are not fraudulent or void.

Jones, Chat. Mortg. 5th ed. § 425.

The presumption of fraud arising in case of a sale of chattels without immediate delivery and change of possession is rebutted by proof that a full and adequate consideration was paid.

Densmore Commission Co. v. Shong, 98 Wis. 380, 74 N. W. 114; Griswold v. Nichols, 117 Wis. 267, 94 N. W. 33, 126 Wis. 401, 105 N. W. 815.

If there be any inconsistency in the opinions of the state courts, the general rule is that the Federal courts will follow the latest settled adjudications in preference to the earlier ones.

Wade v. Travis County, 174 U. S. 499, 508, 48 L. ed. 1060, 1064, 19 Sup. Ct. Rep. 715.

The later cases are inconsistent with the former, and repudiate the doctrine of conclusive presumption arising from the face of the instrument. There is also an inconsistency in the earlier cases.

Cotton v. Marsh, 3 Wis. 221; Fish v. Hawshaw, 45 Wis. 665; Oliver v. Town, 28 Wis. 325; Rosenthal v. Vernon, 79 Wis. 245, 48 N. W. 485; Eastman v. Parkinson, 133 Wis. 384, 13 L.R.A. (N.S.) 921, 113 N. W. 649.

The courts of the United States, in the administration of state laws in cases between citizens of different states, have an independent jurisdiction co-ordinate with that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws.

Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

The trustee in bankruptcy should have alleged and proved (which it did not do) that the creditors did not have the knowledge or the time to question the validity of these mortgages prior to the bankruptcy.

Rogers v. Van Nortwick, 87 Wis. 431, 58 N. W. 757; Hamilton v. Menominee Falls Quarry Co. 106 Wis. 352, 81 N. W. 876; Graham v. La Crosse & M. R. Co. 102 U. S. 148, 154, 26 L. ed. 106, 108.

The trustee in bankruptcy should have shown (which it did not do) that there were no other available assets or funds out of which the claims of creditors could be satisfied.

Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229; Seager v. Armstrong, 95 Minn. 414, 104 N. W. 480; Deland v. Miller & C. Bank,

119 Iowa, 368, 93 N. W. 304; *Adler v. Milwaukee Patent Brick Mfg. Co.* 13 Wis. 57.

The owner of these bonds is a bona fide purchaser.

Croft v. Bunster, 9 Wis. 503; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187; *Merced County v. Hackett*, 1 Wall. 83, 17 L. ed. 548; *Pine Grove Twp. v. Taleott*, 19 Wall. 666, 22 L. ed. 227.

Messrs. **George P. Miller** and **Edward P. Vilas** submitted the cause for appellees:

The agreement permitting the retention of possession by the mortgagor, the sale of the mortgaged property, and the application of the avails thereof to the mortgagor's own use, invalidates the mortgage.

Place v. Langworthy, 13 Wis. 630, 80 Am. Dec. 758; *Steinart v. Deuster*, 23 Wis. 136; *Blakeslee v. Rossman*, 43 Wis. 116; *Anderson v. Patterson*, 64 Wis. 557, 25 N. W. 541; *Merchants' & M. Sav. Bank v. Lovejoy*, 84 Wis. 611, 55 N. W. 108; *Bank of Kaukauna v. Joannes*, 98 Wis. 321, 73 N. W. 997; *Charles Baumbach Co. v. Hobkirk*, 104 Wis. 489, 80 N. W. 740; *Franzke v. Hitchon*, 105 Wis. 11, 80 N. W. 931; *Durr v. Wildish*, 108 Wis. 401, 84 N. W. 437; *Re Antigo Screen Door Co.* 59 C. C. A. 248, 123 Fed. 249; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 A. & E. Ann. Cas. 789; *Zartman v. First Nat. Bank*, 189 N. Y. 267, 12 L.R.A. (N.S.) 1083, 19 Am. Bankr. Rep. 27, 82 N. E. 127; *Eastman v. Parkinson*, 133 Wis. 375, 13 L.R.A. (N.S.) 921, 113 N. W. 649.

The mortgagor in possession cannot be given the benefits of unencumbered property while the creditors are prevented, by reason of the mortgage, from collecting their claims. This vice in the instrument is potent, so long as the mortgagor is in actual possession, whether or not the right of possession be in the mortgagee.

Missinskie v. McMurdo, 107 Wis. 578, 83 N. W. 758; *J. H. Silkman Lumber Co. v. Hunholz*, 132 Wis. 610, 11 L.R.A. (N.S.) 1186, 122 Am. St. Rep. 1008, 112 N. W. 1081, 13 A. & E. Ann. Cas. 713; *George Walter Brewing Co. v. Loekery*, 134 Wis. 81, 114 N. W. 120.

The trustee in bankruptcy can assert this invalidity.

Re Antigo Screen Door Co. and Security Warehousing Co. v. Hand, supra; *Mueller v. Bruss*, 112 Wis. 406, 88 N. W. 229; *Durr v. Wildish*, supra; *Russell v. St. Mart*, 180 N. Y. 355, 73 N. E. 31; *Re Garcewich*, 53 C. C. A. 510, 115 Fed. 87; *Mitchell v. Mitchell*, 147 Fed. 280.

The property in suit here could, under the law of Wisconsin, have been levied upon

and sold under judicial process against the bankrupt.

Mueller v. Bruss, supra; *Re Bement*, 96 C. C. A. 412, 172 Fed. 98.

This mortgage was not valid as to creditors. They were prevented by the bankruptcy from proceedings to avoid it. It could have been levied upon and sold under judicial process against this bankrupt.

Re Bement, supra; *Re Rodgers*, 60 C. C. A. 567, 125 Fed. 169; *Fourth Street Nat. Bank v. Millbourne Mills Co.* — L.R.A. (N. S.) —, 96 C. C. A. 629, 172 Fed. 177.

Mr. George P. Miller also filed a separate brief for appellees:

If general order 36 applies, then the failure to comply therewith is ground for dismissal.

Chapman v. Bowen, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32.

Every appeal which is taken in a proceeding in bankruptcy, as distinguished from a controversy arising in bankruptcy, must be deemed an appeal to which a party is entitled by the act within the meaning of this rule. The theory upon which the appeal appears to have been allowed is evidently that there is presented a controversy arising in a bankruptcy proceeding.

Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690.

Hewit v. Berlin Mach. Works, supra, is distinguishable from the case at bar upon the ground that the Berlin Machine Works there claimed not a lien recognizing the right of the trustee to possession subject thereto, but a paramount title, thus raising a separable issue. This distinction is clearly pointed out in

Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436.

The case presents a proceeding in bankruptcy, for a right to appeal in which we must look only to the bankruptcy act, and therefore general order in bankruptcy No. 36 must be followed.

Re Ronse, H. & Co. 33 C. C. A. 356, 63 U. S. App. 570, 91 Fed. 96; *Cunningham v. German Ins. Bank*, 41 C. C. A. 609, 101 Fed. 977, 4 Am. Bankr. Rep. 192; *Hutchinson v. Otis*, 190 U. S. 552, 47 L. ed. 1179, 23 Sup. Ct. Rep. 778; *Coder v. Arts*, supra.

*Mr. Justice Day delivered the [552] opinion of the court:

The Standard Telephone & Electric Company, a Wisconsin corporation, was adjudicated a bankrupt in the district court of the United States for the eastern district of Wisconsin. Under its articles of association it was authorized to carry on the business of selling appliances for telephone purposes and operating telephone exchanges.

It had established and was operating a telephone exchange at the village of Sheridan, Wisconsin, and was carrying on the business of manufacturing and selling telephone apparatus in the city of Milwaukee, Wisconsin, where it had a stock in trade and trade fixtures. The trustee in bankruptcy filed a petition to sell all the property of the bankrupt. Appellant Knapp, as trustee of certain mortgages given by the telephone company, intervened, and asked to have the lien of the mortgage established as the first lien on the property and satisfied out of the proceeds of the sale. The property was sold, and the question is as to the lien of these mortgages upon the fund.

The trustee in bankruptcy answered the petition of Knapp, trustee under the mortgage, averring that it was a chattel mortgage, and fraudulent and void as to creditors, because of certain agreements contained therein, because it was on after-acquired property, and because of the failure to file an affidavit of renewal, as required by the Wisconsin statutes. The referee in bankruptcy found the facts, and held the mortgage void. Upon hearing, the district judge reached a like conclusion. 157 Fed. 106.

The circuit court of appeals of the seventh circuit, upon appeal, affirmed the decree of the district court, holding the mortgage void for the reasons set forth at large in the opinion of the district judge. 89 C. C. A. 467, 162 Fed. 675.

A motion has been filed to dismiss the appeal for want of findings of fact and conclusions of law in the circuit court of appeals, as required by general order in bankruptcy No. 36. Whether or not such a finding of facts was required depends 553] *upon the character of the present proceeding. General order in bankruptcy No. 36, authorized under subdivision b of § 25 of the bankruptcy act [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432], provides for appeals under the act to this court from the circuit court of appeals within thirty days after the judgment or decree, and for the making and filing of a finding of facts and conclusions of law separately stated, and that the record upon such appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and conclusions of law.

Section 25b provides for appeals from any final decision of a court of appeals allowing or rejecting a claim under the act, under such rules and within such time as may be prescribed by the Supreme Court of the United States. Such appeals are allowed when the amount in controversy exceeds the sum of \$2,000, and the question 54 L. ed.

involved might have been taken by appeal or writ of error from the highest court of a state to the Supreme Court of the United States; or where some justice of the Supreme Court of the United States shall certify that, in his opinion, the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of the bankruptcy act throughout the United States.

Under authority of subdivision b, § 25, general order No. 36 was adopted, and in the cases enumerated a finding of facts and conclusions of law must be made in the circuit court of appeals, and the appeal taken within thirty days after the entry of the judgment or decree.

The case at bar is not of that class; it is an intervention in a bankruptcy proceeding, and, within the meaning of the act, a controversy arising in a bankruptcy proceeding, and the appellate jurisdiction is the same as in like cases under the court of appeals act. Bankruptcy act, § 24a; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, and cases therein cited.

As the appeal was in the manner provided for in the court of appeals act, no special finding of facts was required under *general order No. 36, and the motion to dismiss the appeal must be overruled. [554

The mortgages in question, which were upon all the property and estate of the mortgagor, acquired or to be acquired, in connection with or in relation to the business of the mortgagor, contain, among others, the following provisions:

"Nothing herein contained shall be construed to prevent said first party from carrying on, in the due and regular course, its said business, and collecting the indebtedness and moneys due or to become due therein, and applying the same to its own use, except as hereinafter provided."

The mortgage makes provision for a sinking fund of \$2,000 annually, \$500 quarterly, out of the proceeds of the business, or, if necessary, from the general resources; and the mortgage contains this further provision:

"Said first party further agrees that no dividend shall be declared or paid on its capital stock at any time when any portion of said sinking fund or the interest on said bonds shall not have been duly provided for, according to the terms of this indenture."

"Provided, however, That said trustee be and he is hereby empowered and authorized in his discretion, and in case he does not procure for the sinking fund any of said

bonds at par and accrued interest, upon application in writing by said first party to waive the making by said party of full or any payment into or provision for said sinking fund for any quarter year, and in the event of said trustee electing not to require said first party to make such payment into or provision for such sinking fund, the moneys which would otherwise have been placed therein for the purchase of said bonds as aforesaid shall remain at the disposition of said first party, to be divided as dividends, or to enlarge, extend, improve, repair, renew, or rehabilitate its said described business and property."

It will be seen that under these provisions the mortgagor is allowed to remain in possession of the property, applying the proceeds thereof to his own use, except that 555] no dividends shall *be declared or paid without first making provision for the sinking fund and the interest on the bonds, and with this important proviso,—that the trustee under the mortgage may in his discretion, in case he does not procure for the sinking fund bonds at par and accrued interest, upon the application of the mortgagor, waive the payment into or provision for the sinking fund for any quarter year, and, in such case, the moneys which would otherwise go into the sinking fund for the purchase of bonds shall remain at the disposition of the mortgagor, to be distributed as dividends, or to be used for the benefit of the business and property in the manner described.

Section 2310, Wisconsin Statutes, provides:

"Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and thall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment, that the same was made in good faith and without any intent to defraud such creditors or purchasers."

Section 2313 provides that no mortgage or sale of personal property shall be valid against any other persons than the parties thereto, unless the possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage, or a copy thereof, be filed as required by the statute, except as otherwise provided therein.

Section 2316b provides that a mortgagor in possession of a stock of goods from which he is permitted to make sales and apply the proceeds upon the debt shall file a statement showing the amount of sales, amount applied on mortgage, and amount of new stock bought every sixty days, and, upon his failure to file such statement, the debt shall become immediately *due, and [556 after fifteen days the mortgage shall cease to be a lien, except between the parties thereto.

It was found as a matter of fact that no statement was filed of the amount of the sales, amount of new stock bought, amount applied on mortgage, etc., every sixty days, as required by the Wisconsin statute, § 2316b; that since the execution of the mortgage the company, in the course of its business, made sales from the mortgaged property and applied the proceeds to its own use; that the property was in possession of the mortgagor; that Knapp, the trustee, knew that the business was being so transacted; that it was understood that the business should be so transacted and sales of the mortgaged property so applied to the mortgagor's use.

While there was a finding that no intentional bad faith was shown, still we agree with the court of appeals and the district judge that, under the law of Wisconsin, as construed by her highest court, such conditions as were contained in these mortgages rendered them fraudulent in law and void as to creditors. *Merchants' & M. Sav. Bank v. Lovejoy*, 84 Wis. 601, 55 N. W. 108; *Bank of Kaukauna v. Joannes*, 98 Wis. 321, 73 N. W. 997; *Charles Baumbach Co. v. Hobkirk*, 104 Wis. 488, 80 N. W. 740; *Franzke v. Hitchon*, 105 Wis. 11, 80 N. W. 931; *Durr v. Wildish*, 108 Wis. 401, 84 N. W. 437.

In this case the stipulations of the mortgages practically permitted the mortgagor to dispose of the property for his own benefit, except that it must make certain provisions for a sinking fund and interest on the bonds; and, with the consent of the trustee, no provision need be made for the sinking fund or interest, and the moneys which otherwise would have been placed therein for the purchase of bonds might be applied for the benefit of the mortgagor, whether as dividends or for the benefit of its business and property. Such provisions are clearly within the Wisconsin decisions, for they permit the mortgagor to have the benefit of the property, to keep it in his possession, and to appropriate the proceeds to his own use. The Wisconsin decisions render such mortgages invalid as to creditors, because the effect of such provisions is to give the *beneficial use [557

of the mortgaged property to the mortgagor in possession, and to make possible the use of the mortgage as a protection against creditors of the mortgagor when they shall undertake to assert their rights.

But it is said the trustee in bankruptcy may not defend against these mortgages. It is contended that they are good as between the parties, and that, as to them, the trustee in bankruptcy occupies no better position than the bankrupt. This question was raised and decided in *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 A. & E. Ann. Cas. 789. That case arose in Wisconsin, and it was therein held that, under the Wisconsin law, an attempted pledge of property, without change of possession, was void under the laws of that state. In that case, as in this one, the question was raised as to whether the trustee in bankruptcy could question the transaction, and it was contended that, being valid as between the parties, the trustee took only the right and title of the bankrupt. The question was fully considered therein, and the previous cases in this court were reviewed. The principle was recognized that the trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands is subject to the equities impressed upon it while in the hands of the bankrupt.

But it was held that the attempt to create a lien upon the property of the bankrupt was void as to general creditors under the laws of Wisconsin. Applying § 70a of the bankruptcy act, it was held that the trustee in bankruptcy was vested by operation of the bankrupt law with the title of the property transferred by the bankrupt in fraud of creditors, and also that the trustee took the property which, prior to the filing of the petition, might have been levied upon and sold by judicial process against the bankrupt. It was therefore held that, as there had been no valid pledge of the property, for want of change of possession, it could have been levied upon and sold under judicial process against the bankrupt at the time of the adjudication in bankruptcy, and passed to the trustee in bankruptcy.

558] *The principles announced in *Security Warehousing Co. v. Hand*, supra, when applied to the present case, are decisive of the question here presented. Under the Wisconsin statutes and decisions of the highest court of that state the conditions contained upon the face of this mortgage were such as to render it fraudulent in law and void as to creditors, and prior to the filing of the petition in bankruptcy the property might have been levied upon and sold by judicial process against the bankrupt.

It is true that in *Security Warehousing* 54 L. ed.

Co. v. Hand the court said that the attempted pledge was a "mere pretense, a sham;" but the courts of Wisconsin have held that such provisions as are in these mortgages, giving the bankrupt the right to dispose of the mortgaged property for its own benefit, rendered the conveyance fraudulent in law, and therefore void as to creditors. This brings the conveyance within the terms of the bankrupt act, as one which the trustee may attack, as conclusively as it would if fraudulent intent in fact were shown to exist.

In *Mueller v. Bruss*, 112 Wis. 406, 88 N. W. 229, it was held that a trustee in bankruptcy could maintain an action to set aside a fraudulent conveyance, but that the complaint must aver and the trustee must show that the estate had not sufficient assets in the trustee's hands to satisfy the claims filed against the debtor. And it is insisted that a showing of this character is lacking in the present case. Without deciding that under the bankruptcy act the answer of the trustee in bankruptcy was required to make this averment, accompanied by proof, if necessary, it is sufficient upon this point to say that the intervening petition of the trustee of the mortgage sought to assert a lien upon all the property of the bankrupt in the trustee's hands. The suggestion in appellant's brief, that the trustee in bankruptcy may possibly recover against directors and officers of the corporation for dereliction of duty, and against stockholders for unpaid subscriptions and additional liability on their part, presents no reason why he may not resist an attempt to [559 take all the available property in his hands to apply on a mortgage void as to creditors at the time of the adjudication.

We are of opinion, for the reasons stated, that the mortgages in question are void, and that, under the bankruptcy law, the trustee can assert their invalidity.

Judgment affirmed.

THOMAS FRANKLIN, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 559-570.)

Error to circuit court — jurisdiction below.

1. The contention that, under U. S. Rev. Stat. § 1342, art. 62, U. S. Comp. Stat. 1901, p. 957, a court-martial has exclusive jurisdiction over the crimes committed by a

NOTE. — On direct review in Federal Supreme Court of judgment of circuit or district courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

military officer which are cognizable by courts-martial under the provisions of that article, is too clearly unfounded to serve as the basis of a writ of error from the Federal Supreme Court, to review a conviction in a circuit court.

[For other cases, see Appeal and Error, 895-914, in Digest Sup. Ct. 1908.]

Error to circuit court — frivolousness of Federal question.

2. The claim that power of legislation is unconstitutionally delegated to the state legislatures by the act of July 7, 1898 (30 Stat. at L. 717, chap. 576, U. S. Comp. Stat. 1901, p. 3652), § 2, adopting such punishment for offenses committed in places under the exclusive jurisdiction and control of the United States as the laws of the state in which such places are situated "now provide" for a like offense, the punishment therefor not being otherwise provided for by any law of the United States, is too clearly unfounded to serve as the basis of a writ of error from a Federal Supreme Court to a circuit court.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

[No. 736.]

Submitted February 21, 1910. Decided March 14, 1910.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a conviction of a military officer for embezzlement and presenting false claims upon the government of the United States. Dismissed for want of jurisdiction.

See same case below on demurrer, 174 Fed. 161, 163.

Statement by Mr. Chief Justice Fuller:

Three indictments were returned against plaintiff in error by the grand jury in the southern district of New York. In the first of said indictments he was charged with 560] the embezzlement *of certain personal property of the cadets at the United States Military Academy, upon a government reservation, to wit, the West Point Military Reservation, in the southern district of New York, in violation of § 5391, Revised Statutes, as amended by the act of July 7, 1898 [30 Stat. at L. 717, chap. 576, U. S. Comp. Stat. 1901, p. 3652], and of §§ 528 and 531 of the New York Penal Code.

In the second indictment he was charged with making and presenting to an officer of the Army, for approval, false claims upon the government of the United States for supplies furnished to the cadet mess at West Point, in violation of § 5438, Revised Statutes (U. S. Comp. Stat. 1901, p. 3674); and in the third indictment, he was charged with making and presenting to an officer of

the Army, for approval and for payment, a false claim upon the United States War Department, and upon the treasurer of the United States Military Academy in violation of § 5438, Revised Statutes.

Demurrers to the indictments were overruled and they were then consolidated. The first of said indictments contained six counts, in three of which plaintiff in error was charged with grand larceny in the second degree, under the New York Penal Code, and in the other three he was charged with embezzlement of the same funds, in violation of the New York Penal Code; but the first three of said counts were *nolle prossed*. The defendant thereupon pleaded guilty to all three of the indictments; but before judgment was pronounced, he moved in arrest of judgment, the grounds of his motion being as follows:

"1. Because the said fourth, fifth, and sixth counts of the indictment against the said defendant for grand larceny under § 2, chapter 576, act of July 7, 1898, to and of which the defendant pleaded and was found guilty, do not, nor does any one of the said counts, charge a criminal offense under the laws of the United States.

"2. Because the said § 2, chapter 576, of an act of Congress approved July 7, 1898, entitled, 'An Act to Protect the Harbor Defenses and Fortifications Constructed or Used by the United States from Malicious Injury, and for Other Purposes,' is unconstitutional and void.

"*3. Because, by the Constitution [561 and the laws of the United States, this court here has no jurisdiction of the offense alleged to have been committed by this defendant in said fourth, fifth, and sixth counts of the said indictments, because he says the said § 2, chapter 576, of the said act of Congress approved July 7, 1898, confers upon this court here no jurisdiction of this cause, nor any legal power to hear, try, and determine the same, inasmuch as the punishment for the offense alleged in said indictment, and in each and every count thereof, when committed by the treasurer of the United States Military Academy, an officer of the Army of the United States, is provided for by § 1342, Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 944); and inasmuch as, by the said Constitution and laws, exclusive jurisdiction over said offense, when committed by a person subject to military jurisdiction, is vested in the properly constituted and authorized courts-martial of the United States.

"4. Because the facts alleged in said counts under § 5438, Revised Statutes of the United States, do not, as alleged in

said counts, or in any one of them, charge a criminal offense against the United States."

This motion was overruled, and defendant was sentenced to serve a term of imprisonment of two and one-half years in the United States penitentiary at Atlanta; and, errors being assigned which raised the questions presented in the motion in arrest of judgment, the case was removed to this court by writ of error.

The statutes under which said indictments were found are as follows:

1. Section 2 of the act of July 7, 1898 (30 Stat. at L. 717, chap. 576, U. S. Comp. Stat. 1901, p. 3652):

"That when any offense is committed in any place, jurisdiction over which has been retained by the United States or ceded to it by a state, or which has been purchased with the consent of a state for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure, the punishment for which offense is not provided for [562] by any law of the *United States, the person committing such offense shall, upon conviction, in a circuit or district court of the United States for the district in which the offense was committed, be liable to and receive the same punishment as the laws of the state in which such place is situated now provide for the like offense when committed within the jurisdiction of such state, and the said courts are hereby vested with jurisdiction for such purpose; and no subsequent repeal of any such state law shall affect any such prosecution."

2. Sections 528 and 531 of the Penal Code of New York:

"Sec. 528. A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, either—

"1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or,

"2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates
54 L. ed.

the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, steals such property and is guilty of larceny.

"Sec. 531. A person is guilty of grand larceny in the second degree, who, under circumstances not amounting to grand larceny in the first degree, in any manner specified in this article, steals or unlawfully obtains or appropriates:

"1. Property of the value of more [563 than \$25, but not exceeding \$500, in any manner whatever; or

"2. Property of any value, by taking the same from the person of another; or

"3. A record of a court or officer, or a writing, instrument, or record kept, filed, or deposited according to law, with, or in keeping of, any public office or officer."

3. Section 5438, Revised Statutes, so far as applicable to these indictments:

"Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry . . . every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

Mr. Holmes Conrad submitted the cause for plaintiff in error.

Mr. S. T. Ansell also filed a brief for plaintiff in error.

Solicitor General Bowers submitted the cause for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

This is a writ of error brought directly to this court from the circuit court of the United States for the southern district of New York, and the grounds upon which it is rested appear to be—

First. That under the 62d article of war, § 1342, Revised Statutes (U. S. Comp. Stat. 1901, p. 957), which reads:

*"All crimes not capital, and all [567

disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court,"

a court-martial has exclusive jurisdiction of the offenses charged herein, inasmuch as plaintiff in error was an officer of the United States Army; and

Second. That the case involved the construction or application of the Constitution of the United States, and that the constitutionality of a law of the United States was drawn in question because, as is alleged, § 2 of the act of July 7, 1898, is unconstitutional, in that it undertakes to delegate the power of legislation to the state legislatures.

1. It is well settled that the 62d article of war does not vest, nor purport to vest, exclusive jurisdiction in courts-martial, and that civil courts have concurrent jurisdiction over all offenses committed by a military officer which may be punished by a court-martial under the provisions of that article.

The 30th section of the act of March 3, 1863 (12 Stat. at L. 736, chap. 75, U. S. Comp. Stat. 1901, p. 955), provided that in time of war, insurrection, or rebellion certain offenses, including murder, "shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishments for such offenses shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed."

In *Coleman v. Tennessee*, 97 U. S. 509, 24 L. ed. 1118, it was held that this statute did not confer upon courts-martial exclusive jurisdiction for the trial of the offenses mentioned.

In *Grafton v. United States*, 206 U. S. 333, 348, 51 L. ed. 1084, 1089, 27 Sup. Ct. Rep. 749, 11 A. & E. Ann. Cas. 640, it was expressly declared that the jurisdiction of § 568] courts-martial is not *exclusive. Undoubtedly the general rule is that the jurisdiction of civil courts is concurrent as to offenses triable before courts-martial. See opinion of Attorney General Cushing, 6 Ops. Atty. Gen. 413, 419; *United States v. Clark*, 31 Fed. 710.

And in the present case the language of article 62 and that of § 5438, Revised Statutes, and of § 2 of the act of July 7, 1898,

demonstrates that it was the intention of Congress that offenses committed in violation of the latter statute should be punished by the civil courts; to say nothing of the fact that it was expressly provided in § 2 and prior laws, that conviction should be "in a circuit or district court of the United States in which the offense was committed."

There is absolutely nothing in the first proposition.

2. This is equally so of the intimated constitutional point.

By § 3 of the act of March 3, 1825 (4 Stat. at L. 115, chap. 65, U. S. Comp. Stat. 1901, p. 3651), it was provided:

"That, if any offense shall be committed in any of the places aforesaid, the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive, the same punishment as the laws of the state in which such fort, dockyard, navy yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated provide for the like offense when committed within the body of any county of such state."

In *United States v. Paul*, 6 Pet. 141, 142, 8 L. ed. 348, 349, coming here on certificate of division, it was held by this court, speaking by Chief Justice Marshall, that the effect of this section was "limited to the laws of the several states in force at the time of its enactment;" and it followed that by this act Congress adopted for the government of the designated places, under the exclusive jurisdiction and control of the United States, the criminal laws then existing in the several states within which such places were situated, in so far as said laws were not displaced by specific laws enacted by Congress.

Section 2 of the act of July 7, 1898, was *to the same effect, and moreover, by [569] express language, Congress adopted such punishment as "the laws of the state in which such place is situated now provide for the like offense." There is, plainly, no delegation to the states of authority in any way to change the criminal law applicable to places over which the United States has jurisdiction.

We give below the legislation on the subject.†

†On March 3, 1825, Congress passed:

Chap. 65. An Act More Effectually to Provide for the Punishment of Certain Crimes against the United States, and for Other Purposes.

Sec. 3. . . . That, if any offense shall be committed in any of the places aforesaid, the punishment of which offense is not spe-

570] *We are of opinion that the points attempted to be raised to justify jurisdiction are so unfounded in substance as to utterly fail of their purpose.

Writ of error dismissed for want of jurisdiction.

571] *EDWARD C. OSBORN and Joseph J. Slocum, as Trustees of Hastings & Dakota Railway Company, Plffs. in Err.,
v.

PETER FROYSETH.

(See S. C. Reporter's ed. 571-578.)

Public lands — railroad land grant — withdrawal from settlement.

1. The Secretary of the Interior had no

cially provided for by any law of the United States, such offense shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive, the same punishment as the laws of the state in which such fort, dockyard, navy yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provided for the like offense when committed within the body of any county of such state. (4 Stat. at L. p. 115, U. S. Comp. Stat. 1901, p. 3651, approved March 3, 1825.)

In 1866, Congress enacted the following:

Chap. 24. An Act More Effectually to Provide for the Punishment of Certain Crimes against the United States.

Sec. 2. . . . That if any offense shall be committed in any place which has been, or shall hereafter be, ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall, upon conviction in any court of the United States having cognizance thereof, be liable to, and receive, the same punishment as the laws of the state in which such place is or may be situated, now in force, provide for the like offense when committed within the jurisdiction of such state; and no subsequent repeal of any such state law shall affect any prosecution for such offense in any of the courts of the United States. (14 Stat. at L. p. 13, U. S. Comp. Stat. 1901, p. 3651, approved April 5, 1866.)

This act was carried forward as § 5391 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3651), as follows:

"Sec. 5391: If any offense be committed in any place which has been or may hereafter be ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the state in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction

authority to withdraw from settlement lands within the indemnity limits of the Hasting & Dakota Railway land grant of July 4, 1866 (14 Stat. at L. 87, chap. 168), in advance of a selection approved by him, based upon ascertained losses in the place limits.

[For other cases, see Public Lands, 234-242, in Digest Sup. Ct. 1908.]

Public lands — railroad land grant — indemnity lands — bona fide settlers.

2. The selection of land within the indemnity limits of the railroad land grant of July 4, 1866, to supply deficiencies in the place limits, confers no rights upon the railway company as against a person then actually occupying, in good faith, a portion of the lands so selected, and claiming it as a homestead, although his entry was

tion of such state; and no subsequent repeal of any such state law shall affect any prosecution for such offense in any court of the United States."

The act of July 7, 1898, upon the same subject, reads:

"Sec. 2. That when any offense is committed in any place jurisdiction over which has been retained by the United States or ceded to it by a state, or which has been purchased with the consent of a state for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall, upon conviction in a circuit or district court of the United States for the district in which the offense was committed, be liable to, and receive, the same punishment as the laws of the state in which such place is situated now provide for the like offense when committed within the jurisdiction of such state, and the said courts are hereby vested with jurisdiction for such purpose; and no subsequent repeal of any such state law shall affect any such prosecution."

This section appears in the act of Congress approved March 4, 1909, modifying, amending, and revising the penal laws of the United States, to become effective January 1, 1910, as follows:

"Sec. 289. Whoever, within the territorial limits of any state, organized territory, or district; but within or upon any of the places now existing or hereafter reserved or acquired, described in section two hundred and seventy-two of this act, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which, if committed or omitted within the jurisdiction of the state, territory, or district in which such place is situated, by the laws thereof now in force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such state, territorial, or district law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such state, territory, or district." [35 Stat. at L. 1145, chap. 321, U. S. Comp. Stat. Supp. 1901, p. 1477.]

subsequently rejected by the Land Department, either because the Secretary of the Interior had, though without authority, withdrawn the lands from settlement, or because of defects in his application.

[For other cases, see Public Lands, 253-256, in Digest Sup. Ct. 1908.]

Public lands—railroad land grants—indemnity lands—bona fide settlements.

3. An attempt by a railway company to select lieu lands within the indemnity limits of the grant of July 4, 1866, which was unsuccessful because such selection was rejected by the Secretary of the Interior for the failure of the railway company to furnish a list of the lands lost within the place limits for which the lieu lands were selected, cannot carry back the title of those claiming under the railway company under a second selection, made when the land in question was in the actual bona fide occupancy of a person claiming it as a homestead.

[For other cases, see Public Lands, 253-256, in Digest Sup. Ct. 1908.]

[No. 395.]

Submitted January 5, 1910. Decided March 14, 1910.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court for the County of Chippewa, in that state, in favor of defendant in an action of ejectment. Affirmed.

See same case below, 107 Minn. 568, 119 N. W. 1135.

Statement by Mr. Justice Lurton:

This was an action of ejectment to recover the southeast quarter of section 7, township 119, range 40, in Chippewa county, Minnesota. A jury was waived and the case tried by the court, which made a finding of facts upon which judgment was entered for the defendant. Upon appeal to the supreme court of the state, this judgment [572] was affirmed. 107 *Minn. 568, 119 N. W. 1135. Thereupon, in due course, this writ of error was sued out by the original plaintiffs.

The plaintiffs claim title under a land grant made by Congress, July 4, 1866 [14 Stat. at L. 87, chap. 168], known as the Hastings & Dakota Railway land grant. The premises are not within the place limits of that grant, but are included within the indemnity limits of the line of railroad as located, and were withdrawn from a settle-

ment for the benefit of the grant on July 12, 1866, and again by a modified order of April 22, 1868. On May 26, 1883, the Hastings & Dakota Railway Company, for whose benefit the grant was made, and hereafter referred to as the railway company, attempted to select the land in question, together with other lands within the indemnity limits of the grant, but the selection was rejected by the local land office of the district. Upon appeal, this action was affirmed by the Secretary of the Interior on October 23, 1891. This attempted selection was refused, because not made in accordance with the rules of the Department, requiring, as a condition precedent, that there should be furnished by the railroad company a list of the lands lost within place limits for which lands in lieu were selected. On July 22, 1890, under the land grant adjustment act of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), said land grant was adjusted in the Land Department of the United States, and it was found that there existed a deficiency in the place limits of the grant of 922,182 acres, and that all of the lands within the indemnity limits applicable to cover such loss aggregated less than 100,000 acres. On May 28, 1891, pursuant to instructions from the Secretary of the Interior, the Commissioner of the General Land Office directed the officers of the proper local office that, after giving notice, they should restore to the public domain and open to settlement all the lands in the indemnity limits of said land grant, "not embracing selections heretofore made and applied for by said company."

After the final rejection, on October 23, 1891, of the original selection made in 1883, the predecessor of the plaintiffs in title *made a second selection on October [573] 29, 1891, of the land in suit, together with other lands, which last selection was in due form and in full compliance with the rules of the Department, and thereafter, through steps not necessary to be stated, the title acquired by this second selection under said grant was vested in the plaintiffs in error.

The tenth, eleventh, and twelfth findings of fact are in these words:

"Tenth. At the time of said selection, the land in question was not vacant, but was occupied by the defendant, Peter Froyseth, as hereinafter found.

"Eleventh. Said selection was not approved by the Secretary of the Interior until 1901.

"Twelfth. That the defendant, on the 1st day of November, 1888, declared his intention to become a citizen of the United States, and was, after said date, in all respects qualified and entitled to make a homestead

NOTE.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

As to rights acquired by homestead settlements and entries on public lands—see note to McCune v. Essig, 59 C. C. A. 434.

entry under the laws of the United States, and, on May 15th, 1889, he settled upon and went into possession of the land in controversy, with intent to enter upon and claim the same as a homestead, and with the view of making it his home, and has continued in possession and resided thereon ever since, and his residence and improvements were at all times sufficient to comply with the requirements of the homestead laws of the United States, and at the time of the commencement of this action, such improvements exceeded in value the sum of seven hundred dollars (\$700); that the defendant has never owned or occupied other real estate. That he became a full citizen of the United States on June 9, 1897, and has been such citizen ever since. On the 3d day of November, 1891, the defendant offered, at the proper land office, a homestead entry in due form for said land, which filing was refused by the local land officers solely on the ground that said land was withdrawn from settlement by the executive withdrawal of April 22d, 1868, from which refusal the defendant duly appealed, which appeal remained pending in the Land Department 574] *until September 11th, 1894, on which date the rejection of said filing by the local land officers was affirmed. From the decision of the General Land officers the defendant appealed to the Secretary of the Interior, which appeal was pending until the 25th day of January, 1896, when the decision of the General Land Office of September 11th, 1894, was affirmed. That the defendant did all that was in his power to secure the land as his homestead."

Messrs. **Aldis B. Browne, Alexander Britton, and Evans Browne** submitted the cause for plaintiffs in error:

When the company tendered its selection of all available indemnity lands on May 26, 1883, the grant being then, as theretofore, enormously and hopelessly deficient, there could be no possible need for the designation of losses tract for tract. The company had lost over eight times the amount of available indemnity. The withdrawal for its benefit was then in full force, and any reasonable diligence in action upon its selection could have demonstrated in exact figures the already-existing fact that designation of losses was wholly unnecessary.

St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 19, 35 L. ed. 77, 11 Sup. Ct. Rep. 389.

Facts found by the Secretary of the Interior are not, in the absence of fraud or legal mistake, thereafter open to judicial review.

Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485.

54 L. ed.

Controversies between railroads under railroad grants and adversary claimants under the settlement laws should be determined by the record.

Tarpey v. Madsen, 178 U. S. 215, 219, 44 L. ed. 1042, 1044, 20 Sup. Ct. Rep. 849.

Leniently as the conduct of a settler is always regarded by the courts, it cannot be that such leniency will tolerate the omission by him of any of the substantial requirements of the statute in respect to the creation of rights in the public lands.

Maddox v. Burnham, 156 U. S. 544, 548, 39 L. ed. 527, 528, 15 Sup. Ct. Rep. 448.

The act of May 14, 1880, plainly required this defendant in error, in presenting his homestead application, to show upon the record the date of his alleged settlement, if he sought to initiate a right thereby prior in time to the date of his homestead application. In other words, the statute required him to place his full claim of record. Having failed to do this, and voluntarily chosen to date his initiation of right only from the date of his homestead application, and having based the full adjudication of his right before the Land Department on that record, he is thereafter estopped from asserting some other and different claim.

United States v. California & O. Land Co. 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266.

A withdrawal (even when unauthorized by the granting act) operated to reserve the land from settlement and sale during the continuance of such withdrawal.

Wood v. Beach, 156 U. S. 548, 551, 39 L. ed. 528, 529, 15 Sup. Ct. Rep. 410; **Wolsey v. Chapman**, 101 U. S. 755-768, 25 L. ed. 915-919.

Mr. C. A. Fosnes submitted the cause for defendant in error:

No vested right can be acquired in indemnity lands in a grant like this until there is a valid selection which is approved by the Secretary of the Interior, regardless of the deficit of the place limits.

Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; **LaBar v. Northern P. R. Co.** 17 Land Dec. 406; **Sjoli v. Dreschel**, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154; **Elling v. Thexton**, 7 Mont. 330, 16 Pac. 931; **Sage v. Maxwell**, 91 Minn. 527, 99 N. W. 42; **Barney v. Winona & St. P. R. Co.** 117 U. S. 228, 29 L. ed. 858, 6 Sup. Ct. Rep. 654; **Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.** 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208; **Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.** 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; **United States v. Missouri, K. & T. R. Co.** 141 U. S.

358, 35 L. ed. 768, 12 Sup. Ct. Rep. 13; St. Paul & S. C. R. Co. v. Winona & St. P. R. Co. 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334; Southern P. R. Co. v. Bell, 183 U. S. 675, 46 L. ed. 383, 22 Sup. Ct. Rep. 232; United States v. Colton Marble & Lime Co. 146 U. S. 615, 36 L. ed. 1104, 13 Sup. Ct. Rep. 163; Southern P. R. Co. v. Wood, 124 Cal. 475, 57 Pac. 388; Northern P. R. Co. v. Davidson, 16 Land Dec. 457; Ard v. Brandon, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406; Donohue v. St. Paul, M. & M. R. Co. 101 Minn. 239, affirmed in 210 U. S. 21, 52 L. ed. 941, 28 Sup. Ct. Rep. 600; Sage v. Maxwell, 91 Minn. 533, 99 N. W. 42; Northern P. R. Co. v. Wass, 104 Minn. 411, 116 N. W. 937; Vandenberg v. Hastings & D. R. Co. 26 Land Dec. 390; Hastings & D. R. Co. v. Arnold, 26 Land Dec. 538.

The Secretary of the Interior has the power, *virtute officii*, to make withdrawals of the public lands, and the power to make carries with it the power to revoke withdrawals at his will when no statute is in the way.

Wolsey v. Chapman, 101 U. S. 755, 25 L. ed. 915; O'Connor v. Gertgens, 85 Minn. 483, 89 N. W. 866.

Mr. Justice Lurton, after making the foregoing statement of facts, delivered the opinion of the court:

The facts found show that on May 15, 1889, the defendant in error, being in every way qualified, entered upon the land in question with the intention of claiming it as a homestead, and has ever since continued in possession, residing thereon with his family, and that his improvements have at all times been such as to comply with the homestead laws, and exceeded in value \$700 when this action of ejectment was started. On November 3, 1891, he offered at the proper land office a homestead entry, in due form, for said land. This was rejected. Upon appeal the decision was affirmed by the Secretary of the Interior on September 11, 1894. But the facts found in the trial court, and upon which the supreme court of Minnesota made its decision, show that this entry was refused by the local land office "solely on the ground that said land was withdrawn from settlement by the executive withdrawal of April 22, 1868." A rejection upon the ground stated was not authorized, for the Secretary of the Interior had no authority to withdraw from settlement lands within the indemnity limits of the grant which had not been before selected and approved by

*him. Sjolli v. Dreschel, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154, and cases cited. It has been insisted that although the local land office rejected the application

for the reason stated, the affirmance, upon his appeal, was because his homestead application, instead of alleging that he had settled upon the land at some date prior to the selection made by the railroad company on October 29, 1891, simply alleged, that "he resides on the described land." This contention as to the grounds of the affirmance is only made out by the introduction now for the first time of the decision of the Secretary of the Interior, under date of January 25, 1896. But that simply affirms the decision of the Commissioner made September 11, 1894, affirming the rejection made by the local land office, and gives no reason for the affirmance. This decision is sought to be explained by what purports to be a copy of an official communication under date of September 11, 1894, from the Commissioner to the local land register and receiver, notifying him that his rejection of a number of homestead entries, including that of Froyseth, on the indemnity lands in question, had been affirmed. Among other matters in that communication, it is stated, "that none of the applicants allege that the lands were settled upon either by themselves or others at the date of the said selections in October, 1891, by the Hastings & Dakota Company, nor do the records show that the lands were otherwise than vacant and subject to such selection at said date." If this be competent for our consideration upon this writ of error, it being no part of the record, it does not appear that the applicant was ever advised of this supposed defect in his affidavit. The local office simply advised him that its decision had been affirmed. The matter was remediable, as the fact was that his settlement was made months prior to his application affidavit. But, assuming that the application in its then form was defective, it is of no legal consequence in determining the validity of the title of the plaintiffs in error. This was a plain common-law action of ejectment. The plaintiffs must recover, if at all, upon the *legal [576] title. That the defendant's application for a homestead has not yet ripened into a legal title is of no moment if the plaintiffs are unable to show a complete and superior legal title. The plain effect of the settlement made upon the land here in controversy before any valid selection of the same land by the railroad company, under its grant, was to initiate a homestead right. That settlement and possession continued from the time it was first made, and when, in October, 1891, the Hastings & Dakota Railroad, or its successors in title, attempted to select that land as indemnity land, the land in question was in the actual occupancy of Froyseth, claiming it as a homestead. It had, by such settlement,

been segregated from the lands subject to selection, and in a contest between such a homesteader and those claiming under selections subsequently made of lieu lands, the claim of the former is the better claim. Under the act of May 14, 1880 (chap. 89, 21 Stat. at L. 141, § 3, U. S. Comp. Stat. 1901, p. 1393), the right of one settling in good faith for the purpose of claiming a homestead "relates back to the date of settlement." *Nelson v. Northern P. R. Co.* 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302; *Sjoli v. Dreschel*, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154; *St. Paul, M. & M. R. Co. v. Donohue*, 210 U. S. 21, 52 L. ed. 941, 28 Sup. Ct. Rep. 600. But it is urged that the original selection made May 26, 1883, was valid, and operated to vest the title as of that date in the railroad company. There is nothing peculiar in the act of July 4, 1866, which protected indemnity lands against settlement upon the filing of a map showing definite location of the railroad. The grant was one of every alternate section of land, designated by odd numbers, to the amount of five alternate sections per mile on each side of the road. Then follows the indemnity provision, in these words:

"But in case it shall appear that the United States have, when the lines or route of said roads are definitely located, sold any section, or part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved 577] by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States, nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached, as aforesaid, which lands, thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by," etc.

The rejection by the Secretary of the Interior of the selection made in 1883 is fatal to any claim now made to carry back the title of the plaintiffs in error to that selection. The right to any land within the indemnity limits of the grant, as has been often decided, depended upon the inquiry whether deficiencies had been established within the place limits, and also whether the lands selected in place of such lost lands were, at the time, subject

to such appropriation. Thus, if either pre-emption or homestead rights had been initiated before such selection, the parcels to which such right had attached were not subject to appropriation as indemnity lands. The function of the Secretary of the Interior was therefore judicial, and not ministerial. *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 512, 33 L. ed. 687, 695, 10 Sup. Ct. Rep. 341, 347. In the case cited above, this court said:

"Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts. The doctrine that, until selection *made, no title vests in any in- [578] demnity lands, has been recognized in several decisions of this court. Thus, in *Ryan v. Central P. R. Co.* 99 U. S. 382, 386, 25 L. ed. 305, in considering a grant of land by Congress, in aid of the construction of a railroad similar in its general features to the one in this case, the court said: 'Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the "lieu lands," as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed.' And again, speaking of a deficiency in the land granted, it said: 'It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was for that purpose.'"

In *Sjoli v. Dreschel*, 199 U. S. 564, 566, 50 L. ed. 311, 312, 26 Sup. Ct. Rep. 154, 155, this court said:

"That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States."

But it is urged that the mere fact that there was no record evidence of the homestead claim when the selections of 1891 were made was enough to give efficacy to that se-

lection and vest the legal title under the patents thereafter issued. But this is answered by what we have already said; namely, that if, at that date, this land was actually occupied by one qualified under the law, who had entered and settled thereon before that time, with the intent to claim it as a homestead, the land had ceased to be public land, and as such subject to selection as lieu land.

We find no error in the judgment of the Supreme Court of Minnesota, and it is affirmed.

Mr. Justice Brewer did not sit in this case.

579] *NORTHERN PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.

STATE OF NORTH DAKOTA EX REL. T. F. McCUE, Attorney General.

(See S. C. Reporter's ed. 579-581.)

Appeal — judgment — affirming without prejudice.

The decree of a state court, enjoining a carrier from further violation of a law fixing rates for the carriage of coal within the state, over the objection that the maximum rates so fixed are inadequate and confiscatory, will be affirmed by the Federal Supreme Court, where the evidence leaves the question of reasonableness in doubt, but without prejudice to the right of the carrier to reopen the case by appropriate proceedings, if, after adequate trial, it thinks it can prove more clearly the confiscatory character of the rates.

[For other cases, see Appeal and Error, IX. e, in Digest Sup. Ct. 1908.]

[No. 553.]

Argued February 24 and 25, 1910. Decided March 14, 1910.

IN ERROR to the Supreme Court of the State of North Dakota to review a decree enjoining a carrier from further violation of a law fixing rates for the carriage of coal within the state. Affirmed without prejudice.

See same case below (N. D.) 25 L.R.A. (N.S.) 1001, 120 N. W. 869.

The facts are stated in the opinion.

NOTE. — ON legislative regulation of rates, tolls, and prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

As to reasonableness of governmental regulation of railway rates—see notes to Chicago, M. & St. P. R. Co. v. Tompkins, 44 L. ed. U. S. 417; Pennsylvania R. Co. v. Philadelphia County, 15 L.R.A. (N.S.) 108.

Mr. Charles W. Bunn argued the cause and filed a brief for plaintiff in error.

Messrs. Guy C. H. Corliss and Andrew Miller argued the cause, and, with Mr. T. F. McCue, filed a brief for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is a proceeding by the attorney general of North Dakota, charging the plaintiff in error with continuous violation of a law fixing rates for the carriage of coal within the state, and asking for an injunction. See N. D. Laws of 1907, chap. 51. The railroad answered that the act was void under art. 1, § 8, of the Constitution, the commerce clause, and also under the 14th Amendment, because the maximum rates fixed by it were inadequate and confiscatory. Evidence was taken and reported to [580 the supreme court, and that court decided that the injunction should issue as prayed. (N. D.) 25 L.R.A. (N.S.) 1001, 120 N. W. 869. The grounds of its decision were that the act referred only to transportation wholly within the state, and therefore was not bad under art. 1, § 8, thus removing that question; and that the evidence did not prove that the rates would entail a loss on the carriage of coal, so that it was not necessary to decide whether, in that event, it would be unconstitutional, if the railroad made a fair profit on its whole business within the state.

The court did, however, intimate its opinion that if the railroad was able to make a fair profit upon its whole business within the state, it might be required to carry a particular commodity at cost or possibly below; and it expressed its opinion so strongly that the counsel for the plaintiff in error treats that doctrine as the ground of decision, and the statement as to the insufficiency of the evidence as made only in the light of it, and upon rather technical grounds. He argues that the evidence was undisputed, that the facts testified to and the fair inferences from them must be taken as proved, and that on those facts and inferences the constitutional question is raised. The evidence consisted of tables of rates in other states, computation as to the cost of transportation, and expert opinions, all of which were thought to converge to the conclusion that the statutory rates were unreasonable and less than the cost of carriage. But laying technical objections on one side, and taking the facts as admitted, the argument for the state showed that there are too many elements of uncertainty in the calculation for us to say, if we could, as to which we intimate no opinion, that the conclusion is proved, when

the supreme court of the state says that it is not.

The carriage of coal is a very small part of the railroad's business. The estimate of the cost is admitted to be uncertain, and to depend in part upon arbitrary postulates. It has to be increased considerably above the average cost for freight in order to make out the plaintiff in error's point. We are far from saying that the argument for 581] doing so does not seem to *us to have considerable probability on its side. We do not say that experiment may not establish a case in the future that would require a decision upon the question of constitutional law. But we can express no opinion upon it now. The great difficulty in the attempt to measure the reasonableness of charges by reference to the cost of transporting the particular class of freight concerned is well known and often has been remarked. It seems to us that the nearest approach to justice that can be made at this time is to follow the precedent of *Wileox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, as nearly as may be, and affirm the decree, but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal.

Decree affirmed without prejudice.

Similar decrees will be entered in Nos. 554 and 555 [*Great Northern R. Co. v. State of North Dakota ex rel. T. F. McCue*, Atty. Gen., and *Minneapolis, St. P. & S. Ste. M. R. Co. v. State of North Dakota ex rel. T. F. McCue*, Atty. Gen.].

582] *JENNIE LEE WILLIAMS et al.,
Plffs. in Err.,
v.
FIRST NATIONAL BANK OF PAULS
VALLEY.

(See S. C. Reporter's ed. 582-598.)

Error to state court — Federal question — removal of cause.

1. A question of a Federal nature which will sustain a writ of error from the Fed-

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error 54 L. ed.

eral Supreme Court to a state court was raised by the contention, denied by the state court, that a right or privilege existed under a statute of the United States to remove the cause to a Federal circuit court.

[For other cases, see *Appeal and Error*, 2042-2046, in *Digest Sup. Ct.* 1908.]

Removal of causes — Federal question — Federal law defeating recovery.

2. An action on a promissory note by one claiming as a bona fide holder for value before maturity does not arise under the Constitution or laws of the United States, so as to be removable to a Federal circuit court under the Oklahoma enabling act of June 16, 1906, § 16, as amended by the act of March 4, 1907 (34 Stat. at L. 1286, chap. 2911), because the makers of the note relied for their defense upon provisions of certain Federal statutes as establishing that the transaction upon which the right to recover was based was prohibited by law, which would only demonstrate that the suit could not be maintained at all, and not that the cause of action arose under the Federal Constitution or laws.

[For other cases, see *Removal of Causes*, IV. g, in *Digest Sup. Ct.* 1908.]

Bills and notes — illegal consideration — abandonment of contest over Indian allotment.

3. The abandonment of a bona fide contest between two Indians before the Commission to the Five Civilized Tribes as to the right to an allotment, arising from a claim based upon selection by the contestee and upon occupancy and improvements by the contestant, is a lawful consideration for a promissory note given by the former to the latter.

[For other cases, see *Bills and Notes*, I. d, in *Digest Sup. Ct.* 1908.]

[No. 130.]

Argued March 9, 1910. Decided March 21, 1910.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which, upon a transfer of the cause from the United States Court of Appeals for the Indian Territory, affirmed a judgment of the United States Court for the Southern District of that Territory, in favor of plaintiff in an action on a promissory note. Affirmed.

See same case below, 20 Okla. 274, 95 Pac. 457.

to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On removal of causes where the Federal Constitution or a Federal statute or treaty

Statement by Mr. Justice White:

The defendant in error commenced this action in the United States court for the southern district of Indian territory. The now plaintiffs in error were named as defendants. S. L. and S. T. Williams are brothers, and Jennie L. Williams is the wife of the defendant S. L. Williams. **RE-583**] covery was *sought by the bank, as an innocent holder for value, before maturity, upon a note for \$5,000, executed by the defendants, dated February 4, 1904, and payable to the order of Susan E. Mays, with interest. The consideration for the execution of the note was thus alleged in an amended complaint:

"Plaintiff further alleges and charges the truth to be that the said note was executed by the said Jennie Lee Williams for the benefit of her separate estate; that, at the time of the execution of said note, a contest was pending before the Commission to the Five Civilized Tribes, which said body at said time had authority under law to entertain and hear the same, between the said Jennie Lee Williams, one of the makers of said note, and Susan E. Mays, the payee therein, to determine which of the said parties had a right to take in allot-

ment a certain tract of land located adjacent to the town of Maysville, Indian territory; that said [note] was executed by the said Jennie Lee Williams, S. L. Williams, and S. T. Williams, in consideration of the abandoning of said contest by the said Susan E. Mays, the payee therein; that after said note was executed the said Susan E. Mays did abandon her contest and permit the said Jennie Lee Williams to take the said land in allotment, which she did, and the said land thereby became and is her separate property."

The amended complaint was demurred to on the following grounds:

"1st. Because the said amended complaint does not state facts sufficient to constitute a cause of action, and does not entitle plaintiff to the relief prayed for.

"2d. Because the transferee of a non-negotiable note must aver and prove consideration for the transfer; and the note in suit is non-negotiable, and plaintiff fails to aver any consideration whatever for the transfer.

"3d. Because § 16 of the Atoka agreement provides the only legal way Indian lands may be sold, and where a statute positively declares a thing cannot be done, the law

comes in question—see notes to *Little York Gold Washing & Water Co. v. Keyes*, 24 L. ed. U. S. 656; *Ferguson v. Ross*, 3 L.R.A. 322; *Austin v. Gagan*, 5 L.R.A. 476; *Butler v. National Home*, 36 L. ed. U. S. 346; and *Torrence v. Shedd*, 36 L. ed. U. S. 528.

Error to state court where removal to Federal court was sought.

Whether a case is made for removal from a state to a Federal court is a Federal question which will sustain a writ of error from the Federal Supreme Court to the highest state court. *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *Oakley v. Goodnow*, 118 U. S. 43, 30 L. ed. 61, 6 Sup. Ct. Rep. 944; *Kanouse v. Martin*, 14 How. 23, 14 L. ed. 310; *Stone v. South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Stevens v. Nichols (Carr v. Nichols)*, 157 U. S. 370, 39 L. ed. 736, 15 Sup. Ct. Rep. 640.

But the refusal by an inferior state court of an application to remove a cause to a Federal circuit court presents no such question, where there is nothing in the record to indicate that the question of the right of removal was brought to the attention of the highest state court, and that court could not have considered the question, even if presented, because, at the time the appeal from the final judgment was taken, it was too late to review the order refusing the removal. *Chesapeake & O. R. Co. v. McDonald*, 214 U. S. 191, 53 L. ed. 963, 29 Sup. Ct. Rep. 546.

The action of the trial court in re-

fusing a removal to a Federal court is not ground for a writ of error from the Supreme Court of the United States, where such action could not be considered by the highest state court on an appeal from the judgment of the lower court, because the appeal was from the judgment alone, and the petition for removal was filed subsequent to the entry of the judgment. *Fashnacht v. Frank*, 23 Wall. 416, 23 L. ed. 81.

The decision of a state court that, as no appeal was prosecuted from the final judgments of the court below, the denial of an application to remove the cause to a Federal court was not open to review, and its judgment dismissing the appeal from the orders refusing to set aside the judgments of the court below, present no Federal question. *Tripp v. Santa Rosa Street R. Co.* 144 U. S. 126, 36 L. ed. 371, 12 Sup. Ct. Rep. 655.

A judgment of a state court affirming the judgment of an inferior court denying a petition for the removal of the cause into a circuit court of the United States may be reviewed by the Supreme Court of the United States, although the appellate court rests its judgment on the failure of the proceedings to appear on the technical record by reason of the omission to plead to the jurisdiction. *Kanouse v. Martin*, 15 How. 198, 14 L. ed. 660.

But the decision of a state court affirming a judgment of an inferior court which had struck from the files a petition for removal which was manifestly defective is not reviewable by the Supreme Court of the United States on the theory that the state court, in reviewing the inferior court's decision,

584] *will not suffer its policy and purpose to be thwarted by any subterfuge or ingenious contrivance clothed with the semblance of legality. This was a short-cut attempt to sell 40 acres of land, title to which was in the Indians.

"4th. Because the Dawes Commission had exclusive jurisdiction to determine all matters in controversy between members of the tribes as to their right to select particular tracts of land for allotment, and to determine the rights, if any, of Mrs. Susan Mays in the contest for said 40 acres of land; but the original payee of the note sued on, for a bare promise, violated the law in such case made and provided.

"5th. Because it appears from the allegations in said complaint that the note sued on herein and for the amount and accrued interest of which the plaintiff seeks a judgment against the defendants was executed pursuant to an alleged contract entered into by and between the defendant Jennie Lee Williams and Susan E. Mays, in that said complaint shows that the sole and only consideration of said note was the agreement of the said Susan E. Mays to abandon a certain contest which she had instituted against the said defendant Jennie Lee Wil-

liams, before the Commission to the Five Civilized Tribes at Tishomingo, wherein she claimed the right to select as a part of her allotment certain premises which had been filed on and selected by the said Jennie Lee Williams as a member of the tribe of Chickasaw Indians.

"6th. Said complaint upon its face shows that the said note was executed by the defendants to the said Susan E. Mays for an illegal consideration, and was executed without any consideration whatever, and of all this the defendants pray the judgment of the court."

The demurrer was overruled. In an amended answer, thereafter filed, after admitting the making of the note, and averring that it was executed by Jennie Lee Williams as principal and by the other defendants as sureties, the following allegations were made:

"1st. The defendants admit that heretofore, to wit, on the *4th day of February, [585] 1904, they executed and delivered unto Susan E. Mays their promissory note for the principal sum of \$5,000, due ninety days from date, and they admit that said note, as so executed, is copied in the plaintiff's first amended complaint, and that the same

should have considered the journal entry of a Federal court finding that the application for removal made in that court was sufficient. *Pennsylvania Co. v. Bender*, 148 U. S. 255, 37 L. ed. 441, 13 Sup. Ct. Rep. 591.

A decision against the right of removal to a Federal court was not necessarily involved in a denial of a motion in arrest of judgment, made upon the ground that, by reason of defendant's citizenship, the case was, by the operation of the act of Congress of February 22, 1847, transferred to a Federal court, where there was nothing in the pleadings to show such citizenship. *Carter v. Bennett*, 15 How. 354, 14 L. ed. 727.

It does not follow that the state court decided against any title, right, privilege, and immunity in exercising its jurisdiction because the suit might have been brought in a circuit court of the United States, or removed thereto from the state court on the ground that it arose under the laws of the United States. *Texas & P. R. Co. v. Johnson*, 151 U. S. 81, 38 L. ed. 81, 14 Sup. Ct. Rep. 250.

The action of a state court in allowing plaintiff to amend at the trial by increasing his claim for damages over defendant's objection that he was thereby deprived of his right to remove the cause to a Federal court, to which he would have been entitled had that amount been claimed when the suit was commenced, or the amendment made at an earlier stage of the case, does not amount to a decision against a right of removal, so as to give the Supreme Court of the United States jurisdiction to review the judgment of the state court, where no application for such removal was made. *Northern P. R.*

54 L. ed.

Co. v. Austin, 135 U. S. 315, 34 L. ed. 218, 10 Sup. Ct. Rep. 758.

A reason assigned by the highest state court for presuming the abandonment of a question respecting a right of removal to a Federal circuit court which was not presented to the former court either in brief or oral agreement, that "it is manifest that the circuit court could not have taken jurisdiction," was not such a decision of the question as would give the Supreme Court of the United States jurisdiction to review the judgment. *Weatherby v. Bowie*, 131 U. S. cxxv. Appx., and 25 L. ed. 606.

A state court cannot be held to have decided against a right of removal to a Federal court by declining to review the order of the Federal court remanding the cause to the state court. *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Nelson v. Moloney*, 174 U. S. 164, 43 L. ed. 934, 19 Sup. Ct. Rep. 622.

On writ of error to a state court to review a denial of an application for removal to a Federal circuit court, only the record and proceedings of the state court can be considered by the Supreme Court of the United States in determining whether or not a Federal question is involved. *Pennsylvania Co. v. Bender*, supra.

The action of a circuit court in remanding a cause to a state court after its removal is not open to revision on writ of error from the Supreme Court of the United States to the state court. *Whitcomb v. Smithson*, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

is witnessed by James A. Cotner, and they admit that the defendant Jennie Lee Williams is a married woman and the wife of the defendant S. L. Williams, but they allege and charge that said note was executed by Jennie Lee Williams as principal and S. L. Williams and S. T. Williams as sureties.

"These defendants deny, as alleged in the complaint, that said note was executed by the said Jennie Lee Williams for the benefit of her separate estate; but they admit that, at the time of the execution of the said note, a contest was pending before the Commission to the Five Civilized Tribes between Susan E. Mays, as contestant, and Jennie Lee Williams, as contestee, and that the purpose of said contest, as instituted by the said Susan E. Mays, was to determine whether she or the said contestee had a right to take in allotment a certain tract of land located adjacent to the town of Maysville, Indian territory; but these defendants deny that said note was executed by the said defendants Jennie Lee Williams, S. L. Williams, and S. T. Williams, in consideration of the withdrawal of the said Mrs. Susan E. Mays from said contest, as aforesaid; and they deny that the said Susan E. Mays did withdraw her contest and permit the said Jennie Lee Williams to take the said lands in allotment; and that, by reason of the withdrawal of the said Susan E. Mays from said contest, that said land became and was the separate property of the said defendant Jennie Lee Williams; but defendants allege and charge the truth to be that since the execution and delivery of said note, as aforesaid, that said Commission aforesaid has duly awarded and delivered to said defendant Jennie Lee Williams certificate to said land.

"2d. But these defendants allege and charge the truth to be that sole and only consideration of said note, as aforesaid, 586] *was the pretended and illegal sale of certain lands situated near Maysville, in the Chickasaw Nation, Indian territory, by the said Susan E. Mays to the said Jennie Lee Williams; that said pretended sale was illegal, fraudulent, and void; that the same was made, executed, and delivered by said Susan E. Mays to said Jennie Lee Williams in violation of and in contravention of the provisions of a treaty made by and between the United States and the Chickasaw and Choctaw tribes of Indians in the year 1902, which said treaty was ratified by a majority vote of said tribes and by act of the Congress of the United States, and in violation of and in contravention of the provisions of a treaty of the United States and the said tribes of Indians, made, concluded, and rati-

fied by said tribes and the Congress of the United States in the year 1898, and known as the 'Atoka Agreement,' and that by reason thereof said pretended conveyance from said Susan E. Mays to said Jennie Lee Williams is illegal, fraudulent, and void, and of no effect, and that, by reason of the premises aforesaid, the said note herein sued for, when executed, was and hitherto since has been, illegal and void and without consideration. A copy of said conveyance is hereto annexed and marked 'Exhibit A,' and made a part hereof.

"3d. And still further answering herein, the defendants say that the plaintiff ought not further prosecute and maintain this action against them because they allege and charge that, at the date of the execution of said conveyance from Mrs. Susan E. Mays to Jennie Lee Williams, as aforesaid, said Susan E. Mays did not have the possession, right, or title to the premises in said conveyance described, and did not own the improvements situated thereon, and had no interest therein which she could convey to the defendant Jennie Lee Williams, and that the consideration of the note herein sued on for that reason has totally failed; all of which the defendants are prepared and willing to verify, and they put themselves upon the country, and pray the judgment of the court that they be discharged, with their costs."

*Exhibit "A," omitting the acknowledgment, reads as follows:

Tishomingo, Indian Territory, February 4, 1904.

Know all men by these presents:

That I, Susan E. Mays, of Maysville, Indian territory, for and in consideration of the sum of one dollar (\$1), cash in hand to me this day paid by Samuel L. Williams, Jennie Lee Williams, and receipt of which money is hereby acknowledged, and the further consideration of the sum of five thousand dollars (\$5,000), to be paid me by said Samuel L. Williams, Jennie Lee Williams, on the 4th day of May, 1904, which indebtedness is evidenced by a promissory note of even date herewith, due on the 4th day of May, 1904, bearing interest at the rate of 8 per cent per annum from date, signed by S. L. Williams, Jennie Lee Williams, and S. T. Williams, I hereby bargain, sell, and convey and relinquish all my right, title, or claim which I have in any way in and to the possession of the lands and improvements situated upon the N. $\frac{1}{2}$ of the N.E. $\frac{1}{4}$ of the E. E. $\frac{1}{4}$ of sec. 16, and the N.E. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ sec. 16, and the S.E. $\frac{1}{4}$ of the N.E. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of sec. 16, all in township 4 N., range 2 W., Chickasaw Nation, Indian territory.

Relinquishing unto the said Samuel L. Williams and Jennie L. Williams all rights which I have in and to the proceeds due or to become due, or from the sales of town property, or my interests in the said town site, located on the above described premises, hereby relinquishing to them any claim that I have by any former agreements pertaining to any town site on said lands above described.

Witness my hand on this the 4th day of February, 1904.

Susan E. Mays.

A demurrer to the amended answer was sustained, and, the defendants refusing to plead further, judgment was entered on April 14, 1905, in favor of the bank for the full amount of the note, with interest and costs. 588] A writ of error was allowed *and the cause was taken to the United States court of appeals for the Indian territory. While the cause was pending in that court, Oklahoma became a state, and by virtue of the enabling act the cause was transferred to the supreme court of the new state. On December 24, 1907, a petition was filed on behalf of the plaintiffs in error in the supreme court of the state, accompanied with bond, and it was prayed that the cause be removed into the circuit court of the United States for the eastern district of Oklahoma, upon the ground "that, by virtue of the enabling act, it was entitled to be so removed because the suit herein is of a civil nature at law, arising under the Constitution and laws of the United States." The application was denied, and, from a judgment of affirmance thereafter entered (20 Okla. 274, 95 Pac. 457), this writ of error is prosecuted.

The errors assigned in substance are that the supreme court of Oklahoma erred in overruling the application to remove, in holding that error was not committed by the trial court in overruling the demurrer to the amended complaint, and in deciding that error was not committed in sustaining the demurrer to the amended answer.

Mr. W. O. Davis argued the cause, and, with Messrs. L. S. Dolman and R. E. Thomson, filed a brief for plaintiffs in error:

Any agreement made by the parties to an allotment contest may be disregarded by the Daves Commission.

Creek Contest No. 491, Quabner v. Greenleaf 10th annual report.

No dismissal or confession of judgment is allowed. Testimony must be taken and the land must be awarded to the person who was the owner of the improvements thereon at the time of the filing of the first application.

54 L. ed.

Creek Contest No. 267, Sookey v. Smith; Creek Contest No. 260, Drew v. Conard; Creek Contest No. 263, Franklin v. Franklin; Creek Contest No. 326, Penman v. Hailey.

The Federal courts take judicial notice of the rules of the Land Department in contest cases.

Caha v. United States, 152 U. S. 221, 38 L. ed. 419, 14 Sup. Ct. Rep. 513.

The rights of the citizen claiming to own improvements on more land than he is entitled to take are purely personal, and he cannot convey title to any citizen as against one who is in possession of the land.

Chickasaw Allotment Contest, No. 104, Lane v. Apala.

A bill of sale from a citizen who has completed the allotment to which his family are entitled, and has selected the land upon which he intends to file, is void and conveys no title.

Chickasaw Allotment Contest No. 821, Folsom v. Victor.

The Curtis act was not intended to give illegal holders any vested or other right to dispose of their illegal possessions to the exclusion of other members of the tribe who have entered upon and selected their *pro rata* share prior to any attempted transfers by those whose possessions are in excess of their *pro rata* shares.

Creek Contest No. 759, Burnett v. Berry.

A relinquishment signed by the contestee after institution of contest as part of an unsuccessful attempt to compromise, and reciting no consideration, is not sufficient to deprive contestee of her rights in the land when she does not waive her claim in the presence of the commissioner.

Chickasaw Contest No. 112, Byars v. Carter.

The bill of sale after the institution of a contest is not binding on the commissioner.

Chickasaw Contest No 197, Jacobs v. Townsend.

An Indian family having improvements extending over more land than they were entitled to take in allotment cannot attempt to sell the improvements on the land which they could not take in allotment.

McLaughlin v. Ardmore Loan & T. Co. 6 Okla. Law Journal, No. 11, p. 463.

A contract contemplating the inclosure and use of public lands is illegal and not enforceable.

Lingle v. Snyder, 87 C. C. A. 529, 160 Fed. 627.

A contract of a pre-emptor to convey a part of his pre-emption in consideration of improvements upon it, at the time he took possession, is against public policy.

Anderson v. Carkins, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905.

Mr. S. T. Bledsoe argued the cause, and, with Mr. J. B. Thompson, filed a brief for defendant in error:

The petition for removal presented no sufficient ground for removal of the cause to the circuit court of United States for the eastern district of Oklahoma.

Carson v. Dunham, 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030; Defiance Water Co. v. Defiance, 191 U. S. 190, 48 L. ed. 142, 24 Sup. Ct. Rep. 63; Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; Shreveport v. Cole, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; Florida C. & P. R. Co. v. Bell, 176 U. S. 321-332, 44 L. ed. 486-491, 20 Sup. Ct. Rep. 399; Ikard v. Minter, 4 Ind. Terr. 214, 69 S. W. 852; Hewlett v. Hyden, 4 Ind. Terr. 176, 69 S. W. 839; Turner v. Gilliland, 4 Ind. Terr. 606, 76 S. W. 253; Blocker v. McLendon, 6 Ind. Terr. 481, 98 S. W. 166; Thomason v. McLaughlin, 7 Ind. Terr. 1, 103 S. W. 595; Arkansas v. Kansas & T. Coal Co. 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47.

Compromises are always regarded with favor.

Buekner v. McIlroy, 31 Ark. 634; Mason v. Wilson, 43 Ark. 177; Burton v. Beard, 44 Ark. 556; Springfield & M. R. Co. v. Allen, 46 Ark. 220; Hennessey v. Bacon, 137 U. S. 78, 34 L. ed. 605, 11 Sup. Ct. Rep. 17; Mills County v. Burlington & M. River R. Co. 107 U. S. 557, 27 L. ed. 578, 2 Sup. Ct. Rep. 654; Knotts v. Preble, 50 Ill. 226, 99 Am. Dec. 514; Atchison, T. & S. F. R. Co. v. Starkweather, 21 Kan. 328; Little v. Allen, 56 Tex. 133.

Defendants' repentance extended to an attempted repudiation of the burden of the transaction, but they did not become sufficiently penitent to surrender the "tainted" property acquired through the alleged illegal transaction.

Randon v. Toby, 11 How. 493, 13 L. ed. 784.

The transactions involved were not prohibited by law.

Thomason v. McLaughlin; Turner v. Gilliland; and Blocker v. McLendon,—*supra*.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

In addition to disenssing the merits, the defendant in error presses upon our attention a motion to dismiss, in substance upon the ground that no question of a Federal nature is presented. As the plaintiffs in error had no greater right to prosecute the

writ of error than is possessed by suitors generally when seeking the review of a final judgment of a state court (§ 20, enabling act, as amended, 34 Stat. at L. 1287, chap. 2911), it results that our power to review is controlled by Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575. Irrespective of other contentions, beyond peradventure a question of a Federal nature, however, was raised by the contention, denied by the state court, that a right or privilege existed under a statute of the United States to remove the cause into the circuit court of the United States, and the motion to dismiss cannot therefore prevail.

As to the denial of the right to remove.—The claim of plaintiffs in error is that the right to remove the cause into the circuit court of the United States arose from the fact that it was a suit arising under the Constitution and laws of the *United [593 States, and that the right existed by virtue of § 16 of the enabling act, as amended on March 4, 1907 (34 Stat. at L. 1286, chap. 2911), the pertinent portion of which is as follows:

"Sec. 16. That all civil causes, proceedings, and matters pending in the supreme or district courts of Oklahoma territory, or in the United States courts or United States court of appeals in the Indian territory, arising under the Constitution, laws, or treaties of the United States, or affecting ambassadors, ministers, or consuls of the United States, or of any other country or state, or of admiralty, or of maritime jurisdiction, or in which the United States may be a party, or between citizens of the same state, claiming lands under grants from different states; and all cases where there is a controversy between a citizen of either of said territories prior to admission and a citizen of any state, or between a citizen of any state and a citizen or subject of any foreign state or country, in which cases of diversity of citizenship there shall be more than two thousand dollars in controversy, exclusive of interest and costs, shall be transferred to the proper United States circuit or district court established by this act, for final disposition, and shall therein be proceeded with in the same manner as if originally brought therein: Provided, That said transfer shall not be made in any such case where the United States is not a party, except on application of one of the parties, in the court in which the cause is pending, at or before the second term of such court after the admission of said state, supported by oath, showing that the case is one which may be so transferred. The proceedings to effect such transfer, except as to time and parties, shall be the same as are now provided by law for the removal of causes from

a state court to a circuit court of the United States."

In the petition for removal it was alleged in support of the right to remove—

"That the said suit involves the construction of the treaties and laws and acts of Congress [594] gress concerning the allotment *of lands to the Choctaw and Chickasaw tribes of Indians under the act of Congress approved June 28, 1898 [30 Stat. at L. 495, chap. 517], and the act approved July 1, 1902 [32 Stat. at L. 641, chap. 1362], commonly known as the 'Atoka and the Supplemental Agreements between the Choctaw and Chickasaw Tribes of Indians in the Indian Territory.'

"Petitioner shows that the controversy herein arises from the following facts:

"On February 4, 1904, appellant executed a promissory note to the assignor of appellee for five thousand (\$5,000) dollars, due in ninety (90) days, with interest at 8 per cent from date.

"That the consideration for said note was that the payee thereof should cease to prosecute further and abandon a certain contest then pending before the Commission to the Five Civilized Tribes, in which the payee was contestant and the appellant herein was contestee.

"That the appellee took said note with full knowledge of the facts as disclosed by its pleadings. Appellant, by demurrer and answer, claims that the consideration is contrary to the letter and spirit of the act of Congress of June 28, 1898, and of July 1, 1902; that it is not a legal, valid, or any consideration for the note."

The contention that the cause of action arose under the Constitution or laws of the United States it plainly untenable. Recovery by the bank was in no wise predicated upon any right conferred upon it or its assignor to contract, as was done, and the fact that the makers of the note relied for their defense upon provisions contained in certain statutes as establishing that the transaction upon which the right to recover was based was prohibited by law "would only demonstrate that the suit could not be maintained at all, and not that the cause of action arose under the Constitution or laws of the United States." *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 185, 190, 46 L. ed. 144, 147, 22 Sup. Ct. Rep. 47.

As to the asserted Federal questions claimed to arise upon the rulings in respect to the overruling of the demurrer to the [595] *amended complaint and the sustaining of the demurrer to the amended answer.—In the light of the allegations of the complaint and the admissions (either express or implied from the failure to deny) contained in the amended [54 L. ed.

answer, we think the record established that Susan E. Mays and Jennie Lee Williams were members either of the Choctaw or Chickasaw tribe of Indians; that Mrs. Williams selected for allotment and filed upon 40 acres of land, upon which were improvements, situated adjacent to the town of Maysville, Indian territory. The right of Mrs. Williams to select the land being disputed by Susan E. Mays, she filed a contest against the same before the Commission to the Five Civilized Tribes. When this was done, Susan E. Mays was not in the occupancy of any other land liable to allotment. Pending the proceedings, by way of compromise, Susan E. Mays agreed to abandon the contest instituted by her, and relinquish her right to the allotment of the land in controversy and the improvements thereon, in consideration of the execution of the note in suit; that said note was executed for the benefit of the separate estate of Jennie Lee Williams, and was delivered to Susan E. Mays, who thereupon abandoned the prosecution of her said contest before the Commission, and the allotment of the land to Mrs. Williams followed.

Compromises of disputed claims are favored by the courts (*Hennessy v. Bacon*, 137 U. S. 78, 34 L. ed. 605, 11 Sup. Ct. Rep. 17); and presumptively, the parties to the compromise in question possessed the right to thus adjust their differences. We come, then, to consider whether, as claimed, there was a want of consideration for the note because of an express or implied statutory prohibition against the transaction which formed the consideration for the note.

In the demurrer to the amended complaint, the claim advanced to defeat the right to recover on the note, which was substantially reiterated in the amended answer, was that, in truth, the sale was of the land, and was illegal because not made according to the method for acquiring allottable tribal *land provided for in agree- [596] ments between the government of the United States and the Choctaw and Chickasaw governments, and because controversies as to allotments of land over which the Dawes Commission had jurisdiction could alone be determined by that body. We do not pause to consider whether these general allegations constituted such a special setting up of a right, privilege, or immunity under a law or laws of the United States as is required by Rev. Stat. § 709. Considering the complaint and answer in their entirety, especially when viewed in the light of the allegations of the petition for removal, it clearly results, as stated in the petition for removal, that "the consideration for the said note was that the

payee thereof should cease to prosecute further and abandon a certain contest then pending before the Commission to the Five Civilized Tribes, in which the payee was contestant and the appellant herein was contestee." In the argument at bar, while counsel has referred to statutory provisions and to various decisions which it is asserted establish that a sale by an Indian of part of an excessive holding of allottable tribal land or of improvements thereon would not be a valid consideration for a note given to evidence the price of such sale, we have been referred to no statute nor cited to any treaty or agreement made with the Indian tribes giving rise even to the suggestion that where a bona fide contest existed between two Indians as to right to a tract or tracts of land, arising from a claim based upon selection, on the one hand, and, on the other, because of occupancy and improvements, it would be unlawful for the latter to abandon his contention as to his preferential right for a money consideration. Nor have we been referred to any statutory provision which, either expressly or impliedly, deprived the parties to a contest of their right to compromise simply because of the pendency of the contest before the Commission to the Five Civilized Tribes. An opinion of the United States court of appeals of the Indian territory, a tribunal which was specially competent to pass upon a question of 597] the kind *we are considering, lend support to the conclusion we have reached, that a member of either the Choctaw or Chickasaw tribe, when, as here, there is no showing that such a member was the holder of an excess of lands subject to allotment, was not prohibited at any time from selling his improvements upon tribal land, or abandoning his right to the possession thereof to another Indian. The opinion referred to was announced in the case of *Thomason v. McLaughlin*, 7 Ind. Terr. 1, 103 S. W. 595, in which case, among other questions, the court passed upon the validity of a sale of tribal land by one Indian to another after the enactment of the act of June 28, 1898, known as the Curtis bill (chap. 517, 30 Stat. at L. 495), wherein, in § 29, is embodied the so-called Atoka Agreement. After referring to a provision in § 17 of the act, limiting the extent of an Indian's holding before allotment to the approximate share of the lands to which he and his wife and minor children were entitled, and making it a misdemeanor to retain the possession of an excess of such share after the expiration of nine months from the passage of the act, the court said (p. 9):

"Inasmuch as the sale in this case was made within the nine months' limit, this, of course, would not affect the validity of

the sale, even though Lafon had been in possession of more land than that to which he was entitled. It is a well-known fact that many Indians, at the time of the passage of this act, were in possession of large tracts of improved lands, in excess of that to which they were entitled; and under the laws and customs of the different tribes at that time, this land was lawfully held. The nine months provision was introduced into the Curtis bill for the purpose of giving them an opportunity of disposing of the excess, and thereby to get some remuneration for the improvements which they, by their labor and industry, had lawfully made upon the lands. And there is no provision in either of these sections, or anywhere else, that could be construed to deprive an Indian in this territory of the right to dispose of his holdings to another *Indian, if he desired to do so, [598 in order that he might select his allotment on other lands. The statute did not intend that an Indian should be compelled to take his allotment on the land then held by him. He could sell his improvements and holdings to another Indian for allotment, and lay his own on other land which he might find vacant, or which he might, in turn, purchase from another Indian. This method was adopted almost universally by the Indians, and it was not unlawful as between Indians. But to hold an excess of lands after the expiration of the nine months was unlawful and a crime."

While the asserted Federal questions are not so wholly devoid of substance as to be purely frivolous, they are, nevertheless, without merit, and the judgment must be and it is affirmed.

MONSERRATE GARCIA MAYTIN, Dominga Garcia Maytin, et al., Appts.,

v.

RICARDO VELA, José Quijano, et al.

BEATRIZ DE LOS ANGELES, Widow of Mr. Alós, Appt.,

v.

MONSERRATE AND DOMINGA GARCIA MAYTIN, and Ana Marien y Davila, as Representative of her husband, Mr. Angel Garcia Maytin.

(See S. C. Reporter's ed. 598-603.)

Appeal — parties — summons and severance.

1. An appeal by one of several defendants below will be dismissed by the Federal Supreme Court, where the other defendants did not join in the appeal, and there was no summons and severance.

[For other cases, see Appeal and Error, 2467-2476, in Digest Sup. Ct. 1908.]

Limitation of action—when statute runs—setting aside partition of decedent's estate.

2. The sisters of a decedent, who, under Porto Rico Civ. Code, art. 811, are entitled to any part of their brother's estate which his widow may inherit through her daughter, who was his sole heir, had a sufficient interest, upon the death of the daughter intestate and without descendants, to enable them to bring an action to set aside a so-called partition of their brother's estate between the widow and the daughter, so as to start running the four years' limitation prescribed by articles 1076, 1301, for rescissory actions and actions for nullity.

[For other cases, see *Limitation of Actions*, II, 1, in *Digest Sup. Ct.* 1908.]

[Nos. 90 and 245.]

Argued and submitted March 8 and 9, 1910.
Decided March 21, 1910.

CROSS APPEALS from the Supreme Court of Porto Rico to review a judgment which affirmed a judgment of the District Court of Porto Rico for the Judicial District of San Juan, establishing the rights of the sisters of a decedent to property descended from him. Judgment in No. 90, affirmed. Appeal in No. 245, dismissed.

The facts are stated in the opinion.

Mr. N. B. K. Pettingill argued the cause, and, with Mr. Robert H. Todd, filed a brief for appellants in No. 90 and appellees in No. 245.

Mr. Willis Sweet submitted the cause for appellees in No. 90 and appellant in No. 245.

Mr. Justice Holmes delivered the opinion of the court:

These are cross appeals in a proceeding brought by Monserrate and Dominga Garcia, two sisters of Manuel Garcia Maytin, and by another plaintiff now dropped out, to establish their rights in property descended from the said Manuel Garcia. The claim is founded upon article 831 of the former Civil Code, of which the following is the War Department translation: "The ascendant who inherits property from his descendant, acquired by the latter for a good consideration from another descendant [ascendant] or from a brother or sister, is obliged to reserve the property he may have acquired

by force of law in favor of the relatives within the third degree belonging to the line from which such property originated."

The following is the course of the property concerned:

1. Complainants' brother, Manuel Garcia Maytin. Died intestate in 1886, succeeded by

2. His daughter, Mrs. Beatriz Garcia de Ibarra, as sole heir. Died intestate and without descendants 1891, succeeded by

3. Her mother, Mrs. Beatriz Alós, widow of Manuel Garcia Maytin, as sole heir. Died, 1904, leaving a will, devising to

*4. Her mother, Beatriz de los Angeles, and nephews and nieces, who, with Vela, the executor of the will, and with purchasers from Mrs. Beatriz Alós, are the defendants.

It will be seen that (3) Mrs. Beatriz Alós was an ascendant who inherited from her descendant (2), Mrs. Beatriz Garcia, property acquired by the latter from the ascendant (1) her father. Therefore the devisees of Mrs. Beatriz Alós would be postponed by the law just quoted in favor of the relatives within the third degree, who are the two sisters bringing this complaint. The supreme court of Porto Rico, in a very lucid and persuasive opinion, established the position of the plaintiffs and answered the objections urged by the defense. It was shown that as Mrs. Beatriz Alós (3) inherited all the property of her daughter (2) as sole heir, notwithstanding the fact that the husband of the latter had the usufruct of one third for life, the obligation extended to all the property so inherited, being the same property that the daughter had inherited from her father, she not appearing to have had any other estate, with insignificant exceptions. It was shown further that the obligation of Mrs. Beatriz Alós and Mrs. Beatriz de los Angeles was not affected by the failure of the plaintiffs and others to make it appear in the registry that the property was subject to be reserved. Mortgage law, art. 199. That section was not the source of the plaintiffs' rights, but only a means of securing them against bona fide purchasers. It did not extinguish their rights as against the relatives under art. 811 of the Civil Code, in case of neglect. Finally, a satisfactory answer was given to the argument that the plaintiffs were barred by prescription, under an order of the military government of Porto Rico, published on April 4, 1899, by which the Civil Code, art. 1957, was amended so that ownership should prescribe by possession for six years with good faith and a proper title. The daughter died in 1891 and her mother recorded her title in the registry and held

NOTE.—On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to *Wedding v. Meyler*, 66 L.R.A. 833.

As to parties to appellate proceedings in the Federal Supreme Court—see note to *Amadeo v. Northern Assur. Co.* 50 L. ed. U. S. 723.

54 L. ed.

from 1891 to her death, in 1904. But it 601] was replied that, *in the first place, prescription had not been pleaded, and was not open, and, secondly, that art. 1957, and therefore the amendment, referring to prescription to acquire ownership, coexists with art. 1963, which fixes a term of thirty years for the prescription by which ownership of real property is lost through a failure to bring a real action, and that in this case the prescription relied upon (and, we may add, probably the only one that could have been relied upon) was that resulting from the plaintiffs not having sued.

For these reasons the supreme court affirmed a judgment of the district court, condemning the defendants to deliver to the plaintiffs certain specified land, or, where the same had been sold, the value of the same, to be ascertained by appraisal, with the costs in the district court. The defendant, Mrs. Beatriz de los Angeles, appealed, her appeal being number 245 in this court, but, as the other defendants did not join in the appeal, and there was no summons and severance, not to speak of other possible objections, the appeal must be dismissed. *Hardee v. Wilson*, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 39. We therefore go no farther on this part of the case than to give the foregoing brief summary of an argument from which we see no reason to dissent.

The plaintiffs also appeal, and this makes it necessary to mention one or two facts not noticed thus far. On the death of Manuel Garcia, his widow, in the course of proceedings for the settlement of his estate, filed what seems to have been called a petition for partition, admitting, however, that there were no properties belonging to the conjugal partnership. An auditor was appointed and he prepared schedules of assets and liabilities, of the portion of assets distributed to the widow for the payment of such liabilities, and of the remainder awarded to the daughter and sole heir; this last consisting of two parcels of land and some personalty of small value. Thereupon the partition was closed. The judgment appealed from gave the plaintiffs only the land inherited by the mother from the daughter 602] and included in the last-mentioned schedule. The plaintiffs set up that the partition proceedings were void upon their face for several reasons, and that they therefore are entitled to all the property that Manuel Garcia left.

The local courts answered this claim by

saying that if there were otherwise any foundation for it, it is barred by the limitation of four years set to rescissory actions and actions for nullity by arts. 1076 and 1301 of the Civil Code. For, in the first place, neither the daughter nor her husband, Mr. Ibarra, ever took any steps to set the partition aside, and it is plausible to say that the plaintiffs claim by inheritance from her, since, if she had left descendants, the property would have gone from her to them. Hence, notwithstanding the daughter's inability to cut the plaintiffs off in the event that happened, it is questionable, at least, whether they are not barred by what barred her. In the next place, the plaintiffs took no steps after the daughter's death, during the whole lifetime and occupation of her mother, from 1891 to 1904. Even if, as the plaintiffs say, their right would have been divested by their death during the life of the mother, Mrs. Beatriz Alós (3), it seems to have vested at the death of the daughter, Mrs. Beatriz Garcia (2). We are not prepared to overthrow the assumption made by the court, whose experience in such questions is entitled to much consideration (*Armiño v. Armiño*, 181 U. S. 558, 561, 45 L. ed. 1000, 1002, 21 Sup. Ct. Rep. 707; *Albright v. Sandoval*, Feb. 21, 1910 [216 U. S. 331, ante, 502, 30 Sup. Ct. Rep. 318]), that the plaintiffs had a sufficient interest to entitle them to bring an action to set aside the so-called partition on the daughter's death, and that, on their failing to do so, the right to dispute the same was barred by lapse of time.

If the partition stands, the other questions argued, as to purchasers from the mother, Mrs. Beatriz Alós, etc., need no further answer. We deem it proper to add one remark. Article 811 created the right by which the plaintiffs recover. It did not go into effect until after the death of Manuel Garcia, so that it would seem to have been open to argument that *his daughter [603 inherited his property by an absolute title which that law should not be construed to have disturbed. But, as it did go into effect before the daughter's death, and as it has been assumed on all hands that that moment was the decisive one, we have made the same assumption under the circumstances and for the purposes of this case. It seems to us, however, that the plaintiffs have reason to be satisfied with retaining what they got by the judgment below.

No. 90. Judgment affirmed.

No. 245. Appeal dismissed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

WILLIAM W. WITHNELL, Appellant, v. WILLIAM R. BUSH CONSTRUCTION COMPANY et al. [No. 108.]

Federal courts—jurisdiction.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri to review a decree dismissing, for want of jurisdiction, a bill seeking to avoid certain special tax bills issued by authority of the city of St. Louis against complainant's real property, and asking for an injunction.

Messrs. Edmund T. Allen and Clifford B. Allen for appellant.

Mr. E. C. Kehr for respondents.

February 28, 1910. Decree affirmed with costs by a divided court.

607] LEVI C. WEIR, W. H. Damsel, and Charles Steele, the President and Trustees of the Adams Express Company, Appts.,

v.

AMY J. ROUNTREE.

(See S. C. Reporter's ed. 607, 608.)

Appeal—from circuit court of appeals—jurisdiction below depending on citizenship.

A decree of a circuit court of appeals affirming a decree of dismissal rendered by a Federal circuit court is not reviewable in the Federal Supreme Court where, if the allegations which set up diversity of citizenship were stricken from the bill, the circuit court would have had no jurisdiction of the suit.

[For other cases, see Appeal and Error, 768-784, in Digest Sup. Ct. 1908.]

[No. 769.]

Submitted February 21, 1910. Decided February 28, 1910.

NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605. 54 L. ed.

A PPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western District of Missouri, dismissing a bill to restrain the bringing of a suit for the negligent killing of an employee of an express company. Dismissed for want of jurisdiction.

See same case below, 97 C. C. A. 500, 173 Fed. 776.

The facts are stated in the opinion.

Mr. William C. Scarritt submitted the cause for appellants. Messrs. Elliott H. Jones and E. L. Scarritt were on the brief.

Mr. Eugene F. Ware submitted the cause for appellee. Messrs. Biddle & Lardner and Ware, Nelson, & Ware were on the brief.

Per Curiam:

Bill was filed by the express company to restrain Mrs. Rountree from bringing suit against the company, which was directed to be dismissed for want of jurisdiction, because there was no diversity of citizenship and no Federal ground for jurisdiction. Rountree v. Adams Exp. Co. 91 C. C. A. 186, 165 Fed. 152. From this decree no appeal was taken.

A second suit on the same alleged cause of action was then brought in the name of the officers of the company, Levi C. Weir and others, alleging their diverse citizenship. The second suit was dismissed by the circuit court, and carried to the circuit court of appeals for the eighth circuit, and the latter court affirmed the decree of the circuit court. 173 Fed. 776.

This appeal was then prosecuted; but we are of opinion that it cannot be maintained. Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; Bagley v. General Fire Extinguish-

er Co. 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341. If the allegations which set up diversity of citizenship were stricken 608] from the bill, the *Federal court would have had no jurisdiction. Being relied on, the decree of the circuit court of appeals was final.

Appeal dismissed.

HUDSON OIL & SUPPLY COMPANY, Appellant, v. THEODORE B. BOORAEM, Receiver, etc. [No. 568.]

Admiralty—distribution of proceeds of sale.

Appeal from the District Court of the United States for the District of New Jersey to review a decree for the payment out of the proceeds of a sale of a vessel under a libel in admiralty of the claim of the receiver in bankruptcy of the owner of the vessel.

Mr. De Lagnel Berier for appellant.

Messrs. George S. Silzer and Robert Adrain for appellee.

February 28, 1910. Decree affirmed with costs.

EDWARD B. MOORE, Commissioner of Patents, Plaintiff in Error, v. UNITED STATES OF AMERICA EX REL. NEWCOMB MOTOR COMPANY. [No. 115.]

Appeal—final judgment below.

In Error to the Court of Appeals of the District of Columbia to review a judgment which, reversing a judgment of the Supreme Court of the District, directed that mandamus issue to compel the Commissioner of Patents to set aside certain orders made by him in the matter of certain pending applications for patents.

See same case below, 30 App. D. C. 464.

Messrs. Frederick P. Fish, Melville Church, and Albert G. Davis for plaintiff in error.

Messrs. Charles H. Duell, Robert N. Kenyon, and Walter F. Rogers for defendant in error.

March 7, 1910. *Per Curiam*: The Writ of Error is dismissed for want of jurisdiction. *Frasch v. Moore*, 211 U. S. 1, 53 L. ed. 65, 29 Sup. Ct. Rep. 6; *Rousseau v. Brown*, 21 App. D. C. 73, 80; *Johnson v. Mueser*, 212 U. S. 284, 53 L. ed. 515, 29 Sup. Ct. Rep. 390; *E. C. Atkins & Co. v. Moore*, 212 U. S. 285, 53 L. ed. 515, 29 Sup. Ct. Rep. 390; *Gaines v. Knecht*, 212 U. S. 561, 53 L. ed. 652, 29 Sup. Ct. Rep. 688; *Gaines v. Knecht*, 27 App. D. C. 530, 532; *United States ex rel. Taylor v. Taft*, 203 U. S. 461, 51 L. ed. 269, 27 Sup. Ct. Rep. 148; *United States v. Lynch*, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114; *Baltimore & P. R. Co. v. Hopkins*, 130 U. S. 210, 226, 32 L. ed. 908, 914, 9 Sup. Ct. Rep. 503. The application for Certiorari is also denied:

636

*JAMES A. SHINE et al., Appellants, [609] v. FOX BROTHERS MANUFACTURING COMPANY. [No. 383.]

Appeal from circuit court—jurisdiction.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri to review a decree granting injunctive relief against a boycott.

See same case below in Circuit Court of Appeals, 86 C. C. A. 311, 156 Fed. 357.

Messrs. Shepard Barclay, Thomas T. Fauntleroy, and Cornelius H. Fauntleroy for appellants.

Messrs. Herbert R. Marlatt and Frank H. Sullivan for appellee.

March 7, 1910. *Per Curiam*: In the circumstances disclosed by this record, we are of opinion that a direct appeal does not lie to this court from the decree of the circuit court, and the appeal is therefore dismissed.

*DAVID KAUFMAN & SONS COM- [610] PANY, Plff. in Err., v.

GEORGE L. SMITH, Collector of the Port of Newark, New Jersey.

(See S. C. Reporter's ed. 610, 611.)

Error to circuit court—frivolousness of Federal question.

The contention that merchandise coming into the United States from the Canal Zone in the Isthmus of Panama could not be subjected, as is attempted by the act of March 2, 1905 (33 Stat. at L. 843, chap. 1310), to the duties imposed on merchandise imported from foreign countries, is too frivolous to serve as the basis of a direct writ of error from the Federal Supreme Court to a circuit court.

[For other cases, see Appeal and Error, 938-987, in Digest Sup. Ct. 1908.]

[No. 668.]

Submitted February 28, 1910. Decided March 7, 1910.

IN ERROR to the Circuit Court of the United States for the District of New Jersey to review a judgment denying the right to recover back duties exacted upon merchandise imported into the United States from the Canal Zone in the Isthmus of Panama. Dismissed for want of jurisdiction.

Messrs. Frederick B. Campbell and George Whitefield Betts, Jr., submitted the cause for plaintiff in error. Messrs. George W. Hinckley and Wallace, Butler, & Brown were on the brief.

NOTE.—On direct review in Federal Supreme Court of judgments of circuit or district courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

216 U. S.

Solicitor General Bowers and Assistant Attorney General Lloyd submitted the cause for defendant in error.

Per Curiam:

It is established that to give this court jurisdiction on a direct appeal from, or writ of error to, a circuit court, on the ground of a constitutional question, such question must be real and substantial, and not a mere claim in words.

This was an action brought against the collector of customs for the recovery of duties paid under the act of March 2, 1905, 33 Stat. at L. 843, chap. 1310, entitled, "An Act Fixing the Status of Merchandise 611] *Coming into the United States from the Canal Zone, Isthmus of Panama," providing "that all laws affecting imports of articles, goods, wares, and merchandise, and entry of persons into the United States from foreign countries, shall apply to articles, goods, wares, and merchandise, and persons coming from the Canal Zone, Isthmus of Panama, and seeking entry into any state or territory of the United States or the District of Columbia."

Plaintiff claimed that the merchandise in question was not liable to the duties thus paid, but the circuit court ruled that, in view of the treaty between the Republic of Panama and the United States [33 Stat. at L. 2234], and the various acts of Congress relating to such zone, the principles laid down in *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770, were decisive of the questions raised herein. We concur in that conclusion, and dismiss the writ of error for want of jurisdiction.

Writ of error dismissed.

EDWARD G. LEWIS, Plff. in Err.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 612-613.)

Appeal—in criminal case—entry of nolle prosequi.

1. A person indicted for a crime cannot sue out a writ of error to review the entry of a *nolle prosequi*.

[Appeals in criminal cases, see Appeal and Error, 237-243, in Digest Sup. Ct. 1908.]

Error to district court—Federal question—right to speedy trial.

2. The question of the accused's constitutional right to a speedy trial is not so involved as to give the Federal Supreme Court jurisdiction of a writ of error to a district

court, where the latter court has permitted the entry of a *nolle prosequi*.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

Error to district court—moot case.

3. The Federal Supreme Court has no jurisdiction to review an order of a Federal district court, permitting the entry of a *nolle prosequi* to an indictment for violating U. S. Rev. Stat. § 5480, U. S. Comp. Stat. 1901, p. 3696, punishing the sending of letters through the mails with intent to defraud, where no new indictment has been returned within three years from the date of the commission of the alleged offense, or, if returned, is not still pending, since, under the circumstances, the case has become merely a moot one.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

[No. 202.]

Submitted February 28, 1910. Decided March 14, 1910.

IN ERROR to the District Court of the United States for the Eastern District of Missouri to review an order entering a *nolle prosequi* to an indictment charging the sending of letters through the mails with intent to defraud. Dismissed for want of jurisdiction.

Messrs. Shepard Barclay and Thomas T. Fannleroy submitted the cause for plaintiff in error.

Solicitor General Bowers and Assistant Attorney General Harr submitted the cause for defendant in error.

Per Curiam:

Lewis was indicted December 1, 1905, in the district court of the United States for the eastern district of Missouri, charged with depositing certain letters in a post-office of the United States in pursuance of a scheme to defraud, in violation of § 5480 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3696).

General orders continuing all pending criminal cases were thereafter entered at each term until November 5, 1907, when plaintiff in error, defendant below, moved for a discharge from the accusations of the indictment, upon the ground that his right to a speedy trial had been denied. The court ordered that unless the cause should be proceeded with at that term the motion would be sustained; but later all pending criminal cases were again continued by general order.

At the following May term, defendant below again filed a motion to discharge, and the United States attorney asked leave to enter a *nolle prosequi*. Defendant's motion was overruled and the *nolle prosequi*

NOTE.—On direct review in Federal Supreme Court of judgments of circuit or district courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.
54 L. ed.

entered, releasing and discharging defendant from further prosecution upon the indictment. A motion to set aside the *nolle prosequi* was made and overruled, and this writ of error direct to this court sued out under § 5 of the act of March 3, 1891. [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549.]

It thus appears that this is an appeal by a person indicted for crime from an order of the court releasing and discharging him from further prosecution under the indictment. Plaintiff in error could not complain until he was made to suffer (*Ohio ex rel. Lloyd v. Dollison*, 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. Rep. 703), and when discharged from custody he is not legally aggrieved, and therefore cannot appeal (*Com. v. Graves*, 112 Mass. 282; *Anglo-American Provision Co. v. Davis Provision Co.* 191 U. S. 376, 48 L. ed. 228, 24 Sup. 613] Ct. Rep. 93). *The indictment having been dismissed, the question as to plaintiff in error's constitutional right to a speedy trial is not involved in such a real sense as to give this court jurisdiction (*Lampasas v. Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368). Plaintiff in error was indicted December 1, 1905, for certain violations of § 5480 of the Revised Statutes, alleged to have been committed on the 1st day of February, 1904. That indictment having been *nolle prossed*, and no new indictment appearing to have been returned against him within three years from the date of the commission of the alleged offenses, or, if returned, to be still pending, it is manifest that he has been discharged by the statute of limitations, and that this case, in the circumstances disclosed, has become merely a moot case.

Writ of error dismissed.

JOHN B. MALLERS, Plff. in Err.,
v.
COMMERCIAL LOAN & TRUST COMPANY.
NY.

(See S. C. Reporter's ed. 613, 614.)

Error to state court—Federal question—when raised in time.

A Federal question which will sustain a writ of error from the Federal Supreme Court to a state court cannot be first raised

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On how and when questions must be raised and decided in a state court in or-

in the assignment of errors in the Federal court.

[For other cases, see *Appeal and Error*, 1311-1318, in *Digest Sup. Ct. 1908.*]

[No. 726.]

Submitted February 28, 1910. Decided March 14, 1910.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Appellate Court of the First District, refusing to quash an execution on a judgment upon a promissory note. Dismissed for want of jurisdiction.

See same case below, 242 Ill. 50, 89 N. E. 661.

Mr. Charles B. Stafford submitted the cause for plaintiff in error.

Mr. Horace G. Stone submitted the cause for defendant in error.

Per Curiam:

The Commercial Loan & Trust Company, a banking corporation organized under the laws of Illinois, in 1895 brought suit against John B. Mallers upon a promissory note, and judgment was entered therein by the appellate *court for the first district in favor of the bank, against Mallers, which judgment was affirmed by the supreme court.

On the case being remanded to the appellate court, an execution was issued by the clerk to enforce the collection of the judgment, which Mallers moved to quash, and from the judgment of that court denying that motion a writ of error was prosecuted to the supreme court, which affirmed the judgment of the appellate court.

The case was then brought here on writ of error, which must be dismissed for want of jurisdiction. *Hulbert v. Chicago*, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617; *Burt v. Smith*, 203 U. S. 129, 51 L. ed. 121, 27 Sup. Ct. Rep. 37; *Bonner v. Gorman*, 213 U. S. 86, 53 L. ed. 709, 29 Sup. Ct. Rep. 483.

No Federal question was raised in the state courts, and the attempt to raise a Federal question in the assignment of errors in this court not only came too late, but was palpably not maintainable. *Chapin v. Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

Writ of error dismissed.

der to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

As to when Federal question is raised in time to sustain appellate jurisdiction of the Federal Supreme Court over state courts—see note to *Chicago, I. & L. R. Co. v. McGuire*, 49 L. ed. U. S. 414.

UNITED STATES, Plaintiff in Error, v. PIERRE GRIMAUD et al. [No. 490]; UNITED STATES, Plaintiff in Error, v. ANTONIO INDA. [No. 491.]

In Error to the District Court of the United States for the Southern District of California.

The Attorney General and the Solicitor General for plaintiffs in error.

No appearance for defendants in error.

March 14, 1910.† Judgments affirmed by a divided court.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Plaintiff in Error, v. H. A. HOLLAN. [No. 161.]

Error to state court—Federal question.

In Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Grayson County, of that state, in favor of plaintiff in an action for personal injuries in which an unsuccessful attempt was made to remove the case to the Circuit Court of the United States for the Eastern District of Texas.

See same case below (Tex. Civ. App.) 107 S. W. 642.

Messrs. James Hagerman, Cecil H. Smith, and J. M. Bryson for plaintiff in error.

Messrs. C. B. Randell and Judson H. Wood for defendant in error.

March 21, 1910. Dismissed for want of jurisdiction.

616] *MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Plaintiff in Error, v. HARRY C. WISE. [No. 177.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Texas to review a judgment which affirmed a judgment of the Court of Civil Appeals for the Fifth Judicial District of that state, affirming a judgment of the District Court of Grayson County in favor of plaintiff in an action for personal injuries.

See same case below, 101 Tex. 459, 109 S. W. 112.

Messrs. James Hagerman, Cecil H. Smith, and J. M. Bryson for plaintiff in error.

Messrs. C. B. Randell and Judson H. Wood for defendant in error.

March 21, 1910. Dismissed for want of jurisdiction.

HORACE CHASE, Individually and as Admr., etc., Plaintiff in Error, v. LEONARD H. PHILLIPS et al. [No. 724.]

Error to state court—Federal question.

In Error to the Supreme Judicial Court

†April 18, 1910. Rehearing granted, and cases restored to docket for reargument. 54 L. ed.

of the State of Massachusetts to review a decree which affirmed a decree of a single justice of that court, affirming a decree of the Probate Court for the County of Essex in that state, by which a prior decree of adoption was revoked after the death of both the original parties for fraud and undue influence.

See same case below, 203 Mass. 556,—L.R.A. (N.S.)—, 89 N. E. 1049.

Messrs. Joseph H. Soliday, Richard Y. Fitzgerald, and Frederic D. McKenney for plaintiff in error.

Messrs. Moorfield Storey and Ezra Ripley Thayer for defendants in error.

March 21, 1910. Dismissed for want of jurisdiction.

*SINGER MANUFACTURING COMPANY, [617 Appellant, v. WIRT ADAMS, State Revenue Agent, et al. [No. 727.]

Appeal—final judgment below.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which reversed in part a decree of the Circuit Court for the Southern District of Mississippi, sustaining a demurrer to and dismissing a bill to enjoin certain alleged illegal taxation, and remanded the cause with directions to enter a decree in accordance with the views expressed in its opinion.

See same case below, 91 C. C. A. 461, 165 Fed. 877.

Mr. C. H. Alexander for appellant.

Mr. Edward Mayes for appellees.

April 4, 1910. *Per Curiam*: Appeal dismissed for want of final judgment. Schlosser v. Hemphill, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; Haseltine v. Central Nat. Bank, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, Plaintiff in Error, v. UNITED STATES. [Nos. 124, 125.]

In Error to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Edward Colston, Judson Harmon, A. W. Goldsmith, and George Hoadly for plaintiff in error.

The Attorney General and the Solicitor General for defendant in error.

March 14, 1910. *Judgments affirmed† by a divided court and causes remanded to the District Court of the United States for the Southern District of Ohio.

†Rehearing granted and cases restored to the docket for reargument and assigned to be heard on the first Tuesday of the next term (October 11) after the cases already assigned for that day.

AMERICAN CAR & FOUNDRY COMPANY, Petitioner, v. SEEGER REFRIGERATOR COMPANY. [No. 738.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Samuel R. Betts, Paul Bakewell, and C. A. Severance for petitioner.

Messrs. Edmund Wetmore and Oscar W. Jeffery for respondent.

February 21, 1910. Denied.

UNITED STATES, Petitioner, v. HAVILAND & COMPANY. [No. 763.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 177 Fed. 175.

The Attorney General, the Solicitor General, and Assistant Attorney General Lloyd for petitioner.

Mr. B. A. Levett for respondent.

February 21, 1910. Denied.

UNITED STATES, Petitioner, v. E. J. LAVINO & COMPANY. [No. 764.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 176 Fed. 964.

The Attorney General, the Solicitor General, and Assistant Attorney General Lloyd for petitioner.

Mr. Thomas S. Gates for respondent.

February 21, 1910. Denied.

UNITED STATES, Petitioner, v. O. G. HEMPSTEAD & COMPANY. [No. 765.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

The Attorney General, the Solicitor General, and Assistant Attorney General Lloyd for petitioner.

Mr. Thomas S. Gates for respondent.

February 21, 1910. Denied.

619] *UNITED STATES, Petitioner, v. J. W. HAMPTON, JR., & COMPANY. [No. 766.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

The Attorney General, the Solicitor General, and Assistant Attorney General Lloyd for petitioner.

Mr. Thomas S. Gates for respondent.

February 21, 1910. Denied.

640

EUGENE M. ORGAIN, Trustee, etc., Petitioner, v. JULIA MARTIN. [No. 743.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 174 Fed. 772.

Mr. Charles K. Bell for petitioner.

No appearance for respondent.

February 28, 1910. Denied.

GREAT NORTHERN RAILWAY COMPANY, Petitioner, v. WESTERN UNION TELEGRAPH COMPANY et al. [No. 760.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below on first appeal, 55 C. C. A. 263, 118 Fed. 497; on second appeal, 174 Fed. 321.

Messrs. John G. Johnson and William R. Begg for petitioner.

Messrs. John F. Dillon and Rush Taggart for respondent.

February 28, 1910. Denied.

GREAT FALLS & OLD DOMINION RAILROAD COMPANY, Petitioner, v. GERTRUDE T. HILL. [No. 772.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 34 App. D. C. 304.

Mr. Wilton J. Lambert for petitioner.

Messrs. A. E. L. Leckie and John A. Kratz, Jr., for respondent.

February 28, 1910. Denied.

CHICAGO RAILWAY EQUIPMENT COMPANY, Petitioner, v. PERRY SIDE BEARING COMPANY et al. [No. 773.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. George P. Fisher, Jr., F. N. Judson, and Paul Bakewell for petitioner.

No appearance for respondent.

620] *February 28, 1910. Denied.

GENERAL ELECTRIC COMPANY, Petitioner, v. RICHMOND STREET & INTERURBAN RAILWAY COMPANY. [No. 780.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 178 Fed. 84.

Mr. L. F. H. Betts for petitioner.

Messrs. Thomas F. Sheridan and Clifton V. Edwards for respondent.

February 28, 1910. Denied.

CITY OF CHICAGO, Petitioner, v. ERIE & WESTERN TRANSPORTATION COMPANY. [No. 783.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 178 Fed. 42.

Messrs. C. E. Kremer, Edward J. Brundage, Ernest Wilkinson, and Samuel T. Fisher for petitioner.

Messrs. Harvey D. Goulder, Frank S. Masten, S. H. Holding, C. W. Greenfield, and Frederick M. Brown for respondent.

February 28, 1910. Denied.

WILL F. WOODS, Petitioner, v. UNITED STATES. [No. 789.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 174 Fed. 651.

Messrs. Charles W. Ogden and Richard R. McMahon for petitioner.

The Attorney General and the Solicitor General for respondent.

February 28, 1910. Denied.

O. J. LEWIS MERCANTILE COMPANY, Petitioner, v. ANNIE KLEPNER. [No. 808.] 621] Petition for a Writ of *Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 176 Fed. 343.

Mr. Herbert H. Gibbs for petitioner.

Mr. Edward A. Alexander for respondent.

March 7, 1910. Denied.

HELVETIA SWISS FIRE INSURANCE COMPANY, Petitioner, v. MAX J. BRANDENSTEIN et al. [No. 817.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 92 C. C. A. 614, 168 Fed. 1020.

Messrs. William J. Wallace and Frederick B. Campbell for petitioner.

Messrs. William V. Rowe and Royall Victor for respondent.

March 7, 1910. Denied.

IN THE MATTER OF BERNARD STAVRAHN, Petitioner. [No. 818.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 174 Fed. 330.

Mr. Edwin P. Grosvenor for petitioner.

M. Clarence R. Freeman in opposition.

March 7, 1910. Denied.

SEBALD M. HOHL, Petitioner, v. NORDDEUTSCHER LLOYD. [No. 806.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 175 Fed. 544.

Mr. Lawrence Kneeland for petitioner.

Mr. Joseph Larocque for respondent.

March 14, 1910. Denied.

ROLAND P. CONKLIN, Petitioner, v. DAIMLER MANUFACTURING COMPANY et al. [No. 810.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 27 L.R.A.(N.S.) 534, 95 C. C. A. 346, 170 Fed. 70.

Mr. Henry M. Earle for petitioner.

No appearance for respondent.

March 14, 1910. Denied.

***COASTWISE TRANSPORTATION COMPANY, Owner, etc., Petitioner, v. THE STEAMSHIP "EDDA," etc.** [No. 781.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 97 C. C. A. 638, 173 Fed. 436.

Mr. Edward E. Blodgett for petitioner.

Mr. Edward S. Dodge for respondent.

March 21, 1910. Denied.

MRS. LEE MANER, Petitioner, v. PENN MUTUAL LIFE INSURANCE COMPANY. [No. 807.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. William L. Crawford, M. L. Crawford, and Jack Beall for petitioner.

Mr. Maurice E. Locke for respondent.

March 21, 1910. Denied.

D. L. HENDERSON, Trustee, etc., Petitioner, v. SAM MAYER. [No. 824.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. John R. L. Smith and George S. Jones for petitioner.

No appearance for respondent.

March 21, 1910. Granted.

FRANK H. WASKEY, Petitioner, v. J. J. CHAMBERS. [No. 826.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Joseph C. Campbell, Albert Fink, and W. H. Metson for petitioner.

No appearance for respondent.

April 4, 1910. Granted.

NEWMAN BAUM, Bankrupt, Petitioner, v. JAMES A. COMER, Trustee, etc. [No. 462.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals **623**] *for the Eighth Circuit.

See same case below, 94 C. C. A. 632, 169 Fed. 410.

Messrs. J. W. Blackwood and M. M. Cohn for petitioner.

No appearance for respondent.

April 4, 1910. Denied.

WILLIAM T. HUGULEY, Petitioner, v. ATLANTIC COAST LINE RAILROAD COMPANY et al. [No. 706.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. John M. Thurston and Frederick T. Myers for petitioner.

Mr. John E. Hartridge for respondents. April 4, 1910. Denied.

CORNELL STEAMBOAT COMPANY, Petitioner, v. ANNIE V. FALLON, as Administratrix, etc. [No. 834.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. J. Parker Kirlin and Amos Van Etten for petitioner.

Mr. Nelson Zabriskie for respondent.

April 4, 1910. Denied.

JOAQUIN GIL, Plaintiff in Error, v. UNITED STATES. [No. 803.]

In Error to the Supreme Court of the Philippine Islands.

Solicitor General Bowers for defendant in error.

February 21, 1910. Docketed and dismissed on motion of Mr. Solicitor General Bowers, for defendant in error.

WILLIAM SKINNER, Appellant, v. EDMUND WRIGHT, as Trustee, etc. [No. 178.]

Appeal from the United States **624**] *Circuit Court of Appeals for the Second Circuit.

See same case below, 89 C. C. A. 23, 162 Fed. 315.

Mr. Austin B. Fletcher for appellant.

Mr. Abram I. Elkus for appellee.

February 21, 1910. Dismissed per stipulation.

642

UNITED STATES v. ANTON HANSEN HAUG. [No. 405.]

On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

The Attorney General and the Solicitor General for the United States.

No appearance for Haug.

February 28, 1910. Certificate dismissed on motion of Mr. Solicitor General Bowers for the United States.

ISRAEL ALPER, Appellant, v. WILLIAM HENKEL, United States Marshal for the Southern District of New York. [No. 134.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Max D. Steuer for appellant.

No appearance for appellee.

March 7, 1910. Dismissed with costs, pursuant to the Tenth Rule.

JOHN ALLEN HEANY et al., Appellants, v. EDWARD B. MOORE, Commissioner of Patents. [No. 718.]

Appeal from the Court of Appeals of the District of Columbia.

See same case below, 34 App. D. C. 31.

Messrs. Charles A. Douglas, Gibbs L. Baker, and James H. Hayden for appellants.

No appearance for appellee.

March 10, 1910. Dismissed with costs on motion of counsel for appellants.

EX PARTE: IN THE MATTER OF ARTHUR HEWETT and Tom A. Keating, Petitioners. [No. —, Original.]

Motion for leave to file a petition for a Writ of Habeas Corpus.

Mr. Thomas F. Gatts for petitioners.

*March 14, 1910. Denied. **[625]**

EDWARD THOMPSON COMPANY, Appellant, v. AMERICAN LAW BOOK COMPANY. [No. 353.]

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Mr. Walter Large for appellant.

Mr. William B. Hale for appellee.

March 18, 1910. Dismissed with costs on motion of counsel for appellant.

IN RE CHARLES A. THATCHER, Plaintiff in Error. [No. 844.]

In Error to the Supreme Court of the State of Ohio.

Mr. O. E. Harrison for defendant in error.

March 21, 1910. Docketed and dismissed on motion of Mr. O. E. Harrison in that behalf.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

“

OCTOBER TERM, 1909.

Vol. 217.

REFERENCE TABLE
OF SUCH CASES
DECIDED IN U. S. SUPREME COURT,
OCTOBER TERM, 1909,
AND REPORTED HEREIN,
VOLUME 217,
AS ALSO APPEAR IN
OFFICIAL REPORTER'S EDITION.

Off. Rep. 217 U. S.	Title.	Here in.	Off. Rep. 217 U. S.	Title.	Here in.
1	Maryland v. West Virginia	645	124-127	Southwestern Oil Co. v. Texas	694
22-23	" "	648	127	" "	695
23-26	" "	649	127-129	Unity Bkg. & S. Co. v. Bett-	
26	" "	650	man	" "	695
26-30	" "	651	129-131	" "	696
30-32	" "	652	134	" "	697
32-35	" "	653	135-136	" "	698
35-36	" "	655	136	St. Louis S. W. R. Co. v. Ar-	
36-39	" "	656	kansas	" "	698
39-41	" "	657	140-141	" "	701
41-44	" "	658	142-144	" "	702
44-46	" "	659	144-146	" "	703
46-47	" "	660	146-149	" "	704
47	Will v. Tornabella	660	149-150	" "	705
48-50	" "	661	150	Todd v. Romeu	705
50-53	" "	662	152-154	" "	706
53-55	" "	663	154-157	" "	707
55-58	" "	664	157	" "	708
58-60	" "	665	157	Davis v. Cleveland, C. C. & St.	
60-63	" "	666	L. R. Co.	" "	708
63-65	" "	667	165	" "	714
65-68	" "	668	165-167	" "	715
68-70	" "	669	167-170	" "	716
70	" "	670	170-172	" "	717
71-72	Frellsen v. Crandell	670	172-175	" "	718
72-73	" "	671	175-177	" "	719
75-77	" "	672	177-179	" "	720
77-79	" "	673	179	" "	721
79	Williams v. Arkansas	673	180-182	Chicago, St. P. M. & O. R. Co.	
85-87	" "	676	v. United States	" "	721
87-90	" "	677	182-183	" "	722
90	" "	678	183-186	" "	723
91	International Text-Book Co.		186-188	" "	724
	v. Pigg	678	188-189	" "	725
99-100	" "	682	189	Boston Chamber of Commerce	
100-103	" "	683	v. Boston	" "	725
103-105	" "	684	193-194	" "	726
105-107	" "	685	194-195	" "	727
108-110	" "	686	196	Missouri P. R. Co. v. Ne-	
110-112	" "	687	braska	Missouri P. R. Co. v. Ne-	
112-114	" "	688	braska ex rel. Farmers'		
114	Southwestern Oil Co. v. Texas	688	Elevator Co.	" "	727
115-117	" "	690	204-205	" "	730
117-119	" "	691	205-208	" "	731
119-122	" "	692	208	" "	732
122-124	" "	693			

REFERENCE TABLE.

Off. Rep. 217 U. S.	Title.	Here in.	Off. Rep. 217 U. S.	Title.	Here in.
209	Southern R. Co. v. Miller	732	370-372	Weems v. Miller	800
213-215	" "	735	372-375	" "	801
215-217	" "	736	375-377	" "	802
217	Los Angeles Farmers & M. Co. v. Los Angeles	736	377-380	" "	803
218-219	" "	741	380-382	" "	804
219-221	" "	742	382-385	" "	805
221-224	" "	743	385-387	" "	806
224-226	" "	744	387-389	" "	807
226-229	" "	745	389-393	" "	808
229-231	" "	746	393-394	" "	809
231-233	" "	747	394-397	" "	810
233-234	" "	748	397-399	" "	811
234	Wynne v. United States	748	399-401	" "	812
240-241	" "	749	401-404	" "	813
241-244	" "	750	404-406	" "	814
244-246	" "	751	406-409	" "	815
246-247	" "	752	409-411	" "	816
247	St. Louis, K. C. & C. R. Co. v. Wabash R. Co. (2 cases)	752	411-413	" "	817
248-250	" "	754	413	Standard Oil Co. v. Tennessee ex rel. Cates	817
250-252	" "	755	419-420	" "	820
253-255	" "	756	421-422	" "	821
255-257	" "	757	423	Heike v. United States	821
257	Lutcher & M. Lumber Co. v. Knight	757	426-428	" "	823
258-260	" "	758	428-431	" "	824
260-262	" "	759	431-433	" "	825
262-265	" "	760	433-436	Grenada Lumber Co. v. Missis- sippi	826
265-267	" "	761	436-439	" "	827
267-268	" "	762	439	" "	828
268	McClellan v. Carland	762	439-441	" "	830
274-276	" "	764	441-443	" "	831
276-278	" "	765	443	Citizens' Nat. Bank v. Ken- tucky, use of Boyle County	832
278-280	" "	766	447	" "	833
280-283	" "	767	447-450	" "	834
283-284	" "	768	450-452	" "	835
284-285	Brantley v. Georgia	768	452-454	" "	836
285	" "	769	454-455	" "	837
286	{ United States v. Carter Carter v. United States Ex parte United States	769	455-456	Fay v. Crozer	837
297-298	" "	772	457-459	Hutchinson v. Loewy	838
298-301	" "	773	459-461	" "	839
301-303	" "	774	461	Kidd, D. & P. Co. v. Mussel- man Grocer Co.	839
303-306	" "	775	469-471	" "	844
306-308	" "	776	471-474	" "	845
308-311	" "	777	474	" "	846
311-313	" "	778	475	Sauffront v. La Compagnia Des Sucrecries	846
313-316	" "	779	477-478	" "	847
316-318	" "	780	478-480	" "	848
319-321	" "	781	480-484	" "	849
321-323	" "	782	484-485	" "	850
323	Stewart v. Griffith	782	485-487	" "	851
326-328	" "	785	488	Owen v. Dudley	851
328-330	" "	786	488-490	" "	852
330-332	" "	787	490-493	" "	853
333	United States v. Welch	787	493-495	" "	854
338-339	" "	789	495-496	" "	855
339	" "	790	497-498	H. C. Cook Co. v. Beecher	855
340	Lord v. United States	790	498-499	" "	856
340-343	" "	791	499	Stoffela v. Nugent	856
343-347	" "	792	500-501	" "	858
347-348	" "	793	501-502	" "	859
349	Weems v. United States	793	502	Javierre v. Central Altagracia	859
357-360	" "	795	506-507	" "	860
360-362	" "	796	507-508	" "	861
362-365	" "	797	509	Holmgren v. United States	861
365-367	" "	798	515-516	" "	864
367-370	" "	799	516-518	" "	865

REFERENCE TABLE.

Off. Rep. 217 U. S.	Title.	Here in.	Off. Rep. 217 U. S.	Title.	Here in.
518-521	Holmgren v. United States	866	555-558	Columbia Heights Realty Co.	
521-523	"	867		v. Rudolph	881
523-524	"	868	558-560	"	882
524	Southern R. Co. v. King (2		561-562	Wallach v. Rudolph	883
	cases)	868	563	Brown-Forman Co. v. Ken-	
530-531	"	870		tucky	883
531-534	"	871	568-570	"	886
534-536	"	872	570-572	"	886
536-539	"	873	572-575	"	887
539	"	874	575-576	"	888
539-540	Freeman v. United States	874	577	Maryland v. West Virginia	888
541-543	"	875	577-579	"	889
543-546	"	876	579-582	"	890
546	"	877	582-584	"	891
547	Columbia Heights Realty Co.		584-585	"	892
	v. Rudolph	877	586-587	Ex parte Gruetter	892
549-550	"	878	587-588	"	893
550-552	"	879	589-611	Memorandum Decisions	895-902
553-555	"	880			

54 L. ed.

THE DECISIONS
OF THE
Supreme Court of the United States

AT
OCTOBER TERM, 1909.

1]* STATE OF MARYLAND, Complainant,
v.
STATE OF WEST VIRGINIA.

(See S. C. Reporter's ed. 1-47.)

Boundary — between states — recognition and acquiescence.

1. The boundary line between the states of Maryland and West Virginia from the head waters of the Potomac to the Pennsylvania line is adjudged to be the "Deakins" or "old state" line, run in or about the year 1788, which ever since has been recognized as the boundary, and has served as such, although steps have been taken from time to time, looking towards a more effectual legal settlement and delimitation of the boundary, none of which have been effectual or such as to disturb the continuous possession of the people claiming rights up to the boundary line.

[For other cases, see Boundaries, 75-82, in Digest Sup. Ct. 1908.]

Boundary — between states — river as state boundary.

2. The state of West Virginia is not, as against the state of Maryland, entitled to the Potomac river to the north bank thereof; her title runs only to high-water mark on the West Virginia shore.

[For other cases, see Boundaries, 26-50, in Digest Sup. Ct. 1908.]

[No. 1, Original.]

Argued November 2, 3, 4, 1909. Decided February 21, 1910.

ORIGINAL suit in equity between the states of Maryland and West Virginia to settle the boundary between those states from the head waters of the Potomac to the Pennsylvania line. The Deakins or old state line declared to be the true boundary. Cross bill of the state of West Virginia dis-

missed in so far as it asks for a decree fixing the north bank of the Potomac river as her boundary.

The facts are stated in the opinion.

Messrs. Edward H. Sincell and Isaac Lobe Straus argued the cause, and, with Mr. William L. Rawls, filed a brief for complainant:

The charter of Maryland gave to the Lord Proprietary an absolute right of soil in and to all the territory comprehended within its specified boundaries.

Cunningham v. Browning, 1 Bland, Ch. 305; Cassell v. Carroll, 11 Wheat. 134, 170, 6 L. ed. 438; Binney's Case, 2 Bland, Ch. 127; Baltimore v. McKim, 3 Bland, Ch. 456; Briscoe v. State, 68 Md. 296, 12 Atl. 25; Wharton v. Wise, 153 U. S. 155, 38 L. ed. 669, 14 Sup. Ct. Rep. 783; Morris v. United States, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep. 649.

The state of Maryland, at and by the Revolution, acquired all the territorial rights vested in the Proprietary before the Revolution.

Ringgold v. Malott, 1 Harr. & J. 299; Howard v. Moale, 2 Harr. & J. 249; Cunningham v. Browning, 1 Bland, Ch. 307; Baltimore v. McKim, 3 Bland, Ch. 460; Binney's Case, supra; Matthews v. Ward, 10 Gill & J. 443; Smith v. Devecmon, 30 Md. 473; Briscoe v. State, 68 Md. 294, 12 Atl. 25; Wharton v. Wise and Morris v. United States, supra.

Under the compact between Maryland and Virginia, and the arbitration based upon it, the southern shore of the Potomac river is established as the southern boundary of Maryland.

Morris v. United States, supra; United States v. Morris, 23 Wash. L. Rep. 745; Wharton v. Wise, supra.

By this arbitration and award, the southern boundary of Maryland was established

NOTE.—On rivers and lakes as state boundaries—see note to Buck v. Ellenbolt, 15 L.R.A. 187.
54 L. ed.

on the southern bank or shore of the Potomac river, giving to the state of Maryland exclusive jurisdiction and government over said river, thereby confirming the call in the charter to Lord Baltimore for the farther or southern bank of said stream.

Morris v. United States, supra.

It has always been understood and declared, never denied or doubted, and repeatedly and uniformly adjudicated, that the southern and southwestern boundaries of Maryland extend along the southern shore of the Potomac river, from its mouth throughout its whole extent to its first fountain or source. In other words, the meridian which the charter calls for as its western boundary, and which is located at the first fountain of the river, runs from the Pennsylvania line to the first fountain of the river, and accordingly the southern and southwestern boundaries of the state extend from the point of the meridian at its first fountain upon the southern bank of the stream at its first fountain all the way to the mouth of the stream at Chesapeake bay. Every court and every other authority which has had occasion to consider this subject has so construed this charter. And this is the only construction which is consonant with the manifest intention of the grant and with the rule of interpreting such grants, as laid down by the foremost publicists and jurists.

Morris v. United States, 174 U. S. 196, 223, 43 L. ed. 946, 955, 19 Sup. Ct. Rep. 649; *United States v. Morris*; *Binney's Case*; and *Biscoe v. State*,—supra; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Alexandria Canal R. & Bridge Co. v. District of Columbia*, 1 Mackey, 217; 1 Story, Const. § 103; *O'Neal v. Virginia & M. Bridge Co.* 18 Md. 1, 79 Am. Dec. 669; *Handly v. Anthony*, 5 Wheat. 374, 5 L. ed. 113; *Doddridge v. Thompson*, 9 Wheat. 469, 6 L. ed. 137; *Reynolds v. M'Arthur*, 2 Pet. 417, 7 L. ed. 470; *Howard v. Ingersoll*, 13 How. 416, 424, 425, 14 L. ed. 204, 208; 1 Vattel, Nations, chap. 22, ¶ 5; 1 Bancroft, History of United States, chap. 7, pp. 241–243; McMahon, History of Maryland, pp. 49, 51, 69; McSherry, History of Maryland, pp. 117, 118; Browne, Maryland, History of a Palatinate, p. 18; 1 Scharf, History of Maryland, pp. 409, 410; Steiner, Institutions and Civil Government of Maryland, p. 2; *United States v. Texas*, 162 U. S. 1, 40 L. ed. 867, 16 Sup. Ct. Rep. 725; *Dudden v. Clutton Union*, 1 Hurlst. & N. 627; *Uhl v. Reynolds*, 23 Ky. L. Rep. 759, 64 S. W. 498; 30 Am. & Eng. Enc. Law, Waters & Water Courses, subtitle Source, pp. 351, 352; Gould, Waters, § 41; *Wright v. Howard*, 1 Sim. & Stu. 203; 5 Cyc. Law & Proc. Boundaries, p. 869; 2 Farnham, Waters, § 501, p. 1656; 1 Hil-

dreth, History of United States, pp. 206, 207; 3 Windsor, Narrative & Critical History, chap. 13, p. 520; *Tate v. Parrish*, 7 T. B. Mon. 325; *Colrick v. Swinburne*, 105 N. Y. 503, 12 N. E. 427; *Fleming v. Davis*, 37 Tex. 173; *Arnold v. Foot*, 12 Wend. 330; *Evans v. Merriweather*, 4 Ill. 497, 38 Am. Dec. 106.

The court must place itself as nearly as possible in the situation of the contracting parties at the time the deed was made, in order to ascertain their intent.

4 Am. & Eng. Enc. Law, title Boundaries, p. 796.

The language of a patent must be construed with reference to the understanding between the parties at the time it is issued, as to the real location of the surveys mentioned, where it is sought to establish the boundary line between adjoining surveys thereby.

Standlee v. Burkitt, 78 Tex. 620, 14 S. W. 1040.

The first fountain of a stream is the point or source in which the water first comes to the surface.

Gould, Waters, § 41; Farnham, Waters, § 501, p. 1656; 30 Am. & Eng. Enc. Law, pp. 351, 352; *Doddridge v. Thompson*; *Handly v. Anthony*; and *Reynolds v. M'Arthur*,—supra; *Howard v. Ingersoll*, 13 How. 415, 14 L. ed. 204; *United States v. Texas*; *Uhl v. Reynolds*; *Dudden v. Clutton Union*; *Wright v. Howard*; and *Colrick v. Swinburne*,—supra.

There has been no acquiescence on the part of Maryland in the occupation or possession by West Virginia of any part of the territory embraced in the charter of Lord Baltimore, in dispute in this case.

Doddridge v. Thompson, 9 Wheat. 476–479, 6 L. ed. 139, 140; *Reynolds v. M'Arthur*, supra; 2 Vattel, Nations, Chitty's ed. chap. 11, ¶ 139; 2 Martens, Nations, chap. 3, § 1; 4 Puffendorf, Nature & Nations, chap. 12, § 4; 22 Cyc. Law & Proc. pp. 1728, 1729; 1 Oppenheim, International Law, § 243; 1 Moore, International Law Dig. § 107, pp. 466–475.

The claim of adverse possession set up by the defendant to the land to the west of the irregular broken line marking the eastern boundary of grants made by the state of Virginia, and also to the west of a line drawn north from the Fairfax stone to the Mason and Dixon line, cannot prevail.

Beatty v. Mason, 30 Md. 409; *Armstrong v. Risteau*, 5 Md. 256, 59 Am. Dec. 115; *Baker v. Swan*, 32 Md. 355; *Robinson v. Minor*, 10 How. 643, 644, 13 L. ed. 574, 575; *Pool v. Fleeger*, 11 Pet. 210, 9 L. ed. 690; *Henderson v. Poindexter*, 12 Wheat. 530, 6 L. ed. 718.

No court acts differently in deciding on
217 U. S.

boundaries between states and on lines between separate tracts of land.

Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233.

Where survey lines conflict, the lines of the elder survey will prevail over those of the junior, and this is particularly so where the junior is bounded with express reference to the elder.

5 *Cye. Law & Proc.* title Boundaries, p. 930.

When two are in mixed possession of the same tract of land, the law considers him having the title as in possession to the extent of his rights.

Cheney v. Ringgold, 2 Harr. & J. 94.

The possession of Maryland being a fact beyond the possibility of dispute as to a portion of the land lying between the Fairfax and Potomac meridians, the statute of limitations, if the same were applicable to a question of this character, would have no part or place in the decision of this case, for where there is a joint possession by the legal owner and claimant by possession at any time within the statutory period, the running of the statute will be arrested.

Larwell v. Stevens, 2 McCrary, 311, 12 Fed. 539.

The state of Maryland must, in the eyes of the law, be held to be in constructive and legal possession and seisin of the whole of the territory lying between any line which may be set up by West Virginia upon the east and the Potomac meridian.

Henderson v. Griffin, 5 Pet. 151, 8 L. ed. 79; *Hall v. Powel*, 4 Serg. & R. 456, 8 Am. Dec. 722; *Barr v. Gratz*, 4 Wheat. 223, 4 L. ed. 555; *Deputron v. Young*, 134 U. S. 241, 33 L. ed. 923, 10 Sup. Ct. Rep. 539; *Hunnicut v. Peyton*, 102 U. S. 333, 26 L. ed. 113.

Mr. George E. Price argued the cause, and, with Mr. William G. Conley, filed a brief for defendant:

A boundary established and fixed by compact between nations becomes conclusive upon all subjects and citizens thereof, and binds their rights, and is to be treated, to all intents and purposes, as the true real boundary. The construction of such a compact is a judicial question, and this doctrine applies to the settlement of the boundary between two states of the Union by compact between such states.

Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233; *Virginia v. Tennessee*, 148 U. S. 503, 37 L. ed. 537, 13 Sup. Ct. Rep. 728; *Virginia v. West Virginia*, 11 Wall. 39, 20 L. ed. 67.

In the absence of a compact or agreement establishing a boundary, this court, in case of a disputed boundary between the states; 54 L. ed.

will so mold the rules of the chancery pleading and practice as to bring the case to a final hearing on its merits; and this court regards such cases as too important in character and involving interests too great to be decided upon mere technical principles of chancery pleading, but will decide the case upon principles of an elevated and perfect justice, unfettered by technical subtleties and petty forms, but will apply those same fundamental doctrines of international law which, by the common consent of mankind, are the basis of the intercourse of the civilized world.

Rhode Island v. Massachusetts, 14 Pet. 210-225, 10 L. ed. 423-430.

Possession, or, as it is called in books on international law, usucaption, for a long period of time, is the best evidence of a national right.

Vattel, Nations, 187-191.

Possession for a great many (more than one hundred) years becomes a rightful one by prescription, even if it had begun in wrong and injustice. The acquiescence of the adjoining state for such a lapse of time would be conclusive evidence that she assented to the possession thus held, and had determined to relinquish her claim.

Rhode Island v. Massachusetts, 14 Pet. 260, 261, 10 L. ed. 446, 447; *Rhode Island v. Massachusetts*, 4 How. 591, 11 L. ed. 1116; *Louisiana v. Mississippi*, 202 U. S. 1, 50 L. ed. 913, 26 Sup. Ct. Rep. 408, 571.

It is a principle of public law, universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it is conclusive of the nation's title and rightful authority.

Indiana v. Kentucky, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051.

Independently of any effect due to the compact as such, a boundary line between states or provinces, as between private persons, which has been run out, located, marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary.

Virginia v. Tennessee, 148 U. S. 522, 37 L. ed. 544, 13 Sup. Ct. Rep. 728; *Penn v. Baltimore*, 1 Ves. Sr. 448; *Boyd v. Graves*, 4 Wheat. 513, 4 L. ed. 628; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *United States v. Stone*, 2 Wall. 525, 537, 17 L. ed. 765, 767; *Kellogg v. Smith*, 7 Cush. 382;

Chenery v. Waltham, 8 Cush. 327; Hunt, Boundaries, 3d ed. 306; Indiana v. Kentucky, 136 U. S. 479-516, 34 L. ed. 329-335, 10 Sup. Ct. Rep. 1051; Rhode Island v. Massachusetts, 4 How. 591-639, 11 L. ed. 1116-1137.

If there has been a compact or agreement between the states, settling and fixing the boundary between them, this court will recognize and uphold such compact, and establish the boundary according to its construction of the language of the compact.

Virginia v. Tennessee, *supra*; Poole v. Fleeger, 11 Pet. 185, 9 L. ed. 680.

The old surveys of Virginia rarely ever conform strictly with the original calls when applied to the ground itself, but, if the natural objects called for can be found, or if there is any evidence by which the court and jury can be satisfied as to the routes taken by the surveyor when he originally laid out the ground, that line will be adopted, and the course and distance will be disregarded.

Bartlett Land & Lumber Co. v. Saunders, 103 U. S. 316, 26 L. ed. 546; M'Iver v. Walker, 9 Cranch, 173, 3 L. ed. 694; M'Iver v. Walker, 4 Wheat. 444, 4 L. ed. 611; Newsom v. Pryor, 7 Wheat. 7, 5 L. ed. 382; Cavazos v. Trevino, 6 Wall. 773, 18 L. ed. 813.

Owners of adjacent tracts of land are not bound by consent to a boundary which has been defined under a mistaken apprehension that it is the true line, wherever it may be found; and in such case the party is either precluded or estopped from claiming his own rights under the true one when discovered.

Schraeder Min. & Mfg. Co. v. Packer, 129 U. S. 688, 32 L. ed. 760, 9 Sup. Ct. Rep. 385; Hatfield v. Workman, 35 W. Va. 578, 14 S. E. 153.

But it is also held in the same cases that where a boundary line has been fixed as a settlement of a disputed boundary, and possession taken and held in accordance with such settlement, the parties are bound by it, although the agreement of settlement is merely oral. Such parol agreement is not regarded as passing any land from one proprietor to the other, but as simply ascertaining the line to which their respective deeds extend.

Schraeder Min. & Mfg. Co. v. Packer, *supra*; Gwynn v. Schwartz, 32 W. Va. 488, 9 S. E. 880; Le Comte v. Freshwater, 56 W. Va. 336, 49 S. E. 238.

Long acquiescence by one adjoining proprietor in a boundary as established by the other is evidence of an agreement that such is the boundary.

Sneed v. Osborn. 25 Cal. 626; Schraeder Min. & Mfg. Co. v. Packer; Hatfield v. Work-

man; Gwynn v. Schwartz; and Le Comte v. Freshwater,—*supra*; Kip v. Norton, 12 Wend. 127, 27 Am. Dec. 120; Jackson ex dem. Goodrich v. Ogden, 7 Johns. 238; Jackson ex dem. Livingston v. Freer, 17 Johns. 29; McCormick v. Barnum, 10 Wend. 104; Dibble v. Rogers, 13 Wend. 536; Adams v. Rockwell, 16 Wend. 285; Van Wyck v. Wright, 18 Wend. 157; Boyd v. Graves, 4 Wheat. 513, 4 L. ed. 628; Kellogg v. Smith, 7 Cush. 375; Jackson ex dem. Putnam v. Bowen, 1 Caines, 362, 2 Am. Dec. 193; Jackson ex dem. Nellis v. Dysling, 2 Caines, 200.

The practical interpretation which the parties by their conduct have given to a written instrument or to an agreement or survey is entitled to weight.

Cavazos v. Trevino, 6 Wall. 773, 18 L. ed. 813.

The action of isolated individuals cannot have the effect to prevent the state of West Virginia from getting the benefit of the doctrine of long continued possession and exercise of jurisdiction and governmental authority.

Virginia v. Tennessee, 148 U. S. 527, 37 L. ed. 545, 13 Sup. Ct. Rep. 728.

Great injury and loss will be inflicted upon the inhabitants living between the Deakins and the Michler line if the Michler line shall be established.

Coffee v. Groover, 123 U. S. 1, 31 L. ed. 51, 8 Sup. Ct. Rep. 1.

Mr. Justice Day delivered the opinion of the court:

This case originates in a bill filed by the state of Maryland, October 12, 1891, against the state of West Virginia, invoking the original jurisdiction of this court, conferred by the Constitution for the settlement of controversies between states. At its January session of 1890 the general assembly of the *state of Maryland passed an act authorizing and directing its attorney general to take such steps as might be necessary to obtain a decision of the Supreme Court of the United States which would settle the controversy between the states of Maryland and West Virginia concerning the true location of that portion of the boundary line between the two states lying between Garrett county, Maryland, and Preston county, West Virginia.

Preston county, West Virginia, was erected out of Monongalia county, Virginia, in the year 1818. Garrett county, Maryland, was erected out of the western portion of Alleghany county under chapter 212 of the Acts of the General Assembly of the State of Maryland of 1872.

The boundary in controversy runs between

the two states from the head waters of the Potomac to the Pennsylvania line.

The bill of complaint states the foundation of the Maryland title to be the charter granted on June 20, 1632, by King Charles I. of England to Cecilus Calvert, Baron of Baltimore, all rights under which, it is averred, have vested in the complainant, the state of Maryland. Virginia, it is alleged, by her first Constitution of June 29, 1776, disclaimed all rights to property, jurisdiction, and government over the territory described in the charter of Maryland and the other colonies, in the following terms:

"The territories contained within the charters erecting the colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released, and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction, and government, and all other rights whatsoever which might, at any time heretofore, have been claimed by Virginia, except the free navigation and use of the rivers Potomac and Pokomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon."

24] *The bill also recites complainant's title to the South Branch of the Potomac river. It avers the failure to settle the true location of the boundary line in dispute with West Virginia, which state succeeded to the rights and title of Virginia. The bill charges that the state of West Virginia is wrongly in possession of, and exercising jurisdiction over, a large part of the territory rightfully belonging to Maryland; that the true line of the western boundary of Maryland is a meridian running south to the first or most distant fountain of the Potomac river, and that such true line is several miles south and west of the line which the state of West Virginia claims, and over which she has attempted to exercise territorial jurisdiction.

The state of West Virginia filed an answer and cross bill, in which she sets up her claim concerning the boundary in dispute between the states, and says that the true boundary line, long recognized and established, is the one known as the "Deakins" line, and in the answer and cross bill she prays to have that line established as the true line between the states. She also alleges in her cross bill that the north bank of the Potomac river, from above Harper's Ferry to what is known as the Fairfax stone, is the true boundary between the states; that West Virginia should be awarded jurisdiction over that portion of the river to the north bank thereof.

There is much documentary and other evidence in the record bearing upon the contention that the South Branch of the Potomac river is the true southern boundary of Maryland, but in the briefs and arguments made on behalf of Maryland in this case the claim for the South Branch of the Potomac as the true boundary is not pressed, and the controversy is narrowed to the differences in the location of the boundary, taking the North Branch of the Potomac river as the true southern boundary line of Maryland.

As we have already said, the contention of the state of Maryland is rested upon the construction of the charter granted by King Charles I., June 20, 1632, to Lord Baltimore. *The part of the charter [25 necessary to consider is here given in the original Latin, and the translation thereof, as the same is contended for in the brief filed for the state of Maryland:

Western and Southern Boundaries, Which
Calls Are as Follows, to Wit:

Transuendo a dicto æstuario vocato Delaware Bay recta linea per gradum prædictum usque ad verum Meridianum primi Fontis Fluminis de Pottomack deinde vergendo versus Meridiem ad ulteriorem dicti Fluminis Ripam et eam sequendo qua Plaga occidentalis ad Meridianalis [qu. plagam occidentalem et meridianalem] spectat usque ad Locum quemdam appellatum Cinquack prope ejusdem Fluminis Ostium scituatum ubi in præfatum Sinum de Chesapeake evolvitur ac inde per Lineam brevissimam usque ad prædictum Promontorium sive Locum vocatum Watkin's Point.

Going from the said estuary called Delaware bay in a right line in the degree aforesaid to the true meridian of the first fountain of the river Potomac, then tending downward towards the south to the farther bank of the said river, and following it to where it faces the western and southern coasts as far as to a certain place called Cinquack, situate near the mouth of the same river, where it discharges itself in the aforesaid bay of Chesapeake, and thence by the shortest line as far as the aforesaid promontory or place called Watkin's Point.

There is some difference in the record as to the true Latin text and the translation thereof. For our purpose it is sufficient to consider that presented by the state of Maryland in the language above set forth. It is to be observed that the purpose of this part of the grant was to locate the northern line of the state of Maryland from Delaware bay "to the true meridian of the first fountain of the river Potomac, then tending downward toward the south to the farther bank of said river, and following it to where it faces the western and *south- [26 ern coasts as far as to a certain place called Cinquack," etc.

It is the contention of the state of Mary-

land that the controversy between her and the state of West Virginia is narrowed to a proper location of the true meridian from the first fountain head of the Potomac river, which, being located, will effectually settle the boundary line in dispute. The claim of the state of Maryland may be further illustrated by a consideration of the plate exhibited in the brief filed in behalf of that state, which is herewith given:

the Potomac river, and following it according to the description in the grant, embraces said river to its farther bank as the true boundary of Maryland.

On the other hand, West Virginia contends that the true head of the river Potomac is at the Fairfax stone, and that the boundary should be located by a line from the spring at that point; and that such has long been the recognized boundary line be-



It is to be noted in considering this plate that the north and south line at the left is called the Potomac meridian, running from a certain point designated as the Potomac stone. It is insisted for the state of Maryland that the spring at this point most nearly fulfils the terms of the Lord Baltimore charter, in that it properly locates the true meridian of the first fountain head of

tween Virginia, West Virginia, and Maryland. The distance from the Fairfax meridian to the Potomac meridian is about $1\frac{1}{4}$ miles, and the distance to the Pennsylvania line about 37 miles.

It may be true that the meridian line from the Potomac stone, in the light of what is now known of that region of country, more fully answers the calls in the original

charter than does a meridian line starting from the Fairfax stone. But it is to be remembered that the grant to Lord Baltimore was made when the region of the country intended to be conveyed was little known, was wild and uninhabited, had never been surveyed or chartered, and the location of the upper part of the Potomac river was only a matter of conjecture.

27] *It is said, and the record tends to show, that the only map of the country then known to be in existence was one prepared and published by Captain John Smith, upon which only a very small part of the Potomac river is shown, and 28] *from which we get no light as to the true source and course of the upper reaches of the Potomac river. The so-called Potomac stone was neither set nor located until 1897, six years after the beginning of this suit, when it was put in place by the surveyor in this case, on the part of the state of Maryland. He then set a monument designated as the "Potomac stone," and gave the name Potomac to the spring at the origin of that fork of the Potomac river. The so-called Potomac meridian was run by the same engineer, located and named by him in the year 1897.

The Fairfax stone, which is shown at the beginning of the north and south line in plate No. 1, has a history and importance in this case which renders it necessary to note something of its origin and location. Without going into a history of the prior grants in Virginia, we come directly to the one bearing upon this case. It was made in September, 1688, by King James II. of England, for the northern neck of Virginia, to Thomas (Lord) Culpeper, which subsequently became the property of Lord Fairfax, and is usually spoken of as the Fairfax grant. That grant was under consideration in this court in the case of *Morris v. United States*, 174 U. S. 198, 43 L. ed. 947, 19 Sup. Ct. Rep. 649, a case to which we shall have occasion to refer later; and from page 223 of that report we take a description of so much of the grant as is necessary to a consideration of this cause. The northern neck of Virginia is described in that grant as follows:

"All that entire tract, territory, or parcel of land situate, lying, and being in Virginia, in America, and bounded by and within the first heads or springs of the rivers of Tappahannock als Rappahannock and Quirough als Patowmaek rivers, the courses of said rivers from their said first heads or springs, as they are commonly called and known by the inhabitants and description of those parts and the bay of Chesapeake, together with the said rivers themselves and all the islands within the outermost

banks thereof, and the soil of all and singular the premises, and all lands, woods, underwood, timber, and trees, wayes, mountains, swamps, marshes, *waters, rivers, [29 ponds, pools, lakes, water courses, fishings, streams, havens, ports, harbours, bays, creeks, ferries, with all sorts of fish, as well whales, sturgeons, and other royal fish. . . . To have, hold, and enjoy all the said entire tract, territory, or portion of land, and every part and parcel thereof, . . . to the said Thomas, Lord Culpeper, his heirs and assigns forever."

The territory embraced in this northern neck became subject to the jurisdiction and dominion of Virginia, and the boundary lines fixed for it became important in determining the true boundary between Virginia and adjoining states. In the grant to Lord Culpeper the tract is described as lying in Virginia, in America, and bounded by and within the first heads or springs of the rivers, Rappahannock and Patowmaek. Disputes having arisen between the governor and council of Virginia and Lord Fairfax, touching the true boundary of the grant, an order was made on November 29, 1733, by the King in Council, reciting that Lord Fairfax had petitioned for an order to settle the boundaries of his tract, and for a commission to issue, run out, and ascertain the boundaries of the same. The King granted an order, and thereafter the governor of Virginia, on September 7, 1736, appointed certain commissioners to act for the colony of Virginia in the matter; Lord Fairfax appointed certain commissioners to act on his behalf.

The instructions to the commissioners required them to make a clearer description of the boundaries in controversy, to make exact maps of the rivers Rappahannock and Potomac, and the branches thereof to the head or spring, so called or known, and the surveys made by them, with correct maps thereof, to be laid before his Majesty. The commission adopted the North Branch of the Potomac river, then known as the Cohaugoruton, and after further proceedings, which are not necessary to recite in detail, and after a reference to the Lords of Trade and Plantations, a report was made which, among other things, stated that a line run from the first head *or spring of the south [30 or main branch of the Rappahannock river to the first head or spring of the Potomac river is, and ought to be, the boundary line determining the tract or territory of land commonly called the northern neck. Ultimately the matter was laid before the King in Council, and commissioners were appointed to mark and run the line between the head spring of the rivers Rappahannock and Potomac, and the stone called the Fairfax

stone was planted in September, 1746, at the head spring of the Potomac river. In 1748, the location of the stone was approved by the Virginia assembly and the King in Council. This Fairfax stone has been an important monument in settling and establishing boundaries since that time.

It was found still in place in 1859 by Lieutenant Michler, who made a survey on behalf of the boundary commissioners of Maryland and Virginia, to which we shall have occasion to refer later on. In his report, Lieutenant Michler describes the stone as follows:

"The initial point of the work, the oft-mentioned, oft-spoken of 'Fairfax stone,' stands on a spot encircled by several small streams flowing from the springs about it. It consists of a rough piece of sandstone, indifferent and friable, planted to a depth of a few feet in the ground, and raising a foot or more above the surface. Shapeless in form, it would scarcely attract the attention of the passer-by. The finding of it was without difficulty, and its recognition and identification by the inscription 'Ffx,' now almost obliterated by the corroding action of water and air."

Without stopping to mention the cases in which Virginia has recognized this monument in creating counties and otherwise, it is to be noted that it was recognized as a boundary point by the state of Maryland in creating Garrett county, the boundary between which and Preston county, West Virginia, it was the purpose of the act of the legislature of Maryland to have settled by the filing of the bill and proceedings in the present case.

31] *By the Constitution of Maryland of 1851 it is provided (article 8, § 2):

"When that part of Alleghany county lying south and west of a line beginning at the summit of Big Back Bone or Savage mountain where that mountain is crossed by Mason and Dixon's line, and running thence by a straight line to the middle of Savage river, where it empties into the Potomac river, thence by a straight line to the nearest point or boundary of the state of Virginia, thence with said boundary to the Fairfax stone, shall contain a population of ten thousand, and the majority of electors thereof shall desire to separate and form a new county and make known their desire by petition to the legislature, the legislature shall direct, at the next succeeding election, that the judges shall open a book at each election district in said part of Alleghany county, and have recorded therein the vote of each elector 'for or against' a new county. In case the majority are in favor, then said part of Alleghany county to be declared an independent county, and the inhabitants

whereof shall have and enjoy all such rights and privileges as are held and enjoyed by the inhabitants of the other counties in this state."

In the act of 1872, creating Garrett county, it is provided:

"That all that part of Alleghany county lying south and west of a line beginning at the summit of Big Back Bone or Savage mountain where that mountain is crossed by Mason and Dixon's line, and running thence by a straight line to the middle of Savage river where it empties into the Potomac river; thence by a straight line to the nearest point or boundary of the state of West Virginia, then with the said boundary to the Fairfax stone, shall be a new county, to be called the county of Garrett, provided," etc.

It appears that not infrequent attempts have been made to settle the controversy between the states now at the bar of this court. In the years 1795, 1801, and 1810 certain commissioners were provided for by the state of Maryland to meet commissioners to be appointed by the state of Virginia, with *power to adjust the boundary [32 between the southern and western limits of the state of Maryland and the dividing line between it and Virginia. Nothing seems to have come of these attempts.

In 1818, the state of Maryland passed an act proposing to Virginia the appointment of a commission, to run a line from the most western source of the North Branch of the Potomac.

In February, 1822, the legislature of Virginia expressed its willingness to appoint commissioners, who were to locate the western boundary by a stone located by Lord Fairfax at the head waters of the Potomac river. The commissioners met, but the divergency in their instructions prevented any action.

In 1825, Maryland passed an act for the settlement of the boundary, providing that the governor of Delaware should act as umpire. In 1833, Virginia passed an act providing for commissioners to run the lines from the Fairfax stone, or, at the first fountain of the Cohangoruton or North Branch of the Potomac river. In default of Maryland appointing commissioners, Virginia commissioners were to run and mark the line.

In October, 1834, the state of Maryland filed a bill in this court against the state of Virginia, which bill was subsequently dismissed without any action being taken thereon. In 1859, a line was run by Lieutenant Michler, of the United States Topographical Engineers, to which we shall have occasion to refer more in detail later on.

By an act of 1781, the state of Maryland

appropriated land within the state in Washington county, west of Fort Cumberland, with certain exceptions, to discharge the engagements of the state to the officers and soldiers thereof, and, by a resolution passed in April, 1787, the governor and council were requested "to appoint and employ some skilful person to lay out the manors, and such parts of the reserve and vacant lands, belonging to this state, lying to the west of Fort Cumberland, as he may think fit and 33] capable of being settled *and improved, in lots of 50 acres each, bounded by a fixed beginning and four lines only, unless on the sides adjoining elder surveys; that the beginning of each lot be marked with marking irons, or otherwise, with the number thereof, and that a fair book of such surveys, describing the beginning of each lot by its situation, as well as number, be returned and laid before the next general assembly."

Under this resolution, Francis Deakins was appointed to make the survey, and, in 1788, an act of the general assembly of Maryland was passed. It reads, in part, as follows:

"And whereas, in pursuance of a resolve of the general assembly, at April session, 1787, authorizing the governor and council to appoint and employ some skilful person to lay out the manors and such parts of the reserves and vacant land belonging to this state, lying to the westward of Fort Cumberland, as he might think fit and capable of being settled and improved, in lots of 50 acres each, Francis Deakins was appointed and employed by the governor and council for that purpose, and has finished the said survey, and has returned a general plot of the county westward of Fort Cumberland, on which 4,165 lots of 50 acres each are laid off, besides sundry tracts which have been patented, distinguishing on the plot those lots which have been settled and improved from those which remain uncultivated; and the said Francis Deakins has also returned two books, entitled A and B, in which are entered certificates of all of the lots before-mentioned."

And further enacted that 2,575 of the aforesaid lots were contained in the following limits: "Begining at the mouth of Savage river and running with the North Branch of the Potomac river to the head thereof, then with the present supposed boundary line of Maryland until the intersection of an east line to be drawn from said boundary line with a north course from the mouth of Savage river will include the number of lots aforesaid to be distributed by lot 34] among *the said soldiers and recruiting officers, and their legal representatives," etc.

And it further provides that lots granted

to officers should be adjacent to those distributed to the soldiers, within the following limits: "By extending the aforesaid north course from the mouth of Savage river, until its intersection with an east line to be drawn from the aforesaid supposed boundary line of Maryland will include the necessary number, allowing to each officer or his representatives four lots aforesaid."

The act also contains the following language:

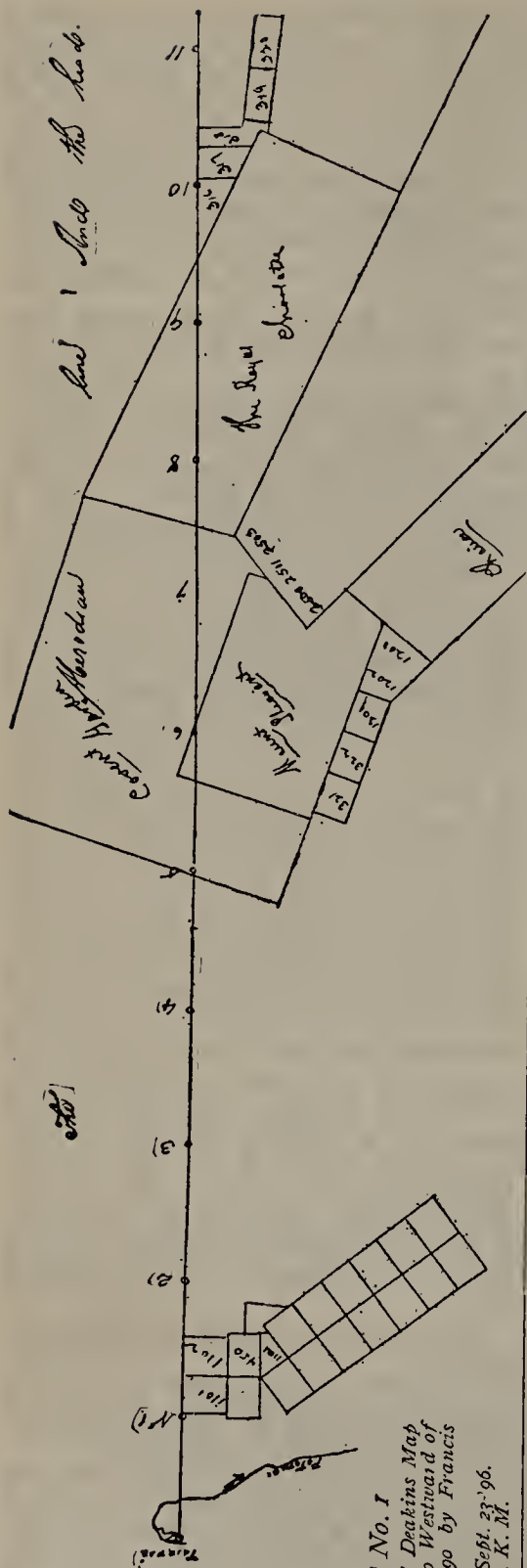
"And be it enacted, that the line to which the said Francis Deakins has laid out the said lots is, in the opinion of the general assembly, far within that which this state may rightfully claim as its western boundary; and that at a time of more leisure the considerations of the legislature ought to be drawn to the western boundaries of the state, as objects of very great importance."

Deakins filed a map, which is in evidence in this case, and which shows a large number of lots laid out, and also certain outlines of deeds and grants. This line in the briefs and records is sometimes mentioned as having been run in 1787, sometimes 1788, and sometimes 1789. In view of the act of 1788, the line was probably run in that year. As, in our view of the case, the action of Deakins in the location of this line, and his evident adoption of the Fairfax stone as a starting point, is an important feature of this controversy, we insert herein a tracing from the original Deakins map, put in evidence on the part of the state of West Virginia. An inspection of this map shows a north and south line upon the west side thereof, and also some of the military lots laid out by Deakins in that part of the tract. It is to be noted that this north and south line is marked: "The meridian line and the head of the North Branch of the Potowmack river as fixed by Lord Fairfax." This could mean but one thing, and that is, an attempted meridian line north from the Fairfax stone, located to the Pennsylvania line.

*We shall have occasion to recur to [35 this line.

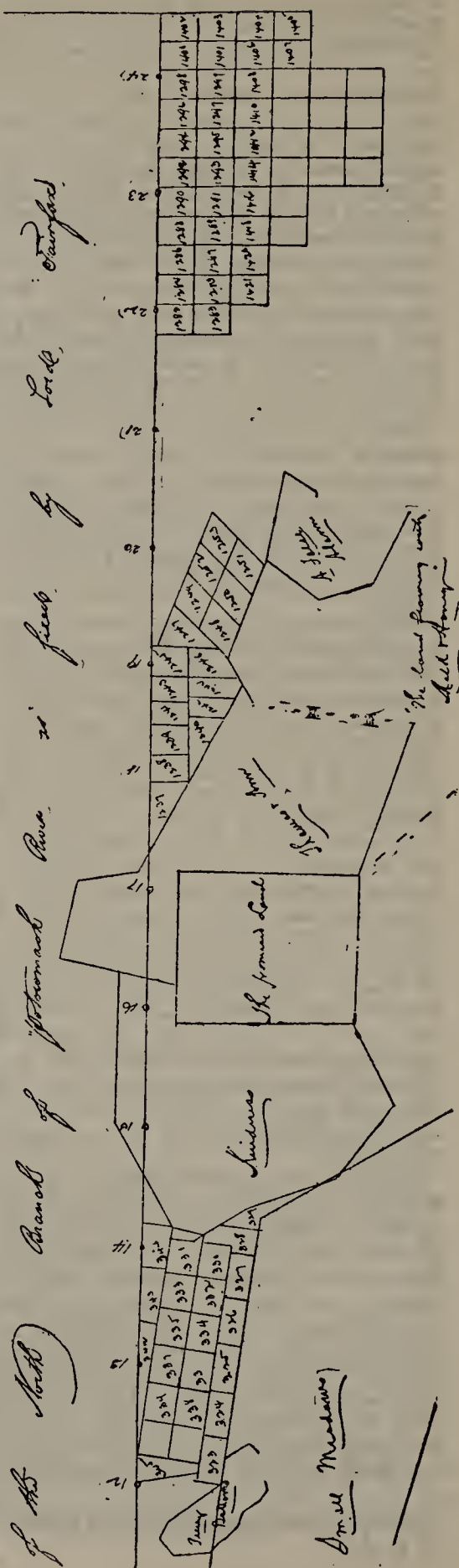
In 1852 the legislature of the state of Maryland passed an act concerning the disputed boundary, which act provides:

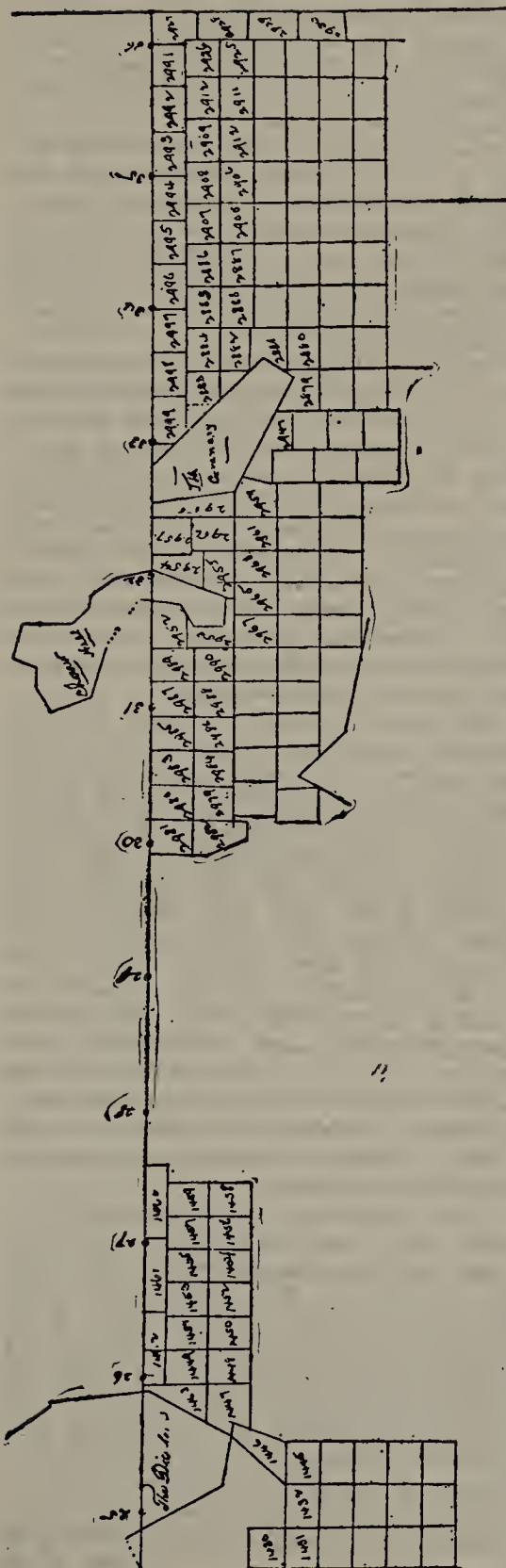
"Whereas it is of great importance that the western territorial limit of the state of Maryland be clearly defined and her boundary be permanently established; and whereas, the true location of the western line of Maryland between the states of Maryland and Virginia, beginning at or near the Fairfax stone on the North Branch of the Potomac river, at or near its source, and running in a due north line to the state of Pennsylvania, is now lost and unknown, and all the marks have been destroyed by



Monroe Exhibit No. 1

Traced from the original Deakins Map of Military Lots located to Westward of Fort Cumberland in 1789-90 by Francis Deakins, 200 acres.
Annapolis, Md., Sept. 23rd '96.
J. K. M.





time or otherwise; and whereas, the states of Virginia and Maryland have both granted patents to the same tracts of land at or near the supposed line, and as suits of ejectment are now pending in the circuit court of Alleghany county, in the state of Maryland, by persons holding under Maryland patents against persons now in possession and holding land under patents granted by the state of Virginia, which cannot be justly settled without establishing said boundary line:

"Therefore, section 1. Be it enacted by the general assembly of Maryland, that the governor be and he is requested to open a correspondence with the governor of Virginia in relation to tracing, establishing, and marking the said line, and in case the legislature of Virginia shall pass an act providing for the appointment of a commissioner to act in conjunction with a commissioner on the part of Maryland in the premises, then and in such case, the governor be and he is hereby authorized and requested to appoint a commissioner who, together with the commissioner who shall be appointed on the part of Virginia, shall cause the said line to be accurately surveyed, traced, and marked with suitable monuments, beginning therefor at the said Fairfax stone, and running thence due north to the line of the state of Pennsylvania.

"Sec. 2. And be it enacted, that it shall be the joint duty *of the commissioners [36 after running, locating, establishing, and marking the said line, to make a report setting forth all the facts touching, locating, and marking said line; and it shall be the duty of the commissioner of each respective state to forward copies of the joint report to each of their respective legislatures; and upon the ratification of said report by the state of Virginia and the state of Maryland, through their respective legislatures, the said boundary lines shall be fixed and established so to remain forever, unless changed by mutual consent of the two states."

In 1854, the general assembly of Virginia met this action upon the part of the state of Maryland by the passage of an act which provides:

"Whereas the general assembly of Maryland has passed an act for running and marking the boundary line between that state and the state of Virginia, beginning therefor at the Fairfax stone on the Potomac river, sometimes called the North Branch of the Potomac river, at or near the source, and running thence due north to the line of the state of Pennsylvania; and whereas the legislature of Maryland has requested the appointment of a commissioner on the part of this state to act in conjunction with the commissioner of Maryland to

run and mark said line: therefore, be it enacted,

"1. That the governor appoint a commissioner who, together with the Maryland commissioner, shall cause the said line to be accurately surveyed, traced, and marked with suitable monuments, beginning therefor at the Fairfax stone, situated as aforesaid, and running thence due north to the line of the state of Pennsylvania."

And the act concludes:

"Upon the ratification of such report by the legislatures of the states of Virginia and Maryland, the said boundary line shall be fixed and established to remain forever, unless changed by mutual consent of the said states."

Under these acts of the legislatures of the respective states, commissioners were appointed, who made application to the [37] *Secretary of War for the services of an officer of the United States Engineers to aid them in carrying out the purposes of the acts. Upon this application, the Secretary of War detailed Lieutenant N. Michler, of the United States Topographical Engineers. As directed in both the acts, Lieutenant Michler commenced his work at the Fairfax stone, and ran a line northwardly, marking it at certain places. This line intersected the Pennsylvania line at a point about three fourths of a mile west from the northern extremity of the Deakins line, which had been run in 1788, as we have already stated. There was a triangle between the Deakins and Michler lines, having its apex at the Fairfax stone, and lines diverging thence, until there was a difference of three fourths of a mile at the base of the triangle at the Pennsylvania line.

It appears that the commissioners of the two states differed, the commissioner of Virginia contending that by the act of the legislature, above referred to, that state had not adopted the meridian line from the Fairfax stone as the boundary. The commissioner of Maryland contended for that meridian line. On March 5, 1860, the legislature of Maryland passed an act adopting the Michler line, commencing at the Fairfax stone at the head of the North Branch of the Potomac river, and running thence due north to the southern line of Pennsylvania, as surveyed in the year 1859 by commissioners appointed by the states of Maryland and Virginia, and thereafter the state of Maryland provided for the marking of the Michler line.

Virginia did not approve of the Michler line, but in 1887 West Virginia passed an act confirming the line as run by Lieutenant Michler in 1859 as the true boundary line between West Virginia and Maryland,

but the act was not to take effect until and unless Maryland should pass an act or acts confirming and rendering valid all the entries, grants, patents, and titles from the commonwealth of Virginia to any person or persons, to lands situate and lying between the new Maryland line and the old Maryland line heretofore claimed by *Virginia and West Virginia, to the [38 same extent and with the like legal effect as though the said old Maryland line was confirmed and established.

The divergence between Michler's line and the line shown on Deakins's map probably arises from the fact that Lieutenant Michler ran a true astronomical line, and that his line is a true north and south line, whereas the Deakins line was probably run with a surveyor's compass, and with less accuracy than the Michler line.

It is the contention of the state of Maryland that Deakins never attempted to run a true north and south line; that he never had any authority from the state of Maryland so to do; and that, in the act confirming the laying out of the lots by Deakins, it was especially declared by the state of Maryland that it did not show the true western boundary of the state; furthermore, that the attempts which have been made to trace the Deakins line show that it is not a true north and south line, but a broken line, having offsets in various places.

The state of Maryland insists that the evidence shows that a number of old grants made prior to the Deakins survey would extend west of the boundary line, as shown either by Deakins or Michler. It is the contention of the state of Maryland that when these grants were made she indicated a line further to the west than either of these lines, and that the ancient grants of large tracts of land show that fact. But the evidence contained in this record leaves no room to doubt that after the running of the Deakins line the people of that region knew and referred to it as the line between the state of Virginia and the state of Maryland. Lieutenant Michler, in the frank and able report filed with his survey, recognizes this situation, for he says:

"The meridian as traced by me last summer differs from all previous lines run; some varying too far to the east, others too far to the west. The oldest one, and that generally adopted by the inhabitants as the boundary lines, passes to *the east; and [39 from measurements made to it I found that it was not very correctly run. The surveyor's compass was used for the purpose, and some incorrect variation of the needle allowed. Owing to the thick and heavy growth of timber, it is utterly impossible to run a straight line through it without first open-

ing a line of sight. It could only be approximately done.

"When north of the railroad, and the nearer the Pennsylvania line is approached, the settlements and farms become more numerous; and if the meridian line is adopted as the boundary, it will cause great litigation, as the patents of most of the lands call for the boundary as their limits. On the Pennsylvania boundary the new line is about three quarters of a mile west of the old; on the railroad,—feet; at Weill's field, 85 feet; on the northwestern turnpike, about 40 feet, and on the backbone, about 20 feet."

These recitals from Lieutenant Michler's report, if the record were lacking in other evidence, would leave little doubt that there was an old boundary line, generally adopted, and that the adoption of the true meridian line, which Lieutenant Michler ran, would cause great litigation because of the acquiescence of the people in the old boundary line,—the Deakins line.

The report of the committee of the Maryland Historical Society, an exhibit in this case, contains a history of the boundary dispute, and it is therein said:

"The provisional line of 1787, or 'Deakins line,' as it was called, had long done duty as a boundary; and as the state granted no lands beyond it, it came to be looked upon, despite the emphatic protest of the assembly of 1788, as the true boundary line of the state. In process of time the marks became obliterated, and conflicts of title and litigation arose between the holders of Maryland and the holders of Virginia patents for lands in the debatable territory. So in May, 1852, the Maryland legislature passed an act reciting these facts, and requesting the governor to open a correspondence with [40] *the governor of Virginia about the matter; and authorizing him to appoint a commissioner, if the legislature of Virginia would also appoint one, which joint commission should run and mark a line due north from the Fairfax stone, which line, when ratified by both legislatures, should be the boundary between the states."

The state of Maryland has herself, in sundry grants, recognized this old line. In a grant by the state of Maryland for a tract called "Maryland," dated January 23, 1823, among other calls is this one: "Running thence south 36 degrees west, 86 perches to the Virginia and Maryland line, as run under the directions of Francis Deakins at the time of laying out the lots to the westward of Fort Cumberland, and thence running," etc.

In the Deakins description of the first lot north of the Fairfax stone, the following

language is used in describing military lot No. 1101:

"Beginning at a bounded maple marked 1100, standing one mile north from a stone fixed by Lord Fairfax for the head of the North Branch of the Powtomack river, and running north 89½ perches; east, 89½ perches; south, 89½ perches; then to the beginning, containing 50 acres."

This record leaves no doubt as to the truth of the statement contained in the report of the committee of the Maryland Historical Society, that the Deakins line, before the passage of the act under which the Michler line was run, had long been recognized as a boundary and served as such. Even after the Michler line was run and marked, the testimony shows that the people generally adhered to the old line as the true boundary line. There are numerous Virginia grants and private deeds of land given in the record, which call for this old Maryland line as the boundary.

The testimony shows that the people living along the Deakins line worked and improved the roads on the Virginia side, as a general rule, up to this line. Correspondingly, Maryland worked the roads on the other side of this line. On the *west of the [41 line, the people paid taxes on their lands in Preston county, West Virginia. They voted in that county, and with rare exceptions regarded themselves as citizens of West Virginia. As a general rule, the schools established there were West Virginia schools. The allegiance of nearly all these people has been given to West Virginia.

It is true there has been more or less contention as to the true boundary line between these states. Attempts have been made to settle and adjust the same, some of which we have referred to, and the details of which may be found in the very interesting document to which we have already made reference, the report of the committee of the Maryland Historical Society. In the proposed settlements, for many years, Virginia and West Virginia have consistently adhered to the Fairfax stone as a starting point for the disputed boundary. When West Virginia passed the act of 1887, ratifying the Michler line, it was upon condition that Virginia titles granted between the Michler line and the old Maryland line should be validated. Maryland, in the act of 1852, recognized the same starting point.

And the fact remains that after the Deakins survey in 1788, the people living along the line generally regarded that line as the boundary line between the states at bar. In the acts of the legislatures of the two states, to which we have already referred, resulting in the survey and running of the Michler line, it is evident from the language used

that the purpose was not to establish a new line, but to retrace the old one; and we are strongly inclined to believe that had this been done at that time, the controversy would have been settled.

A perusal of the record satisfies us that for many years occupation and conveyance of the lands on the Virginia side has been with reference to the Deakins line as the boundary line. The people have generally accepted it and have adopted it, and the facts in this connection cannot be ignored. In the case of *Virginia v. Tennessee*, 148 U. S. 503, 522, 523, 37 L. ed. 537, 544, 13 Sup. 42] Ct. Rep. 728, 736, *Mr. Justice Field, speaking for the court, had occasion to make certain comments which are pertinent in this connection, wherein he said:

"Independently of any effect due to the compact as such, a boundary line between states or provinces, as between private persons, which has been run out, located, and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. *Lord Hardwicke in Penn v. Baltimore*, 1 Ves. Sr. 444, 448; *Boyd v. Graves*, 4 Wheat. 513, 4 L. ed. 628; *Rhode Island v. Massachusetts*, 12 Pet. 657, 734, 9 L. ed. 1233, 1264; *United States v. Stone*, 2 Wall. 525, 537, 17 L. ed. 765, 767; *Kellogg v. Smith*, 7 Cush. 375, 382; *Chenery v. Waltham*, 8 Cush. 327; *Hunt, Boundaries*, 3d ed. 306.

"As said by this court in the recent case of *Indiana v. Kentucky*, 136 U. S. 479, 510, 34 L. ed. 329, 332, 10 Sup. Ct. Rep. 1051, 'it is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.' In the case of *Rhode Island v. Massachusetts*, 4 How. 591, 639, 11 L. ed. 1116, 1137, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: 'Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of states or individuals,

long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked *with greater justice and propriety [43 than in a case of disputed boundary.'"

And quoting from Vattel on the Law of Nations to the same effect:

"The tranquillity of the people, the safety of states, the happiness of the human race, do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title." [Bk. 2, chap. 11, § 149.]

And adds from Wheaton on International Law:

"The writers on natural law have questioned how far that peculiar species of presumption arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question." [Pt. 2, chap. 4, § 164.]

And it was said:

"There are also moral considerations which should prevent any disturbance of long-recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home, and to family, on which is based all that is dearest and most valuable in life."

In *Louisiana v. Mississippi*, 202 U. S. 1, 53, 50 L. ed. 913, 932, 26 Sup. Ct. Rep. 408, 423, this court said:

"The question is one of boundary, and this court has many times held that, as between the states of the Union, long acquiescence in the assertion of a particular boundary, and *the exercise of dominion [44 and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both."

An application of these principles cannot permit us to ignore the conduct of the states and the belief of the people concerning the purpose of the boundary line known as the old state, or Deakins, line, and to which their deeds called as the boundary of their

farms, in recognition of which they have established their allegiance as citizens of the state of West Virginia, and in accordance to which they have fixed their homes and habitations.

True it is, that, after the running of the Deakins line, certain steps were taken, intended to provide a more effectual legal settlement and delimitation of the boundary. But none of these steps were effectual, or such as to disturb the continued possession of the people claiming rights up to the boundary line.

The effect to be given to such facts as long-continued possession "gradually ripening into that condition which is in conformity with international order" depends upon the merit of individual cases as they arise. 1 *Oppenheim, International Law*, § 243. In this case, we think a right in its nature prescriptive has arisen, practically undisturbed for many years, not to be overthrown without doing violence to principles of established right and justice equally binding upon states and individuals. *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233.

It may be true that an attempt to relocate the Deakins line will show that it is somewhat irregular, and not a uniform, astronomical north and south line; but both surveyors appointed by the states represented in this controversy were able to locate a number of points along the line, and the northern limit thereof is fixed by a mound, and was located by the commissioners who fixed the boundary between West Virginia and Pennsylvania by a monument which was erected at that point, and we think from 45] the evidence in this record *that it can be located with little difficulty by competent commissioners.

We think, for the reasons which we have undertaken to state, that the decree in this case should provide for the appointment of commissioners whose duty it shall be to run and permanently mark the old Deakins line, beginning at a point where the north and south line from the Fairfax stone crosses the Potomac river, and running thence northerly along said line to the Pennsylvania border.

As to the contention made by West Virginia in her cross bill, that she is entitled to the Potomac river to the north bank thereof, we think that claim is disposed of by the case of *Morris v. United States*, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep. 649, already referred to. In that case, among other things, there was a controversy between the heirs of James II. Marshall and the heirs of John Marshall as to the ownership of the bed of the Potomac river from shore to shore, including therein certain

reclaimed lands. Claim of the one set of heirs was based upon the charter of Lord Baltimore of June, 1632, and that of the others upon the grant of King James II. to Lord Culpeper, afterwards owned by Fairfax, to which we have already referred.

After making reference to the award of the commission to fix the Virginia and Maryland boundary, appointed in 1877, fixing the line and boundary at low-water mark on the Virginia shore, to which arbitration the state of West Virginia was not a party, this court disposed of the controversy, irrespective of that award, in the following language, used by Mr. Justice Shiras in delivering the opinion of the court:

"Whether the result of this arbitration and award is to be regarded as establishing what the true boundary always was, and that therefore the grant to Thomas, Lord Culpeper, never of right included the Potomac river, or as establishing a compromise line, effective only from the date of the award, we need not determine. For, even if the latter be the correct view, we agree with the conclusion of the court below, that, upon all the evidence, the charter granted to Lord *Baltimore by Charles I., in 1632, [46 of the territory known as the province of Maryland, embraced the Potomac river and the soil under it, and the islands therein, to high-water mark on the southern or Virginia shore; that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings prior to the Revolution; nor was such grant affected by the subsequent grant to Lord Culpeper.

"The record discloses no evidence that, at any time, any substantial claim was ever made by Lord Fairfax, heir at law of Lord Culpeper, or by his grantees, to property rights in the Potomac river, or in the soil thereunder, nor does it appear that Virginia ever exercised the power to grant ownership in the islands or soil under the river to private persons. Her claim seems to have been that of political jurisdiction."

We think this decision disposes of and denies this claim of the state of West Virginia in her cross bill.

Upon the whole case, the conclusions at which we have arrived, we believe, best meet the facts disclosed in this record, are warranted by the applicable principles of law and equity, and will least disturb rights and titles long regarded as settled and fixed by the people most to be affected. If this decision can possibly have a tendency to disturb titles derived from one state or the other, by grants long acquiesced in, giving the force and right of prescription to the ownership in which they are held, it will no doubt be the pleasure, as it will be

the manifest duty, of the lawmaking bodies of the two states, to confirm such private rights upon principles of justice and right applicable to the situation.

A decree should be entered settling the rights of the states to the western boundary, and fixing the same, as we have hereinbefore indicated, to be run and established along the old line known as the Deakins or old state line; and commissioners should be appointed to locate and establish said line as near as may be. The cross bill of the state of West Virginia should be dismissed in so far as it asks for a decree fixing [47] *the north bank of the Potomac river as her boundary. Counsel for the respective states are given forty days from the entry hereof to agree upon three commissioners, and to present to the court for its approval a decree drawn according to the directions herein given, in default of which agreement and decree this court will appoint commissioners, and itself draw the decree in conformity herewith. Costs to be equally divided between the states.

Decree accordingly.

ALBERTO WILL, Doing Business under the Name of Will & Company; Frederick Midgley, Alfred Midgley, and Lewis Midgley, Doing Business under the Firm Name of David Midgley & Sons, et al., Appts.,
v.

JOAQUIN TORNABELLS, Doing Business under the Firm Name of J. Tornabells & Company, et al.

(See S. C. Reporter's ed. 47-70.)

Trial — findings — effect.

1. A finding that the evidence in a creditors' suit failed to establish that a conveyance by an insolvent debtor and a mortgage executed by his grantee were voluntarily made to hinder and delay the complaining creditors in the collection of their debts negatives the existence of fraudulent simulation, which was the controlling issue in the suit, although the court, in its conclusions of law, announced that an insolvent debtor had the right to give a preference, which must be regarded as intended to be responsive solely to other findings of fact,

NOTE.—On conveyance in fraud of creditors generally—see note to Gaylord v. Kelshaw, 17 L. ed. U. S. 612.

On participation by creditor in fraudulent intent of debtor which will make a transfer to pay or secure his debt invalid as to other creditors—see note to Rice v. Wood, 31 L.R.A. 609.

On the right of creditor to buy property from his debtor in satisfaction of the debt—see note to Feder v. Ervin, 36 L.R.A. 335.

tending to establish the giving of such a preference.

[For other cases, see Trial, XI. in Digest Sup. Ct. 1908.]

Fraudulent conveyances — fraud on creditors.

2. Only contracts in fraud of the rights of creditors are embraced in the provision of Porto Rico Civ. Code, art. 1291, including in the enumeration of contracts which may be rescinded, "those executed in fraud of creditors, when the latter cannot recover in any other manner what is due them," and such provision does not give the right to rescind a contract made by an insolvent debtor, merely because, without rescission, the creditor cannot otherwise recover his debt.

[Transactions in fraud of creditors, see Fraudulent Conveyances, in Digest Sup. Ct. 1908.]

Fraudulent conveyances — preferences.

3. Contracts made by an insolvent debtor, which, being upon adequate consideration, are not fraudulent simulations, cannot be rescinded under the law of Porto Rico, merely because their execution operates to give a preference in favor of a creditor.

[For other cases, see Fraudulent Conveyances, III. in Digest Sup. Ct. 1908.]

Appeal — review of facts — fraud.

4. The findings of fact in a creditors' suit, which are not reviewable in the Federal Supreme Court, embrace a statement accompanying the findings, to the effect that certain conversations between an attorney and client were excluded because the plan outlined by the latter did not tend to establish a fraud on creditors so as to exclude the claim of privilege, since such statement really shows that instead of rejecting the testimony, the court weighed and considered it, and its finding that the conversation did not tend to show the fraud which it was asserted it did show, and which was the same fraud charged in the bill, was but an expression of the conclusion of the court upon the facts involved in the merits of the controversy.

[For other cases, see Appeal and Error, 4782-4820, in Digest Sup. Ct. 1908.]

Evidence — hearsay — declarations of decedent.

5. Statements made by a widow with reference to conversations with her husband are inadmissible to show that certain transactions on his part were in fraud of creditors,—especially where she was not herself called as a witness.

[For other cases, see Evidence, 2021-2025, in Digest Sup. Ct. 1908.]

Appeal — prejudicial error — excluding evidence.

6. The error, if any, in rejecting testimony in a creditors' suit, offered only as against the widow of the alleged fraudulent grantor and her children, and not against the other defendants, is not prejudicial, where the court decrees that the claimants are not entitled to any relief under their bill.

[For other cases, see Appeal and Error, 5051-5065, in Digest Sup. Ct. 1908.]

Submitted December 10, 1909. Decided March 14, 1910.

APPPEAL from the District Court of the United States for Porto Rico to review a decree dismissing the bill in a creditors' suit. Affirmed.

See same case below, 3 Porto Rico Fed. Rep. 125.

The facts are stated in the opinion.

Messrs. N. B. K. Pettingill and Frederick L. Cornwell submitted the cause for appellants.

No brief was filed for appellees.

Mr. Justice White delivered the opinion of the court:

This appeal is taken to secure the reversal of a decree of the court below, dismissing the bill of complaint. The court sustained its action by an elaborate opinion, and subsequently stated, in a formal way, its findings of fact and conclusions of law.

The evidence is not in the record, although a portion of the testimony is contained in the formal findings of fact, upon the theory that this was necessary to preserve the right to review the action of the court concerning objection urged by the defendants to the admission of certain testimony tendered on behalf of the complainants. The record, we are constrained to say, is unsatisfactory and confused,—a condition which we assume has resulted from circumstances referred to by the court below in the opening passage of its opinion, as follows:

"This is a creditors' bill filed June 23, 1902, and permitted to remain on the docket of this court during the five years that have since intervened, without any apparent proper or sufficient cause for the unwarranted delay, and with infinite inconvenience to many parties connected with the subject-**49**] *matter of the controversy. The first two years and a half of the time seem to have been taken up with a battle over the proceedings, trying to get the answers of the several respondents settled, and during which time complainants' exceptions to several of the answers were referred to a master, arguments had before him, his report filed, exceptions to the same presented, arguments had on the latter, and briefs submitted in support thereof, and so on, in an interminable and fruitless contest of petitions, motions, exceptions, pleas, demurrers, orders, affidavits, and rules to show cause, without result or real merit, as we see it. The next year and a half seem to have been taken up somewhat in the same way, and also partly in an application for a receiver-**54** L. ed.

ship and in opposing efforts to the same, and in efforts to prevent outside parties from foreclosing several mortgages they had on some of the premises involved, that they had secured in the meantime, in enjoining them from so proceeding, and in issuing rules as for contempt against them for their action in that behalf, etc." [3 Porto Rico Fed. Rep. 126.]

In order to in some measure dispel the obscurity which must arise from the circumstances just referred to, we briefly state, in their chronological order, certain unquestioned facts which gave rise to the controversy, and also outline the pleadings and proceedings, the whole for the purpose of enabling us to adequately test the sufficiency of the errors assigned.

For many years the firm of J. Tornabells & Company, composed of Joaquin Tornabells and Carlos Doitteau, was established in Porto Rico and there carried on a mercantile business. The firm was the owner of various trading establishments and warehouses, was, besides, the owner of considerable real estate, embraced in which were extensive coffee plantations which the firm carried on, including the buildings, machinery, and appurtenances incident thereto. It is not disputed that, presumably as the result of losses occasioned by a disastrous hurricane which devastated the island of Porto Rico, the firm, prior to 1900, had become temporarily embarrassed, and, under provisions of the local law, had obtained in a local court "an extension of time for [50 the payment of its debts. While we state the fact as to the suspension, we shall nevertheless indulge in the assumption that such fact has no material bearing upon the questions here to be decided. We do this because no rights based upon such fact were asserted in the bill of complaint or passed upon by the court, and no right of such a character is asserted in the assignments of error or referred to in the elaborate argument filed on behalf of the appellants, the appellees not having appeared in this court, either orally or by brief.

On May 9, 1900, Tornabells & Company, by deed before a notary public, conveyed to Luis Aran y Lanci the following property, as stated by the court below: "Its place of business and other town property, its stock of merchandise and twenty-six several pieces of real estate, most of them being coffee plantations and their appurtenances." The stated price was 197,700 pesos, provincial money, 30,000 declared to have been paid in cash, and the remainder to be paid in ten instalments of 16,770 pesos, bearing no interest, maturing respectively from one to ten years. A few days thereafter, on May 11, 1900, Aran y Lanci mortgaged for

150,000 pesos nineteen of the twenty-six pieces of real estate thus conveyed to him. This mortgage was in favor of one Baudelio Duran y Cat and a firm styled Duran & Coll. The mortgage in favor of the first was for 130,000 pesos, divided into ten annual instalments of 13,000 pesos each, evidenced by notes to the order of the mortgagee, maturing in each of the ten years, the whole being secured on fourteen of the twenty-six pieces of real estate. The mortgage in favor of Duran & Coll was on five of the pieces of real estate acquired as aforesaid, and secured 20,000 pesos, divided into five instalments of 4,000 pesos each, maturing in each of five years. These mortgages were not indivisible, as the amount of each was apportioned among the various pieces of real estate, so that each piece was liable only for the sum secured on it. The sale to Aran y Lanei was recorded on May 21, and the 51] mortgages just stated *on May 24, 1900. On June 25, 1900, the mortgage for 20,000 pesos, which had been executed in its favor by Aran y Lanei, was assigned by the firm of Duran & Coll to Raimundo Valdecillo to secure an indebtedness due him by the firm of 6,000 pesos provincial money, and this assignment was duly registered on July 5, 1900. Sixteen months after the conveyance to Aran y Lanei,—that is, on September 16, 1901,—the firm of Tornabells & Company acknowledged by notarial act that Aran y Lanei had, by anticipation, fully paid the deferred purchase price (167,700 pesos). Nine months after such acknowledgment Aran y Lanei mortgaged in favor of the Banco de Solleir, to secure 32,780 pesetas, Spanish money, one of the pieces of property previously mortgaged to Duran y Cat. On July 5, 1902, this mortgage was put upon record. A few days before it was so put upon record, *viz.*, on June 23, 1902, the suit before us was commenced.

The bill—which was not sworn to—was originally filed on behalf of three commercial firms, Will & Company of Cuba, David Midgley & Sons of Manchester, England, and Ramon Cortado & Company of Ponce, Porto Rico, and the members of said firms, in their own behalf and in behalf of all others similarly situated who might intervene in the cause. It was alleged that the complainants were creditors of the firm of Tornabells & Company at the time of the conveyance to Aran y Lanei and the execution of the mortgages by Aran y Lanei, above recited, and that, subsequent to said transactions, the claims of the complainants had been merged into judgments against the firm, obtained in the court where the bill was filed, and that on such judgments executions had issued and been returned unsatisfied. It was further alleged that the con-

veyance made by Tornabells & Company to Aran y Lanei, and the mortgages put by the latter upon the property in favor of Duran y Cat, and the firm of Duran & Coll, were fraudulent simulations, and that the property covered by the conveyance and the mortgages continued to belong to the firm, and was held by Aran y Lanei under a secret trust in favor of Tornabells & Company, the conveyance *and mortgages [52 being mere fictitious devices adopted between the parties for the purpose of screening the property from creditors, or hindering and delaying them in the recovery of their claims. It was further charged that, at the time of the transactions referred to, Tornabells & Company was insolvent, that the alleged price mentioned in the conveyance to Aran y Lanei was largely below the real value of the property, and that, despite the alleged conveyance and mortgages, the firm of Tornabells & Company continued to control the property conveyed and enjoy the fruits thereof. The prayer of the bill in substance was that a receiver of the property might be appointed, that the conveyance and subsequent mortgages and transfers should be declared to be fraudulent and void and be vacated and annulled, and that the property and each and every parcel thereof should be decreed to be subject to the lien of the several judgments. Tornabells and Doitteau, the members of that firm, Aran y Lanei, Duran y Cat, and Duran & Coll, and the members of that firm, were made defendants to the bill. Valdecillo, to whom the mortgage executed by Aran y Lanei in favor of Duran & Coll had been assigned, was also joined as defendant, he being called upon to establish the verity of his alleged lien. Alfredo Saliva, who was alleged to be the attorney in fact of, and to have acted for, Aran y Lanei in the transactions set out in the bill, was also made a defendant.

Separate sworn answers were filed on behalf of the members of the firm of Tornabells & Company, traversing the allegations of insolvency and of simulation and fraud, both as respected the conveyance to Aran y Lanei and the mortgages executed by the latter. The answers contained affirmative allegations as to the good faith of the conveyance to Aran y Lanei, the adequacy of the consideration, and full payment thereof prior to the commencement of suit. The taking possession by and the exclusive control and management of the property conveyed, and receipt of the fruits thereof by Aran y Lanei for his exclusive use and benefit was also averred. An answer *sub- [53 stantially of like tenor, also sworn to, was filed on behalf of Aran y Lanei. Juan Coll, a partner in the firm of Duran & Coll, also

answered, and averred the bona fides of the mortgage executed by Aran y Lanci to his firm, and the transfer thereof made to Valdecillo.

On October 31, 1904, the firm of L. W. & P. Armstrong of New York city, unsecured creditors of Tornabells & Company, were made parties complainant to the bill. Thereafter, Ruffer & Sons, a firm doing business in London, England, and the Caja de Ahorros de Mayaguez, a Porto Rican corporation, as creditors of Tornabells & Company, were also allowed to intervene and become parties complainant.

Early in 1905, Tornabells died and the cause was revived as to him against his widow and children as his heirs. In November of the same year Aran y Lanci died, and the cause was revived against his widow, as administratrix of his estate. Doitteau, the surviving partner of Tornabells & Company, died on January 22, 1907, and the cause was revived against his widow and children.

Duran y Cat, an original defendant to the bill—in whose favor, as we have stated, Aran y Lanci had mortgaged fourteen of the pieces of real estate for 130,000 pesos—was not served with process and did not enter his appearance. He also died during the pendency of the cause. On February 12, 1907, upon motion of the complainants, an order was entered dismissing the cause as to the heirs of said Duran y Cat, "on the ground that said heirs, being out of the jurisdiction, and having entirely disposed of their interest in the cause, are not indispensable parties thereto."

Journal entries are contained in the record, showing that more than a dozen firms or individuals became additional defendants in the cause. The time when they came in and the nature of the pleadings by them filed or the proceedings had concerning their rights do not distinctly appear. It is, however, fairly inferable that these new defendants came in long after the commencement of the suit, either during or subsequent to the dilatory and confused proceedings referred to by the court in the excerpt heretofore made from its opinion, and that such defendants asserted rights claimed to have been acquired, after the filing of the bill, in the property affected by the suit, either as purchasers or as holders of mortgage notes. In this connection it is to be observed that neither when the suit was commenced nor at any time during its progress was the court requested by the complainants to award a cautionary notice, to be placed upon the public records, as a means of warning to parties who might deal with the property in controversy, thus preserving against them, *pendente lite*, the

rights which might be ultimately established as existing in the complainants, and which would not have been preserved by the mere pendency of the suit, unaccompanied with the allowance and registry of the statutory cautionary notice.

Answers or amended answers were filed on behalf of the widow and administratrix of Tornabells, and by the guardian *ad litem* who was appointed for his minor children. An answer was also filed on behalf of the widow and administratrix and minor children of Doitteau. This also was the case as to the widow and administratrix of Aran y Lanci. These various answers were substantially in accord with those which had been previously filed on behalf of the original defendants, except that in one of them the prescription of one year was pleaded. It is inferable from the record that at this stage of the proceedings, or, at all events, at a time not earlier than four years after the commencement of the suit, certain persons who had acquired rights in or to the property, either directly from Aran y Lanci or through the mortgage executed in favor of Duran y Cat and Duran & Coll, sought to enforce their claims and were enjoined from so doing. At about the same time a receiver was appointed. The record is silent, however, as to whether the receivership was intended to apply to all the property in controversy, or whether the receiver attempted to take possession under his appointment, although it would seem that to some extent he did so, since by the final decree the [55 receiver was ordered to settle his accounts, etc.

It came at last to pass in the spring of 1907 that the cause was heard and taken under advisement. It was disposed of in the summer of that year by the entry of a final decree dismissing the bill, and was followed nearly six months thereafter, on December 19, 1907, by the making of formal findings of fact and conclusions of law applicable thereto.

The facts found are embraced in fourteen numbered paragraphs. The first merely states in general terms the filing of the bill, makes allusion to the complicated proceedings which followed, the dismissal as to some of the defendants (presumably the heirs of Duran y Cat), the coming in of other parties, the ultimate joinder of issue, and the submission of the cause. In the second is stated the fact that evidence was heard on behalf of the complainants and the submission of a motion for a decree dismissing the bill on two grounds; *viz.*, the failure to prove the allegations of the bill and the prescription of one year. The third finding is as follows:

"3. The documentary evidence introduced

on behalf of complainants and the testimony of all the witnesses do not prove the allegations of the bill so as to entitle the complainants to a decree in their favor, declaring the conveyance from defendants Tornabells & Company to defendant Aran, and the mortgage from defendant Aran to defendants Duran y Coll and Duran personally to be voluntary, or made to hinder and delay the complainants in the collection of their debts."

The fourth, fifth, sixth, seventh, eighth, and ninth paragraphs, in a summary way, find substantially, as we have stated them, the facts concerning the conveyance by Tornabells & Company to Aran y Lanci, the execution of the mortgages in favor of Duran y Cat and Duran & Coll, and the divisibility of those mortgages, as well as the fact that the claims upon which the complainants sued, although in existence, were not reduced to judgment until some time after the execution of the conveyances and 56] mortgages in question. In *one of the paragraphs it is stated that the property conveyed by Tornabells & Company was substantially all that was owned by the firm at the time of the conveyance, and that Duran y Cat was a relative of the senior member of Tornabells & Company. By the tenth paragraph it is found that the mortgage asserted by the Banco de Sollier was one which Aran y Lanci had executed in favor of that bank on one of the properties acquired by him from Tornabells & Company, and was given to secure a debt due by that firm to the bank, that Aran y Lanci incurred no personal responsibility, and that he produced, as paid, the mortgage note identified with the act of mortgage executed in favor of Duran y Cat, which had been released or extinguished so far as the particular property was concerned. The eleventh paragraph stated that the mortgage asserted by the firm of Fritze, Lundt, & Company, on one of the pieces of property conveyed to Aran y Lanci, was executed by the latter in favor of Fritze, Lundt, & Company to secure the payment of a current account for supplies furnished for the cultivation of properties included in the conveyance from Tornabells & Company to Aran y Lanci, and that previous to the giving of the mortgage the advances made by the firm were secured by a pledge of one of the mortgage notes executed by Aran y Lanci in favor of Duran y Cat, which, when Aran y Lanci mortgaged the property in favor of the firm of Fritze, Lundt, & Company, was produced by him as the owner thereof and canceled. In this case, also, no personal responsibility was assumed by Aran y Lanci. The twelfth and thirteenth paragraphs state sales by Aran y Lanci, in

1903 and 1905, to named persons, of pieces of the property acquired by him from Tornabells & Company, and the production by Aran y Lanci, as extinguished and paid, of the mortgage notes resting upon the property so conveyed, identified with the mortgage in favor of Duran y Cat. The fourteenth paragraph simply embraced a general statement of the release of the Duran y Cat mortgage on the properties referred to in the tenth to the thirteenth paragraphs, inclusive, and that the mortgages and conveyances referred to in *such paragraphs "were, in each and [57 every case, duly recorded in the registry of property prior to any record in the registry of property of the judgments obtained by complainants herein against Tornabells & Company, referred to in paragraph nine."

From the facts thus found the court drew the following conclusions of law:

"1. That the proof on behalf of complainants is not sufficient to entitle them to any relief under their bill of complaint.

"2. That there is not now, and never was, any such statute in Porto Rico as the statute of 13th Elizabeth in England, referring to fraudulent conveyances, because we have the civil-law rule here instead of the common law. Every state in the Union has a re-enactment of the statute of Elizabeth in some form or other among its laws. In the absence of it there is no rule of law preventing a debtor, even when insolvent, for even that does not take from him the power of disposition of his property, and paying his debts with it, or a portion of his debts, and preferring one or more of his creditors with absolute intent to hinder, delay, or even to defeat other creditors. If the favored creditor receives no more than is due him, and permits the debtor to secure no advantage to himself, the transaction will be upheld.

"3. That the statute of limitations of one year, as fixed by article 37 of the mortgage law, is applicable to suits like the one at bar.

"4. That complainants, under the pleadings and proofs herein, are not entitled to subject the properties described in the bill of complaint herein to any lien, interest, or decree by which the complainants would be entitled to have the conveyance and mortgages described in said bill of complaint canceled and annulled for the benefit of the said complainants.

"5. That the bill of complaint should be dismissed."

These conclusions were followed by the reproduction of portions of the testimony to preserve the right to review certain *rulings of the court respecting testi-[58 mony offered on behalf of the complainants.

The assignments of error are seven in

number. The seventh we at once put out of view, as it only charges generally that the court erred in dismissing the bill of complaint.

The sixth, fifth, and fourth assignments concern rulings as to the admissibility of testimony, and the third complains of the action of the court maintaining the plea of prescription of one year. As these assignments cannot be disposed of without, in some respect, appreciating the merits, we temporarily forego considering them.

The remaining assignments, that is, the first and second, are as follows:

"First, the court erred in finding as matter of law that in Porto Rico there was no rule of law preventing a debtor, even though insolvent, from preferring one creditor over others, with absolute intent to hinder, delay, or even defeat the just claims of said others.

"Second, the court erred in finding as matter of law, from the facts found, that the above rule of law was applicable, and in not finding as matter of law that the applicable rule was that a debtor could not transfer his property without any consideration, for the purpose of delaying or defeating the just claims of his creditors."

It is apparent that these propositions assert that a twofold error was committed: first, in not applying to the facts as found the legal principle rightfully applicable; and, second, by erroneously stating the law in the irrelevant proposition which was mistakenly applied in deciding the cause. The first contention rests upon the theory that the facts found established that the conveyance and mortgages which the bill assailed were mere fraudulent simulations, and upon this assumption insists that the case should have been controlled by the law applicable to that state of fact, instead of being governed, as it was, by considering how far, as a matter of law, a debtor, being insolvent, 59] had a right, through a real and *bona fide transaction, to prefer one or more of his creditors. But when the findings of facts are considered, it is manifest that the premise upon which the proposition rests is a false one, since it cannot be indulged in without disregarding the findings. We say this is manifest, because the third finding of fact, which we have already quoted, expressly declares that the documentary evidence introduced on behalf of the complainants and the testimony of all the witnesses did not establish that the conveyance from Tornabells & Company to Aran y Lanei, and the mortgage made by him to the firm of Duran & Coll and to Duran y Cat, individually, were "voluntarily made to hinder and delay the complainants in the collection of their debts." The error which would

have resulted from applying the doctrine applicable to a mere simulated transfer to a case where the findings established that simulation was not shown is self-evident. This result, which necessarily arises from a consideration of the mere text of the third finding, is also demonstrated if that finding be contemplated in the light of the issues which the cause presented in connection with the other findings and all the conclusions of law which were deduced therefrom and applied in deciding the cause. The essential charge which the complaint made was the fraudulent and simulated character of the conveyance and mortgages which were assailed. That issue was, therefore, the controlling question to be decided. Considering the findings, as we have previously fully stated them, it is, we think, clear that the third finding was intended by the court as a statement of its conclusion of fact as to that controlling issue, and that the first conclusion of law which the court stated, that is, the insufficiency of the proof to justify recovery by the complainants, was intended as the legal resultant of the finding which had established that there had been a failure to prove the charge of simulation.

We think it is also clear that the second proposition of law which the court announced, that is, the right of a debtor under the Porto Rico law, although insolvent, to give a *preference, in no way detracted from or modified the previous finding and conclusion as to the absence of proof of simulation or purpose to hinder and delay creditors in the conveyance from Tornabells & Company to Aran y Lanei and the Duran y Cat and the Duran & Coll mortgage, but was solely intended as responsive to the findings in other respects. That is to say, we think the second finding of law was responsive to the facts found in the paragraphs other than number three, which tended to establish that, even although the sale from Tornabells & Company to Aran y Lanei was not simulated, and not intended to hinder and delay creditors, nevertheless Aran y Lanei had discharged a portion of the credit price which he had agreed to pay by making payments to third persons, creditors of the firm of Tornabells & Company, in extinguishment of the indebtedness of the firm to such creditors, and thus, to the extent of such payments, preferring the creditors paid out of the price due to Tornabells & Company as the result of the sale.

Indeed, unless the appreciation which we have just made of the findings and the conclusions of law deduced therefrom be correct, it would cause the findings of fact to be absolutely silent on the issue of simulation, although that issue was the control-

ling one in the cause,—an issue, indeed, so essential that it is impossible to conceive that the cause could have been disposed of on its merits without a finding on the subject. But if the findings could be thus envisaged, the inquiry would be at once suggested whether they were not so manifestly irresponsible to the case as made by the pleadings and to the facts necessarily involved in the decision rendered as to cause them to be no findings at all, and therefore to require at our hands an affirmance of the judgment because of the substantial absence of any finding to enable us to review. *Gray v. Howe*, 108 U. S. 12, 27 L. ed. 634, 1 Sup. Ct. Rep. 136. Concerning this suggestion, however, we express no opinion, since we do not consider that the findings are of the unsubstantial and irrelevant character which would result from attributing to them the construction contended for by the appellants.

61] *Our conclusion that the findings of fact exclude the contention concerning the simulated character of the assailed contracts renders it unnecessary to review the authorities cited in argument to establish the proposition, which is not challenged, that, under the law of Porto Rico, creditors possess the right to set aside mere fraudulent and simulated contracts or conveyances made by their debtor to or in favor of an interposed person, in order to place the property of the debtor apparently in the name or under the control of such person for the purpose of defeating creditors.

The substantial foundation upon which the cause was based, that is, the issue as to the simulation of the conveyance to Aran y Lanei and the mortgage to Duran y Cat and the firm of Duran & Coll being disposed of, the remaining contentions are free from difficulty. We say this because, although it is elaborately insisted that, putting the question of simulation out of view, the court was wrong in its second legal conclusion to the effect that the law of Porto Rico did not avoid a real and otherwise valid contract merely because its result was to prefer one or more creditors of the debtor making the contract, we think such contention is shown by the record to be an afterthought, or, if not, is unsupported by the provisions of law which are cited to maintain it. An afterthought because the entire theory of the bill was opposed to the conception that the assailed transactions merely embodied preferences giving rise to a revocatory action, that is, merely to have an otherwise valid contract revoked. Indeed, it is difficult to imagine that the action in any aspect was considered as but revocatory in character, when it is borne in mind that although the mortgage in favor

of Duran y Cat covered fifteen pieces of real estate securing 130,000 pesos, he was not served with process, and after his death, on motion of the complainants, the cause was dismissed as to his heirs, upon the theory that they had no interest in the result. We say that the contention as to preference, if not an afterthought, is unsupported by the provisions of law relied upon, *since [62 those which are referred to plainly relate to cases of simulation, and, even if applicable to a question of preference, tend to support the view stated by the court in its second conclusion of law. For instance, the military order of March 5, 1899, deals with simulated transfers, and, when its context is considered, we think also concerns alone sales made seemingly for cash, and therefore, for a twofold reason, is inapposite to the question of mere preference arising from a contract for a legal consideration, although not immediately payable in cash. So, also, the general provisions of article 1101 of the Civil Code, providing that those who fraudulently neglect to fulfil their obligations are liable in damages; those of article 1275, declaring that contracts without a consideration, or with illicit consideration, can have no legal effect; and the terms of article 1276, providing that the statement of a false consideration in contracts shall render them void, unless it be proven that they were based on another and licit consideration,—may be put out of view, since they simply announce undisputed propositions of law which are not involved in the case before us, and which are not disputed by anyone. And a like reason is also adequate to dispose of the contention based upon the third paragraph of article 1291 of the Civil Code, which embraces in the enumeration of contracts which may be rescinded, “those executed in fraud of creditors, when the latter cannot recover in any other manner what is due them.” We say this, since this provision clearly limits the right of the creditor to rescind to cases where he cannot otherwise recover his debt without resorting to an action for rescission, and even in such case, only confers such right where the contract sought to be rescinded is one which is in fraud of his rights. To contend, as is in effect done in the argument at bar, that the article gives to a creditor a right to sue to rescind any contract made by his insolvent debtor, simply because, without rescission, the creditor cannot otherwise recover his debt, is to distort the clause by misconceiving its obvious meaning. The power to seek rescission being thus *limited to contracts [63 which are in fraud of the rights of the creditor, the question is, Did the court below err in holding that, under the law of Porto Rico,

contracts made by an insolvent debtor which were not fraudulent simulations, because made upon adequate consideration, are not susceptible of being resealed merely because their execution operated a preference in favor of a creditor? We are cited to no express provision of the local law, or referred to any decision so interpreting that law, and we think an analysis of the provisions of the local law relied upon for the purpose of inferentially showing that the court below erred, clearly not only does not support, but refutes the contention we are considering. Thus, the provision expressly authorizing the right to reseal payments made by an insolvent debtor on account of obligations which, at the time of making the payments, the debtor could not be compelled to make (Civil Code, art. 1292), plainly import the validity of such a payment under other circumstances. So, also, the provision creating a presumption of fraud as to alienations for valuable consideration, made by an insolvent debtor against whom a condemnatory judgment has been rendered or a writ of seizure of property has been issued (Civil Code, art. 1297), also gives rise to the inference that where these circumstances do not exist the contrary rule would apply. And the inferences which are deducible from the text of the Code are cogently fortified by a consideration of the mortgage law. Thus, while the law contains an enumeration of the suits which may be brought for the rescission of conveyances made for the purpose of defrauding creditors, and includes those made without consideration when the third person was a party to the fraud (mortgage law, arts. 36 and 37), it does not mention the case of a mere preference resulting from a contract made for an otherwise valuable consideration. So, also, in article 39, the conveyance without consideration to defraud creditors is expressly limited to those where "there was no price or its equivalent, or any pre-existing obligation which had fallen *dû*,"—an affirmative prohibition which would seem necessarily to exclude a right to reseal a contract because of mere preference, where there was a price or its equivalent, or where the consideration was a pre-existing obligation which had fallen due.

The foregoing considerations cause it to be unnecessary to pass on the error which it is alleged was committed in maintaining the plea of prescription of one year. It remains, therefore, only to dispose of the errors based upon the action of the court in disposing of objections to testimony. They relate to two subjects; the first, to objections made to the admissibility of the testimony of Mr. Cornwell, one of the attorneys of record of the complainants, con-

cerning statements made to him by members of the firm of Tornabells & Company in reference to their intention to dispose of or mortgage their property, and the other, to the testimony of the same witness concerning statements made to him by the widow of Tornabells after the death of her husband, and during the pendency of the cause, as to alleged conversations had by her with her husband, tending to show simulation of the contracts which were assailed. To pass upon the contentions on these subjects, a statement of what transpired at the time the evidence in question was proffered, and of the action of the court thereon, is essential. While testimony was being taken in open court, Mr. Cornwell, one of the attorneys for the complainants, was offered as a witness on their behalf. It developing at once from the questions put to him that the purpose was to draw from the witness statements made to him by the members of the firm of Tornabells & Company shortly before the assailed conveyance and mortgage were executed, objection was made that such statements were incompetent, because, at the time they were made, Cornwell was the attorney for the firm and its members, and therefore the statements were not admissible, because privileged communications. Thereupon the examining counsel, while not denying that, at the time the statements were made, the relation of attorney and client existed, insisted that the statements were admissible, because their character was such as to cause them to be outside of the privilege. The court declaring that it would reserve its ruling on the objection until it had an opportunity to examine the subject during the noon recess, the examination of the witness proceeded for the purpose of showing his professional relation to the firm of Tornabells & Company at the time of the making of the statements. When the court convened after the recess, the subject of the admissibility of the offered testimony was at once taken up. The court intimating doubt on the subject, the counsel making the objection declared that he had witnesses present by whom he expected to prove that Mr. Cornwell not only was the confidential legal adviser of Tornabells & Company at the time the statements were made to him concerning which it was desired to question him, but that he continued to act for that firm as their attorney after the assailed contracts were made up to the time of the bringing of this suit. Answering this statement, the counsel for complainants declared that his position was that the offered proof was irrelevant in view of the ruling in *Dent v. Ferguson*, 132 U. S. 50, 33 L. ed. 242, 10 Sup. Ct. Rep. 13,

to the effect that the privilege did not extend to statements made by a client to his attorney, of the intention of the client to commit a fraud. The court then announced as follows: "I am going to permit Mr. Cornwell to testify, reserving the right to see what it is, giving to all the counsel a right to except." Upon this announcement, counsel for the defendants insisted upon being permitted to call witnesses to establish the existence of the professional relation of the witness with the firm, as previously stated, and proceeded to do so. After testimony had been given and documentary evidence introduced without objection, tending to show the existence of the relation of attorney and client between the witness and the firm of Tornabells & Company, in accordance with the previous declaration as to what was proposed to be proven on that subject, the court interrupted the taking of the testimony as follows:

66] *The court: It doesn't change the court's mind as to admitting the testimony in the way it intimates. It will let it in.

Mr. Dexter: I desire to except against that ruling.

The court: Give an exception to all counsel that wish it.

Mr. Dexter: I want my objection to clearly appear: (1) It is incompetent because of the relation of attorney and client; (2) it is incompetent under the United States statute; and (3) because of the party being dead.

Mr. Boerman: I want an exception to every question given.

The witness Cornwell was then recalled and was fully examined and cross-examined, not only in regard to the alleged statements, but as to his professional relations with the firm of Tornabells & Company when the statements as to which he testified were made, and thereafter up to or nearly about the time of the bringing of this suit.

Beyond question, the testimony established that the witness had been the confidential legal adviser of the firm of Tornabells & Company up to and at the time when the statements as to which he testified were made. Without reproducing the testimony as to the statements, we think it suffices to say that, on the examination in chief of the witness, he repeated a conversation had with both members of Tornabells & Company a short while before the making of the conveyance to Aran y Lanci and the mortgage by the latter of the property, which conversation was occasioned by the fact that the members of the firm called upon the witness as their legal adviser,

either to consult him or to state to him the purpose of the firm to convey or mortgage its property, and that the witness, on his examination, stated that he construed the statements made to him by his clients as unfolding a purpose on their part to make a simulated transfer of their property to defraud their creditors, and that he, the witness, declared he could not represent them in the matter or have anything to do with it. The second statement testified to a conversation had with Doitteau, one of the members of the firm, after *the assailed [67 conveyance and mortgage had been put upon the record, which the witness considered was an admission by Doitteau of the fraud and an explanation on the ground that he consented to it because of the influence of his partner, Tornabells. It is also true, however, that the statements made by the witness on cross-examination tended to qualify the impression as to the conversation resulting from his statements in chief, and to indicate that the purpose of the members of the firm, as disclosed by them in the conversation, was either to sell or mortgage their property in order to raise money to apply to their debts, and that the witness thought that this purpose was illegal, because it was intended with the funds which might be raised to prefer particular creditors. It was established that, at the time of the first conversation, the witness, although the attorney of the firm, had to its knowledge the claim of one of its creditors in his hands professionally. It was also stated that after the conversations above referred to, and after the witness had knowledge of the existence of the assailed conveyance and mortgage, he continued both to have personal and professional relations with the firm. He brought a number of suits in its behalf during the two years which elapsed between the making of the assailed conveyance and mortgages and the bringing of this suit. In fact, the claim which was in the witness's hands at the time of the conversation with the members of the firm was some time afterwards merged to judgment by a confession by the members of the firm, which was written in the office of the witness by one of his associates. Precisely when the witness became the counsel for all the complainants does not exactly appear, but certain is it that he stated in his testimony that he was to receive a large contingent fee, amounting in several of the cases to 50 per cent of the amount recovered. The case, as we have at the outset said, was decided some months after its submission, and six months thereafter the statement of facts to which we have referred, accompanied with extracts from the evidence, was *certified by the [68

court. After reproducing in the statement the extracts from the testimony, the court said:

"As appears from the above, the court tentatively allowed the foregoing evidence of said witness Cornwell to be admitted, but subsequently, upon the consideration of the testimony as a whole, and upon making its findings of fact and law, and rendering its decision herein, the court did determine and rule that the defendants' objections to the testimony of said witness Cornwell, in so far as same related to conversations between said witness and Joaquin Tornabells, Carlos Doitteau, and Luis Aran, should be sustained and said testimony excluded, because the plan outlined by said Tornabells during said conversation did not constitute a fraud upon creditors under the laws of Porto Rico at that time in force, hence, the privilege existing as to confidential communications between attorney and client was applicable thereto; and further, because such testimony involved admissions of a dead man against the interests of his own heirs, who are parties to the suit."

It is upon this statement that the contention is based that the court illegally rejected the testimony of the witness Cornwell. But, when the statement is accurately considered, it appears that, instead of rejecting the testimony, the court weighed and considered it, and but declared that on its face it did not tend to establish a fraud within the meaning of the Porto Rico law, and hence, that the statements were privileged. As the fraud on the part of the firm of Tornabells & Company which was charged in the bill, and the fraud which it was insisted was demonstrated by the statements made to the witness, were in substance one and the same, it necessarily follows that the finding of the court, that the statements testified to did not tend to show the fraud which it was asserted they did show, was but an expression of the conclusion of the court upon the facts involved in the merits of the controversy, and therefore is embraced in its finding of fact, which we may not review. If, however, we could otherwise consider the action of the court, we are constrained to say, upon an examination of the *testimony of the witness, made part of the certificate, that we think the court was right in concluding that the testimony did not establish a sufficient foundation to relieve the witness from the obligation resting upon him as the result of his professional relations.

The error which it is insisted the court committed as to the statements of the widow of Tornabells need only be briefly noticed. In the course of his examination, the witness Cornwell was asked concerning

statements made to him by Mrs. Tornabells of conversations which she stated she had with her husband, tending to show that the assailed contracts were simulated, the statements to the witness having been made after the death of Mr. Tornabells. In reference to the motives which induced Mrs. Tornabells to make to him the statements about which the witness was asked, he said that she represented herself to be in great pecuniary distress, and was desirous of ascertaining whether she and her children could not in some way be benefited if the pending suit assailing the conveyance and mortgage of the property was successful. Indeed, on cross-examination, the witness said:

Q. Is it a fact, Mr. Cornwell, that a contract was made between your firm and this woman to give her either money or property?

A. If it was, it was made afterwards by Judge Pettingill and Mr. Horton.

Q. I am asking you if it was.

A. I don't know. I am out at the mill the most of the time.

On objection being made to the witness testifying to the statements of Mrs. Tornabells as to the conversations with her deceased husband, the court declared that the objection would be overruled *pro forma*, with a right to sustain it later, and gave counsel for the defendants an exception. Thereupon the counsel for the complainants declared as follows:

"I want to get on the record that it is not claimed by the complainants that this statement, whatever it may be, made *by [70 the widow of Tornabells as a defendant in this case, binds any defendant or is admissible against any defendant except herself and the minor children whom she represents."

After this declaration, the witness testified as to the statements made to him by Mrs. Tornabells concerning conversations with her husband, the substance of which tended to show that the assailed contracts were fraudulent simulations. Although the testimony was thus in the case when it was submitted to the court for decision, in its certificate appended to the statement of facts to which we have already referred, the court said that, in disposing of the case, it, in effect, concluded that the statements by Mrs. Tornabells as to the conversations with her husband were inadmissible, because they were hearsay, Mrs. Tornabells not having been called as a witness, and because, in any event, it was incompetent to establish the want of good faith in written contracts made by a deceased person by re-

peating conversations had with him during his lifetime. Conceding that the action of the court can be construed as indicating that it rejected the testimony instead of simply weighing it, and found it insufficient to prove the alleged fraud, we think it suffices to say, without further elaboration, that the reasons stated by the court are, on their face, adequate to sustain its conclusion. Besides, as the testimony of the witness Cornwell concerning the statements made by the widow Tornabells was offered only as against her and her children, and not against the other defendants, it clearly results that no prejudicial error could in any event have resulted from the ruling, even on the hypothesis that the administrator was competent, by a mere admission, to injuriously affect the estate of her minor children, which the court made, in view of its finding as to the rights of the other defendants.

Affirmed.

71] *J. W. FRELLSEN & COMPANY, a Partnership Composed of Joseph W. Frellsen and James D. Hill, Plffs. in Err.,
v.

A. W. CRANDELL, Register of the State Land Office, et al.

(See S. C. Reporter's ed. 71-79.)

Public lands—avoidance of patent—who may object.

Patents from a state for its public lands, signed by the proper officers, and in due form to convey the title of the state to the patentees, are not subjects of individual attack as improperly issued because the land scrip accepted by the state in lieu of the purchase price was not legally receivable for the lands in question, but such patents can be set aside only in judicial proceedings instituted on behalf of the state.

[For other cases, see Public Lands, 1118-1121, in Digest Sup. Ct. 1908.]

[No. 129.]

Argued March 7, 8, 1910. Decided April 4, 1910.

IN ERROR to the Supreme Court of the State of Louisiana to review a decree which affirmed a decree of the District Court for the Parish of East Baton Rouge, in that state, refusing an injunction to restrain the state officers from confirming the rights of holders and owners of patents and certificates of entry issued for scrip not legally receivable in payment therefor. Affirmed.

See same case below, 120 La. 712, 45 So. 558.

Statement by Mr. Chief Justice Fuller:

Congress, by an act entitled, "An Act to Aid the State of Louisiana in Draining the Swamp Lands Therein," approved March 2, 1849 (9 Stat. at L. 352, chap. 87), granted to that state "the whole of those swamp and overflowed lands" in her borders, "which may be or are found unfit for cultivation." See also 9 Stat. at L. 519, chap. 84. In 1880, the general assembly of the state of Louisiana, by an act known as "act 23 of 1880," approved March 8, 1880 (La. Laws 1880, p. 25), authorized the governor of the state to institute proceedings to recover all of those lands not already conveyed to the state, or, if improperly failed to be conveyed, their value in money or government scrip, "provided, that the state shall incur [72 no cost or expense in the prosecution of the said claims other than an allowance to be made by the governor out of the lands, money, or scrip that may be recovered." On March 20, 1880, the governor made a contract with John McEnery to recover from the United States the unconveyed balance of the lands, or their value in money or scrip, and agreed to pay him "50 per centum of the lands, money, or scrip recovered, to be paid as provided in said act 23." It also provided: "Where lands in kind are recovered, the compensation, as aforesaid, of the said McEnery, shall be represented in scrip or certificates, to be issued by the register of the land office of the state, and locatable upon any lands owned by the state." A large amount of lands were recovered, and the register of the state land office issued to John McEnery certificates in terms made locatable upon any vacant land granted to the state by the act of Congress heretofore referred to. These certificates were sold and assigned by McEnery, and his assignees located them upon public lands, some of which had not been recovered by McEnery under his contract. To some of the assignees patents were thereafter issued, while others held simply certificates of location. By act 106 of 1888 (La. Laws 1888, p. 171), act 23 of 1880 was repealed, and by § 2 of the repealing act it was provided "that the act or agreement made between Louis A. Wiltz, governor of the state, and John McEnery, made March 20, 1880, purporting to be under the authority of said act No. 23, is hereby abrogated and terminated." This repealing act took effect January 1, 1889. By act No. 125, approved July 8, 1902 (La. Laws 1902, p. 209), it was provided that the swamp and overflowed lands donated by Congress to the state should be subject to entry and sale at the rate of \$1.50 per acre. On July 7, 1906, the legislature passed act No. 85 of 1906 (La. Laws 1906, p. 141), declaring

"that present holders and owners of patents for public lands, issued by the state of Louisiana, their heirs, assignees, or transferees, shall be confirmed as applicants for said lands, from the date of the issuance of said 73] patents, where the said patents *were not paid for in money, but were paid for by certificates or warrants for scrip, which were not legally receivable in payment for such patents, and authorizing such present holders and owners, their heirs, assignees, or transferees, of said patents, to validate and perfect their title to the lands covered by said patents, or to any part or subdivision of such lands, within one year from date of passage of this act, by paying therefor, in cash, the price of \$1.50 per acre." The act further provided that upon payment of such amount "the said patents shall be valid and legal for all purposes, as if payment therefor had been made in cash at the date of their issuance."

Petitioners, claiming that the location of these certificates upon lands not recovered by McEnery, and the issuance of patents therefor, were illegal, tendered on March 28, 1905, to the proper officers, \$1.50 per acre for a large body of lands which were covered by these certificates and patents. They demanded that warrants should be issued to them for the lands, which was refused. On July 11, 1906, they filed their petition in the twenty-second judicial district court for the parish of East Baton Rouge, state of Louisiana, averring that they were the first and only applicants for said lands under the provisions of said act No. 125 of 1902, or of any other law of the state since the date of the issuance of said illegal certificates and patents, and that, by making the legal tender, they became vested with the right to acquire said lands.

The district court sustained the exception of no cause of action, and entered judgment dismissing the suit. This judgment was affirmed by the supreme court of the state (120 La. 712, 45 So. 558), and from that court was brought here on writ of error.

Mr. P. M. Milner argued the cause, and, with Mr. H. G. Morgan, filed a brief for plaintiffs in error:

A patent null and void on its face does not segregate the land from the public domain.

St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 645, 26 L. ed. 878; Doolan v. Carr, 125 U. S. 625, 31 L. ed. 847, 8 Sup. Ct. Rep. 1228; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 322, 41 L. ed. 176, 16 Sup. Ct. Rep. 1018.

54 L. ed.

Messrs. J. Blanc Monroe and A. P. Pujo argued the cause, and, with Messrs. Walter Guion, Bernard Titcher, Leland H. Moss, Wynne G. Rogers, C. D. Moss, C. A. McCoy, R. L. Knox, E. D. Miller, Harry H. Hall, and Monte M. Lemann, filed a brief for defendants in error:

A patent to lands, issued by the Land Department of the government, is, until annulled by judicial tribunal, conclusive against the government and all claiming under junior patents or titles, and only the government, under sanction of the proper authority, can institute proceedings to annul or rescind the patents. And such proceedings must be before judicial tribunals, with citation to patentees and assigns.

United States v. Throckmorton, 98 U. S. 70, 25 L. ed. 96; McLaughlin v. United States, 107 U. S. 526, 27 L. ed. 621, 2 Sup. Ct. Rep. 862; Western P. R. Co. v. United States, 108 U. S. 510, 27 L. ed. 806, 2 Sup. Ct. Rep. 802; United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; United States v. Stone, 2 Wall. 535, 17 L. ed. 767; Mowry v. Whitney, 14 Wall. 439, 20 L. ed. 859; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 647, 26 L. ed. 879; Emblen v. Lincoln Land Co. 184 U. S. 660, 46 L. ed. 736, 22 Sup. Ct. Rep. 523.

Where the Land Department of the government has issued a patent or certificate of patent to lands, no subsequent entryman or applicant by his application can acquire any vested interest in or vested right to such land.

McMichael v. Murphy, 197 U. S. 304, 49 L. ed. 766, 25 Sup. Ct. Rep. 460; Re Emblen, 161 U. S. 52, 40 L. ed. 613, 16 Sup. Ct. Rep. 487; Emblen v. Lincoln Land Co. supra; State ex rel. Goodloe v. Lanier, 47 La. Ann. 569, 17 So. 130.

The entry of public land of the state or United States, whether legal or illegal, segregates it from the public domain, appropriates it to private use, and withdraws it from public entry or acquisition until the prior entry is officially canceled or removed.

James v. Germania Iron Co. 46 C. C. A. 476, 107 Fed. 603; Stimson Land Co. v. Rawson, 62 Fed. 426; 8 Words & Phrases, 7308; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; Sioux City & I. F. Town Lot & Land Co. v. Griffey, 143 U. S. 32, 36 L. ed. 64, 12 Sup. Ct. Rep. 362; Whitney v. Taylor, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796; Northern P. R. Co. v. Sanders, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671; Northern P. R. Co. v. De Lacey, 174 U. S. 622, 43 L. ed. 1111, 19 Sup. Ct. Rep. 791.

Mr. R. G. Pleasant also argued the cause for defendants in error.

75] *Mr. Chief Justice Fuller delivered the opinion of the court, after reading the following memorandum:

This opinion, including the preliminary statement, was prepared by our Brother Brewer, and had been approved before his lamented death. It was recirculated and again agreed to, and is adopted as the opinion of the court.

Petitioners contend that by their tender they made a contract with the state for a conveyance of the lands in controversy; that this contract was broken, and that they were deprived of their rights thereunder by the legislation of the state and the action of its officers in pursuance thereof; that thus a Federal question arises under art. 1, § 10, of the Constitution of the United States, which forbids a state to pass a "law impairing the obligation of contracts." Their argument is briefly this: The lands were not obtained by McEnery under his contract with the state; the statute authorizing that contract provided that his payment should be solely out of the lands obtained by him from the United States. Notwithstanding this limitation, certificates were issued to him authorizing location upon any lands included within the grant of Congress by the act of 1849, and they were in fact located upon the lands in controversy,—lands which were not obtained by McEnery; that this location, even when followed by patent, did not segregate these lands from the public domain of the state, and they remained therefore open to purchase by anyone complying with the statutes; that petitioners were the first and only parties who tendered to the state the prescribed price; that thereby they acquired a vested right to a conveyance by the state of the legal title.

But it is not contended that the patents were not signed by the proper officers and in due form to convey the title of the state to the patentees. It is not suggested that McEnery received any greater amount of lands than he was entitled to receive under his contract, and it does not appear from the

76] *record that the patents, on their face, disclosed any invalidity in the title conveyed. While an examination of the records would, if the facts stated in the petition are true, show that they were improperly issued, yet this could be ascertained only by looking beyond the face of the patent. Now, whether the patents were wrongfully issued or could be set aside was a matter to be settled between the state and the patentee. The state undoubtedly received something, for the acceptance of every McEnery certificate released the state *pro tanto* from its obligation under the contract to McEnery. Whether it should remain satisfied with that payment

or not was for the state to determine. If it were not satisfied, it could take proper proceedings to set aside the patent, but no individual was authorized to act for the state.

The rule in respect to the administration of the public domain of the United States is well settled. In *Doolan v. Carr*, 125 U. S. 618, 624, 31 L. ed. 844, 846, 8 Sup. Ct. Rep. 1228, 1231, Mr. Justice Miller said:

"There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which, on its face, is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times, to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority, if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void,—void for want of power in them to act on the subject-matter of the patent, not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided."

In *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 363, 33 L. ed. 363, 366, 10 Sup. Ct. Rep. 112, 114, Mr. Justice Lamar, who had been Secretary of the *Interior, discussed the question of a homestead entry, and, after referring to *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566, added:

"Counsel for plaintiff in error contends that the case just cited has no application to the one we are now considering, the difference being that in that case the entry existing at the time of the location of the road was an entry valid in all respects, while the entry in this case was invalid on its face and in its inception; and that this entry, having been made by an agent of the applicant, and based upon an affidavit which failed to show the settlement and improvement required by law, was, on its face, not such a proceeding in the proper land office as could attach even an inchoate right to the land.

"We do not think this contention can be maintained. Under the homestead law three things are needed to be done in order to constitute an entry on public lands. . . . If either one of these integral parts of an entry is defective, that is, if the affidavit be insufficient in its showing, or if the applica-

tion itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards canceled on account of these defects by the Commissioner, or, on appeal, by the Secretary of the Interior; or, as is often the practice, the entry may be suspended, a hearing ordered, and the party notified to show by supplemental proof a full compliance with the requirements of the Department; and on failure to do so, the entry may then be canceled. But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants."

78] *In *Re Emblen*, 161 U. S. 52, 56, 40 L. ed. 613, 616, 16 Sup. Ct. Rep. 487, 488, Mr. Justice Gray thus stated the law:

"After the patent has once been issued, the original contest is no longer within the jurisdiction of the Land Department. The patent conveys the legal title to the patentee, and cannot be revoked or set aside, except upon judicial proceedings instituted in behalf of the United States. The only remedy of *Emblen* is by bill in equity to charge *Weed* with a trust in his favor. All this is clearly settled by previous decisions of this court, including some of those on which the petitioner most relies. *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Moore v. Robbins*, 96 U. S. 530, 24 L. ed. 848; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. ed. 800; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 37 L. ed. 72, 13 Sup. Ct. Rep. 217; *Turner v. Sawyer*, 150 U. S. 578, 586, 37 L. ed. 1189, 1191, 14 Sup. Ct. Rep. 192."

See also *McMichael v. Murphy*, 197 U. S. 304, 311, 49 L. ed. 766, 769, 25 Sup. Ct. Rep. 460.

Obviously, in this case the supreme court of Louisiana followed the practice obtaining in respect to the public lands of the United States. But if it had not, and had declared simply the law of the state of Louisiana, its decision would doubtless be controlling on this court, for, in the matter of the sale and conveyance of lands belonging to the public, no one state is obliged to

follow the legislation or decisions of another state, or even those of the United States, but may administer its public lands in any way that it sees fit, so long as it does not conflict with rights guaranteed by the Constitution of the United States.

Counsel criticize the opinion of the supreme court of Louisiana, in that it speaks of all the lands as having gone to patent, while it is said in the petition that some of the assignees "stood upon the certificates." Whether the language of the petition technically justifies the construction placed upon it by the supreme court of the state is immaterial. Certainly, there is no naming of any single tract as covered by certificate alone, and not patented, and if any tract was held under a certificate of location, it was, within the scope of the ruling *of the supreme [79] court, not subject to other entry or purchase.

We see no error in the ruling of the Supreme Court, and its judgment is affirmed.

AL WILLIAMS, Plff. in Err.,
v.

STATE OF ARKANSAS.

(See S. C. Reporter's ed. 79-90.)

Constitutional law — due process of law — prohibiting drumming on carrier's premises.

1. The prohibition against drumming and soliciting business or patronage upon railway trains and premises of common carriers, which is made by Ark. act April 30, 1907, does not offend against the due process of law clause of the Federal Constitution.

[For other cases, see Constitutional Law, IV. b, 7, in Digest Sup. Ct. 1908.]

NOTE.—On the right of state or municipality to forbid solicitation of patronage at railway stations—see note to *Emerson v. McNeil*, 15 L.R.A. (N.S.) 715.

As to the use of carrier's premises by hack and cab drivers, hotel runners, etc.—see note to *Donovan v. Pennsylvania Co.* 57 C. C. A. 367.

As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621, and *State v. Loomis*, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

Constitutional law — equal protection of the laws — classification — drumming on carrier's premises.

2. Hotels, lodging houses, eating houses, bath houses, physicians, masseurs, surgeons, or other medical practitioners, could be singled out by Ark. act of April 30, 1907, as the business and professions to which should be made applicable the provisions of that statute forbidding the drumming or solicitation of business or patronage on railway trains and premises of common carriers, without making such statute invalid, as denying the equal protection of the laws to the business and professions mentioned.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

[No. 138.]

Argued and submitted March 11, 1910. Decided April 4, 1910.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Circuit Court of Garland County, in that state, convicting a boarding-house keeper of drumming and soliciting patronage upon a railway train. Affirmed.

See same case below, 85 Ark. 464, 26 L.R.A. (N.S.) 482, 122 Am. St. Rep. 47, 108 S. W. 838.

The facts are stated in the opinion.

Mr. George B. Rose argued the cause, and, with Messrs. U. M. Rose, W. E. Hemingway, D. H. Cantrell, and J. P. Loughborough, filed a brief for plaintiff in error:

The act deprives plaintiff in error of his constitutional liberty.

Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 757, 28 L. ed. 591, 4 Sup. Ct. Rep. 652; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Lawton v. Steele, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; Allgeyer v. Louisiana, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427; Lochner v. New York, 198 U. S. 57, 49 L. ed. 941, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Bessette v. People, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 219; Bailey v. People, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Re Jacobs, 98 N. Y. 105, 50 Am. Rep. 636; Ex parte Whitwell, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 872; People v. Beattie, 96 App. Div. 383, 89 N. Y. Supp. 193; State v. Peel Splint Coal Co. 36 W. Va. 856, 17 L.R.A. 385, 15 S. E. 1000; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Brazeville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep.

206, 35 N. E. 62; People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; 2 Hare, Am. Const. Law, p. 777; Cooley, Const. Lim. 6th ed. p. 738.

The right to solicit is inseparably attached to the right to do business.

Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Stoutenburgh v. Hennick, 129 U. S. 143, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; McCall v. California, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Gunn v. White Sewing Mach. Co. 57 Ark. 24, 18 L.R.A. 206, 4 Inters. Com. Rep. 309, 38 Am. St. Rep. 223, 20 S. W. 591; Hurford v. State, 91 Tenn. 673, 20 S. W. 201; State v. Scott, 98 Tenn. 258, 36 L.R.A. 461, 39 S. W. 1; Clements v. Casper, 4 Wyo. 497, 35 Pac. 473; Overton v. Vicksburg, 70 Miss. 559, 13 So. 227; Pegues v. Ray, 50 La. Ann. 579, 23 So. 904; McLaughlin v. South Bend, 126 Ind. 472, 10 L.R.A. 357, 26 N. E. 185; Bloomington v. Bourland, 137 Ill. 536, 3 Inters. Com. Rep. 667, 31 Am. St. Rep. 382, 27 N. E. 692; Toledo Commercial Co. v. Glen Mfg. Co. 55 Ohio St. 222, 45 N. E. 197; W. B. Mearshon & Co. v. Pottsville Lumber Co. 187 Pa. 16, 67 Am. St. Rep. 560, 40 Atl. 1018; Simmons Hardware Co. v. McGuire, 39 La. Ann. 850, 2 So. 592; State v. Agee, 83 Ala. 112, 2 Inters. Com. Rep. 21, 3 So. 856; Stratford v. Montgomery, 110 Ala. 626, 20 So. 129; State v. Bracco, 103 N. C. 350, 9 S. E. 404; Wrought Iron Range Co. v. Johnson, 84 Ga. 758, 8 L.R.A. 273, 3 Inters. Com. Rep. 146, 11 S. E. 233; Emmons v. Lewistown, 132 Ill. 382, 8 L.R.A. 328, 22 Am. St. Rep. 540, 24 N. E. 58; State v. Rankin, 11 S. D. 148, 76 N. W. 299; Ames v. People, 25 Colo. 511, 55 Pac. 725; Ex parte Rosenblatt, 19 Nev. 441, 3 Am. St. Rep. 901, 14 Pac. 298; Ft. Scott v. Pelton, 39 Kan. 766, 18 Pac. 954; State v. Hickox, 64 Kan. 654, 68 Pac. 35; Talbutt v. State, 39 Tex. Crim. Rep. 65, 73 Am. St. Rep. 903, 44 S. W. 1091; French v. State, 42 Tex. Crim. Rep. 224, 52 L.R.A. 160, 58 S. W. 1015; State v. Hanaphy, 117 Iowa, 18, 90 N. W. 601; Adkins v. Richmond, 98 Va. 101, 47 L.R.A. 583, 81 Am. St. Rep. 702, 34 S. E. 967; Stone v. State, 117 Ga. 296, 43 S. E. 740; Com. v. Pearl Laundry Co. 105 Ky. 259, 49 S. W. 28; Wagner v. J. & G. Meakin, 33 C. C. A. 577, 63 U. S. App. 476, 92 Fed. 76; Re Tinsman, 95 Fed. 648; Re Kimmel, 3 Inters. Com. Rep. 114, 41 Fed. 775; Re Houston, 14 L.R.A. 719, 47 Fed.

539; *Re Mitchell*, 4 Inters. Com. Rep. 767, 62 Fed. 576; *Ex parte Hough*, 5 Inters. Com. Rep. 327, 69 Fed. 330; *Ex parte Loeb*, 72 Fed. 657; *Louisiana v. Lagarde*, 60 Fed. 186; *Ex parte Green*, 114 Fed. 959; *Delamater v. South Dakota*, 205 U. S. 100, 51 L. ed. 729, 27 Sup. Ct. Rep. 447, 10 A. & E. Ann. Cas. 733; *People v. Armstrong*, 73 Mich. 288, 2 L.R.A. 721, 16 Am. St. Rep. 578, 41 N. W. 275.

It is not within the power of the legislature to make such use of the right of free speech an offense.

Cooley, Const. Lim. 6th ed. pp. 510-518.

The act also deprives the citizen of the equal protection of the law.

Yiek Wo v. Hopkins, 118 U. S. 368, 30 L. ed. 225, 6 Sup. Ct. Rep. 1064; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Achison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Railroad Tax Case*, 8 Sawy. 238, 13 Fed. 733; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 512; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 555, 46 L. ed. 688, 22 Sup. Ct. Rep. 431; *State v. Conlon*, 65 Conn. 478, 31 L.R.A. 55, 48 Am. St. Rep. 227, 33 Atl. 521; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 635; *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 456; *Frorer v. People*, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 397; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 63; *Dobbins v. Los Angeles*, 195 U. S. 236, 49 L. ed. 175, 25 Sup. Ct. Rep. 18.

Messrs. Hal L. Norwood and William F. Kirby submitted the cause for defendant in error. Mr. C. A. Cunningham was on the brief:

The statute is a police regulation, and clearly within the power of the state.

McLean v. Arkansas, 211 U. S. 546, 53 L. ed. 319, 29 Sup. Ct. Rep. 206; *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; *Adair v. United States*, 208 U. S. 172, 52 L. ed. 441, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; *Lochner v. New York*, 198 U. S. 45, 53, 56, 49 L. ed. 937, 940, 941, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 584, 50 L. ed. 605, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *Bacon v. Walker*, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576; *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 54 L. ed.

Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171; *Strickley v. Highland Boy Gold Min. Co.* 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174; *Offield v. New York, N. H. & H. R. Co.* 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Donovan v. Pennsylvania Co.* 199 U. S. 279, 293, 296, 50 L. ed. 192, 199, 200, 26 Sup. Ct. Rep. 91.

The hotel drummer and hackman have long been regarded as belonging to that class of persons whose occupation or business may be regulated for the public good, and the railroad companies themselves have the right to prohibit drumming or soliciting for hotels, boarding houses, and hack lines upon their trains and depot platforms.

St. Louis, I. M. & S. R. Co. v. Osborn, 67 Ark. 399, 55 S. W. 142; *Landrigan v. State*, 31 Ark. 51, 25 Am. Rep. 547; *Lindsay v. Anniston*, 104 Ala. 261, 27 L.R.A. 436, 53 Am. St. Rep. 44, 16 So. 545; *Donovan v. Pennsylvania Co.* supra; *McQuillin, Mun. Ord.* §§ 28, 184; *Emerson v. McNeil*, 84 Ark. 552, 15 L.R.A. (N.S.) 715, 106 S. W. 479.

The act does not deny plaintiff in error the equal protection of the law.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Farmers' & M. Ins. Co. v. Dobbney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Bacon v. Walker*, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; *McLean v. Arkansas*, supra; *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 256, 52 L. ed. 197, 28 Sup. Ct. Rep. 89; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

This law operates alike upon all whom it affects, and equal protection is not denied where the law operates alike upon all persons similarly situated.

McLean v. Arkansas, supra; *New York ex rel. Lieberman v. Van De Carr*, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; *Western Turf. Asso. v. Greenberg*, 204 U. S. 359, 51 L. ed. 520, 27 Sup. Ct. Rep. 384; *Bacon v. Walker*, supra; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *State v. Schlemmer*, 42 La. Ann. 1166, 10 L.R.A. 135, 8 So. 307; *State v. Moore*,

104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143; *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10; *Barbier v. Connolly*, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Minneapolis & St. L. R. Co. v. Beekwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Kentucky R. Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

When a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the 14th Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.

Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Plaintiff in error was convicted for violating a statute of the state of Arkansas, entitled, "An Act for the Protection of Passengers, and for the Suppression of Drumming and Soliciting upon Railroad Trains **86**]" and upon the Premises of Common *Carriers," approved April 30, 1907.

The 1st and 2d sections of that act are as follows:

"Sec. 1. That it shall be unlawful for any person or persons, except as hereinafter provided in § 2 of this act, to drum or solicit business or patronage for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner, on the trains, cars, depots of any railroad or common carrier operating or running within the state of Arkansas.

"Any person or persons plying or attempting to ply said vocation of drumming or soliciting, except as provided in § 2 of this act, upon the trains, cars, depots of said railroads or common carriers, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty (\$50) nor more than one hundred dollars (\$100) for each offense.

"Sec. 2. That it shall be unlawful for any railroad or common carrier operating a line within the state of Arkansas knowingly to permit its trains, cars, or depots within the state to be used by any person or persons for drumming or soliciting business or patronage for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner, or drumming or soliciting for any business or pro-

fession whatsoever; except, that it may be lawful for railroads or common carriers to permit agents of transfer companies on their trains to check baggage or provide transfers for passengers, or for persons or corporations to sell periodicals and such other articles as are usually sold by news agencies for the convenience and accommodation of said passengers.

"And it shall be the duty of the conductor or person in charge of the train of any railroad or common carrier to report to the prosecuting attorney any person or persons found violating any of the provisions of this act, and upon a wilful failure or neglect to report any such person or persons known to be violating the provisions of this act by drumming *or soliciting, said conductor or other person in charge of such train shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than one hundred dollars."

The case was tried upon the following agreed statement of facts:

"The defendant has for six years been keeping a boarding house in the city of Hot Springs, and was keeping the same on the 10th day of December, 1907, when he entered a train of the Little Rock & Hot Springs Western Railway Company, while running in the county of Garland and state of Arkansas, and solicited and drummed the passengers on said train to induce them to come to his said boarding house to board during their sojourn in said city; and said defendant was so engaged in drumming and soliciting upon said train when he was arrested. He had paid his fare as a passenger on said train, and was riding as such passenger while engaged in drumming and soliciting."

Plaintiff in error challenged the act as unconstitutional on the grounds that it deprived him of liberty and property without due process of law, and also of the equal protection of the law guaranteed by the 14th Amendment.

The principles that govern this case have been settled by very many adjudications of this court. They were sufficiently set forth in *McLean v. Arkansas*, 211 U. S. 546, 53 L. ed. 319, 29 Sup. Ct. Rep. 206, in which a statute making it unlawful for mine owners employing ten or more men underground in mining coal and paying therefor by the ton mined, to screen the coal before it was weighed, was held valid; and also that it was not an unreasonable classification to divide coal mines into those where less than ten miners were employed and those where more than that number were employed, and that a state police regulation was not unconstitutional under the equal-protection

clause of the 14th Amendment because only applicable to mines where more than ten miners were employed. This court in that case, discussing the police power, said:

88] **"In Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, this court summarized the doctrine as follows:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state; and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed, without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

"In Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765, this court said:

"But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be at all times, and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good."

"It is then the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to protect the safety, health, and welfare of the people. . . ."

"The legislature, being familiar with local conditions, is primarily the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

*"If the law in controversy has a reasonable relation to the *protection of the public health, safety, or welfare, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government."*

54 L. ed.

And see *Donovan v. Pennsylvania Co.* 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91.

In the present case, the supreme court of Arkansas (85 Ark. 470, 26 L.R.A.(N.S.) 482, 122 Am. St. Rep. 47, 108 S. W. 838) said:

"The legislature clearly has the power to make regulations for the convenience and comfort of travelers on railroads, and this appears to be a reasonable regulation for their benefit. It prevents annoyance from the importunities of drummers. It is suggested in argument that the statute was especially aimed at the protection of travelers to the city of Hot Springs. If this be so, we can readily see additional reason why the regulation is a wholesome one. A large percentage of those travelers are persons from distant states, who are mostly completely strangers here, and many are sick. Drummers who swarm through the trains soliciting for physicians, bath houses, hotels, etc., make existence a burden to those who are subjected to their repeated solicitations. It is true that the traveler may turn a deaf ear to these importunities, but this does not render it any the less unpleasant and annoying. The drummer may keep within the law against disorderly conduct, and still render himself a source of annoyance to travelers by his much beseeching to be allowed to lead the way to a doctor or a hotel."

"It is also argued that the act, literally construed, would prevent any person of the classes named from carrying on a private conversation on a train concerning his business. This is quite an extreme construction to place upon the statute, and one which the legislature manifestly did not intend. We have no such question, however, before us on the facts presented in the record."

*"This statute is not an unreasonable restriction upon the privilege one should enjoy to solicit for his lawful business, *which, [90 it is rightly urged, is an incident to any business. It does not prevent anyone from advertising his business, or from soliciting patronage, except upon trains, etc. This privilege is denied him for the public good. It is a principle which underlies every reasonable exercise of the police power, that private rights must yield to the common welfare."*

As to the objection that the act discriminated against plaintiff in error and denied him the equal protection of the law, because forbidding the drumming or soliciting business or patronage on the trains for any "hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner," which, it was contend-

ed, was an unreasonable classification, the state supreme court said:

"The legislature, in framing this statute, met a condition which existed, and not an imaginary or improbable one. The class of drummers or solicitors mentioned in the act are doubtless the only ones who ply their vocation to any extent on railroad trains. It is rare that the commercial drummer finds opportunity to meet customers and solicit trade on trains, therefore the lawmakers deemed it unnecessary to legislate against an occasional act of that kind."

It is settled that legislation which, "in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment" (*Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357); and "when a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the 14th Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

Judgment affirmed.

91]*INTERNATIONAL TEXT-BOOK COMPANY, Plff. in Err.,
v.

AARON T. PIGG.

(See S. C. Reporter's ed. 91-114.)

Foreign corporations—doing business in state—correspondence school.

1. A foreign corporation conducting a correspondence school whose business involves the solicitation of students in Kansas by local agents, who are also to collect and forward to the home office the tuition fees, and the systematic intercourse by correspondence between the company and its scholars and agents, wherever situated, and the transportation of the needful books, apparatus, and papers, is doing business within the state, within the meaning of Kan. Gen. Stat. 1901, § 1283, which prohibits the maintaining of an action in the

Kansas courts by any corporation doing business in the state which has not filed with the secretary of state the statement of its condition, provided for 17 that section. [For other cases, see *Corporations*, XII. b, in *Digest Sup. Ct. 1908.*]

Commerce—what is interstate commerce—correspondence schools.

2. Commerce is conducted among the states, within the meaning of the Federal Constitution, by a corporation engaged in imparting instruction by correspondence, whose business involves the solicitation of students in other states by local agents, who are also to collect and forward to the home office the tuition fees, and the systematic intercourse between the corporation and its scholars and agents, wherever situated, and the transportation of the needful books, apparatus, and papers.

[For other cases, see *Commerce*, I. b, in *Digest Sup. Ct. 1908.*]

Interstate commerce—state regulation—foreign correspondence schools.

3. Interstate commerce is unconstitutionally regulated by the provisions of Kan. Gen. Stat. 1901, § 1283, under which the filing of a statement of financial condition is made a prerequisite to the right of a foreign corporation engaged in imparting instruction by correspondence to do business in the state, where such business involves the solicitation of students in Kansas by local agents, who are also to collect and forward to the home office the tuition fees, and the systematic intercourse by correspondence between the company and its students and agents, wherever situated, and the transportation of the needful books, apparatus, and papers.

[For other cases, see *Commerce*, IV., in *Digest Sup. Ct. 1908.*]

Statutes—invalid in part—dependent parts.

4. The unconstitutional portion of Kan. Gen. Stat. 1901, § 1283, under which a foreign corporation may be required to make and file a statement of its financial condition as a condition of doing interstate business in the state, cannot be separated from the further provision in the same section that the obtaining of the certificate of the secretary of state that such statement has been properly made shall be a condition precedent to the right of the corporation to maintain an action in the Kansas courts, but both provisions must fall together.

[For other cases, see *Statutes*, 73-76, in *Digest Sup. Ct. 1908.*]

[No. 15.]

NOTE.—As to what constitutes carrying on business by foreign corporation in state—see notes to *Ammons v. Brunswick-Balke-Collender Co.* 72 C. C. A. 622, and *Wagner v. J. & G. Meakin*, 33 C. C. A. 585.

On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* 13 L.R.A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; and *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158.

On recognition or exclusion of foreign corporations—see notes to *Cone Export & Commission Co. v. Poole*, 24 L.R.A. 289, and *McCanna & F. Co. v. Citizens' Trust & Surety Co.* supra.

On statutes part valid and part invalid—see notes to *Titusville Iron Works v. Keystone Oil Co.* 1 L.R.A. 363, and *Fayette County v. People's & D. Bank*, 10 L.R.A. 196.

Argued April 21, 1909. Decided April 4, 1910.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Shawnee County, in that state, affirming a judgment of the Court of Topeka, denying the right of a foreign correspondence school to maintain an action in the state courts. Reversed.

See same case below, 76 Kan. 328, 91 Pac. 74.

The facts are stated in the opinion.

Mr. James M. Beck argued the cause, and, with Mr. Seth T. McCormick, filed a brief for plaintiff in error:

The contract between the plaintiff and the defendant for the shipment by the plaintiff from Seranton, Pennsylvania, to the defendant, in Topeka, Kansas, of printed and documentary merchandise, for a pecuniary consideration, was a transaction of interstate commerce.

Rearick v. Pennsylvania, 203 U. S. 507, 512, 51 L. ed. 295, 297, 27 Sup. Ct. Rep. 159; Swift & Co. v. United States, 196 U. S. 375, 398, 399, 49 L. ed. 518, 525, 526, 25 Sup. Ct. Rep. 276; Gibbons v. Ogden, 9 Wheat. 1, 4, 6 L. ed. 23, 24; Passenger Cases, 7 How. 283, 12 L. ed. 702; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 218, 38 L. ed. 962, 968, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321; Preston v. Finley, 72 Fed. 857; Re Nichols, 48 Fed. 164; Re White, 11 L.R.A. 284, 3 Inters. Com. Rep. 531, 43 Fed. 914; Culberson v. American Trust & Bkg. Co. 107 Ala. 457, 19 So. 34; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 17.

The right to engage in interstate commerce includes as a necessary incident the right to employ agents or other representatives to solicit contracts for the purchase of interstate commodities; and the mere fact that such an agent solicits a contract and collects the price does not give the state any larger power to burden or restrain such business by license, taxes, or police regulations.

Robbins v. Taxing Dist. 120 U. S. 489, 491, 493, 30 L. ed. 694-696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Lyng v. Michigan, 135 U. S. 161, 166, 34 L. ed. 150, 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. 54 L. ed.

Com. Rep. 178, 10 Sup. Ct. Rep. 958; Crutcher v. Kentucky, 141 U. S. 47, 57-59, 35 L. ed. 649, 652, 653, 11 Sup. Ct. Rep. 851; Caldwell v. North Carolina, 187 U. S. 622, 623, 47 L. ed. 336, 337, 23 Sup. Ct. Rep. 229.

The statutes of Kansas, requiring plaintiff to obtain its "permission" to engage in interstate commerce, and burdening the exercise of its constitutional right to do so with license taxes and fees, and penalizing the plaintiff for engaging in interstate commerce without the "permission" of the state by denying to the plaintiff equality of judicial relief in its courts, are unconstitutional.

Pensacola Teleg. Co. v. Western U. Teleg. Co. supra; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 118, 34 L. ed. 394, 396, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Crutcher v. Kentucky and Caldwell v. North Carolina, supra; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 691, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Stoutenburgh v. Hennick, 129 U. S. 142, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 190, 31 L. ed. 654, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

It matters not whether an attempted regulation of such commerce by the state is through its executive or judiciary, for the state may not, by any of its agencies,—legislative, executive, or judicial,—impair or destroy a right under the Constitution of the United States.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 753, 43 L. ed. 1154, 1159, 19 Sup. Ct. Rep. 804; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234, 41 L. ed. 979, 983, 17 Sup. Ct. Rep. 581.

A denial of judicial relief to a party engaged in interstate commerce is a burden upon such commerce.

Underwood Typewriter Co. v. Piggott, 60 W. Va. 532, 55 S. E. 664; Woessner v. H. T. Cottam & Co. 19 Tex. Civ. App. 611, 47 S. W. 678; Lane & B. Co. v. City Electric Light & Waterworks Co. 31 Tex. Civ. App. 449, 72 S. W. 425; Texas & P. R. Co. v. Davis, 93 Tex. 378, 54 S. W. 381; Coweta Fertilizer Co. v. Brown, 89 C. C. A. 612, 163 Fed. 162; Greek-American Sponge Co. v. Richardson Drug Co. 124 Wis. 476, 109 Am. St. Rep. 961, 102 N. W. 888; Haldy v. Tomoor-Haldy Co. 4 Ohio S. & C. P. Dec. 118; Hargraves Mills v. Harden, 25 Misc. 665, 56 N. Y. Supp. 937; Coit & Co. v. Sutton, 102 Mich. 324, 25 L.R.A. 819, 4 Inters. Com. Rep. 768,

60 N. W. 690; *Gunn v. White Sewing Mach. Co.* 57 Ark. 24, 18 L.R.A. 206, 4 Inters. Com. Rep. 309, 38 Am. St. Rep. 223, 20 S. W. 591; *Hovey's Estate*, 198 Pa. 385, 48 Atl. 311; *Savage v. Atlanta Home Ins. Co.* 55 App. Div. 20, 66 N. Y. Supp. 1105.

The right to contract within a state implies necessarily the right to use the courts of the state to enforce the contract.

Von Hoffman v. Quincy, 4 Wall. 535, 552, 18 L. ed. 403, 409.

A state cannot discriminate against citizens or products of other states (*Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855; *Tiernan v. Rinker*, 102 U. S. 123, 26 L. ed. 103; *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454); nor impose a tax on interstate commerce, either by a tax laid on the transportation of the subjects of that commerce (*State Freight Tax Case*, 15 Wall. 232, 279, 21 L. ed. 146, 162; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 465, 26 L. ed. 1067, 1068; *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87), or by a tax on the receipts derived from that transportation, or upon the capital stock of the carrier (*Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Western U. Teleg. Co. v. Alabama Bd. of Assessment [Western U. Teleg. Co. v. Seay]* 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Western U. Teleg. Co. v. Pennsylvania*, 128 U. S. 39, 32 L. ed. 345, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 6; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Fargo v. Michigan [Fargo v. Stevens]* 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826), or by means of a license fee on the privilege or occupation of engaging in interstate commerce (*Robbins v. Taxing Dist.* supra; *Corson v. Maryland*, 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep.

655; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Harman v. Chicago*, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; *Asher v. Texas*, supra; *McCall v. California*, 136 U. S. 104, 34 L. ed. 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Henderson v. New York [Henderson v. Wickham]* 92 U. S. 259, 23 L. ed. 543; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256); nor can a state in any way attempt to regulate interstate commerce by imposing burdensome conditions under which it may be conducted, whether by fixing rates (*Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087), or preventing the introduction of certain articles of commerce (*Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 1062; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681); or by requiring telegraphic messages to be sent in the order received and delivered by messengers' within one mile of the office (*Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126); or by requiring common carriers to give equal passenger accommodations without distinction on account of race or color (*Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547).

To the extent that this plaintiff conducts its business through the mails, it is not important whether the subject-matter, which is transmitted from Pennsylvania to Kansas, was an article of commerce or not, or whether its mere transmission was strictly interstate commerce; for the state of Kansas was powerless to invade the exclusive power of the Federal government to determine what should and what should not be transported through the mails.

Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877; *Re Rapier*, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374; *Horner v. United States*, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407.

Mr. David C. Harrington also filed a brief for plaintiff in error:

A corporation incorporated to do a manufacturing business, exercising all its corporate franchises in the state where it is incorporated, and manufacturing the article which it sells in the state where it is incorporated, although it sends agents to other states to sell its goods, does not engage in business in the other states. It can only be "doing business" in other states when it opens its manufacturing establishment and manufactures its goods in another state.

Bertha Zinc & Mineral Co. v. Clute, 7 Misc. 123, 27 N. Y. Supp. 342; *People ex rel. Washington Mills v. Roberts*, 8 App. Div. 201, 40 N. Y. Supp. 417; *People ex rel. Southern Cotton Oil Co. v. Roberts*, 25 App. Div. 13, 48 N. Y. Supp. 1028; *People ex rel. Soda Fountain Co. v. Roberts*, 29 App. Div. 585, 51 N. Y. Supp. 487; *People ex rel. Kellogg Newspaper Co. v. Roberts*, 30 App. Div. 150, 51 N. Y. Supp. 866; *Ware Cattle Co. v. Anderson*, 107 Iowa, 231, 77 N. W. 1026; *Holder v. Aultman, M. & Co.* 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269; *Sullivan v. Sullivan Timber Co.* 103 Ala. 371, 25 L.R.A. 543, 15 So. 941; *Toledo Commercial Co. v. Glen Mfg. Co.* 55 Ohio St. 217, 45 N. E. 197; *W. B. Mearshon & Co. v. Pottsville Lumber Co.* 187 Pa. 12, 67 Am. St. Rep. 560, 40 Atl. 1019; *Wolff Dryer Co. v. Bigler*, 192 Pa. 466, 43 Atl. 1092; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; *Davis & R. Bldg. & Mfg. Co. v. Dix*, 64 Fed. 412; *People ex rel. Lembeck & B. Eagle Brewing Co. v. Roberts*, 22 App. Div. 282, 47 N. Y. Supp. 949; *People ex rel. H. B. Smith Co. v. Roberts*, 27 App. Div. 455, 50 N. Y. Supp. 355; *Beard v. Union & American Pub. Co.* 71 Ala. 60; *Murphy Varnish Co. v. Connell*, 10 Misc. 553, 32 N. Y. Supp. 492; *People ex rel. Harlan & H. Co. v. Campbell*, 139 N. Y. 68, 34 N. E. 753; *People ex rel. Chicago Junction R. & Union Stockyards Co. v. Roberts*, 154 N. Y. 1, 47 N. E. 974; *Havens & G. Co. v. Diamond*, 93 Ill. App. 557.

If a statute is judicially construed and afterwards re-enacted, there is incorporated in it the opinion and construction given by the court. The same rule applies in cases where a statute has been passed in one state, and has received the judicial construction of the court in that state. If, after such construction, it is adopted in another state, the construction is incorporated in the statute.

23 Am. & Eng. Enc. Law, 2d ed. pp. 371, 432; *The Abbottsford*, 98 U. S. 440, 25 L. ed. 168; *United States v. Mooney*, 116 U. S. 104, 29 L. ed. 550, 6 Sup. Ct. Rep. 304; *Reiche v. Smythe*, 13 Wall. 162, 20 L. ed. 566; *Dwaris, Statutes*, pp. 701-766; *McDonald v. Ho-*

vey, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. Rep. 142.

The contract in this case is a Pennsylvania contract.

9 Cyc. Law & Proc. p. 670.

What the company is doing in Kansas is interstate commerce, and the attempted regulation by Kansas is unlawful.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; *Cooper Mfg. Co. v. Ferguson*, supra; *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh v. Henrick*, 129 U. S. 140, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Stockard v. Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576; *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 558, 46 L. ed. 689, 22 Sup. Ct. Rep. 431; 19 Cyc. Law & Proc. pp. 1272, 1273; *Havens & G. Co. v. Diamond*, supra; *MacMillan Co. v. Stewart*, 69 N. J. L. 212, 54 Atl. 240; *M. B. Faxon Co. v. Lovett Co.* 60 N. J. L. 128, 36 Atl. 692; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Passenger Cases*, 7 How. 283, 12 L. ed. 702; *Henderson v. New York (Henderson v. Wickham)* 92 U. S. 259, 23 L. ed. 543; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Corson v. Maryland*, 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep. 655; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; *Lottery Case (Champion v. Ames)* 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 118, 34 L. ed. 397, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565;

McCall v. California, 136 U. S. 104, 34 L. ed. 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881.

The fact that a burden or condition or regulation is laid indiscriminately on foreign and local corporations and on individuals does not help the statute any. States must not interfere with interstate commerce, whoever carries it on.

17 Am. & Eng. Enc. Law, 2d ed. p. 77, and note.

If a corporation is engaged in commerce, a sister state cannot deprive it of the equal protection of the laws, which includes the right to resort to the courts for the enforcement of contracts.

Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 120, 30 L. ed. 342, 347, 7 Sup. Ct. Rep. 108; Smyth v. Ames, 169 U. S. 466, 526, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207.

The power of a foreign corporation to make and take contracts is utterly ineffectual and illusory, if it does not include the ordinary remedies afforded by the local state to its own citizens and corporations.

6 Thomp. Corp. § 7977.

Means of enforcement of a contract is the breath of its vital existence.

Edwards v. Kearzey, 96 U. S. 600, 24 L. ed. 796.

The mere fact that a foreign corporation, without complying with such a statute, makes a contract with a domestic citizen, or takes a contract from him, does not make the contract unlawful, but it may be enforced in a judicial proceeding.

19 Cyc. Law & Proc. p. 1275; Holder v. Aultman, M. & Co. 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269.

No appearance for defendant in error.

Mr. Justice Harlan delivered the opinion of the court:

This action was brought by the International Text-book Company in one of the courts of Kansas,—the court of Topeka,—to recover from Pigg, the defendant in error, the sum of \$79.60, with interest, as due the plaintiff under a written contract between him and that company, made in 1905. The case was tried upon agreed facts, and judgment was rendered in favor of the defendant for his costs. That judgment was af-

firmed in a state district court, which held that the plaintiff was not entitled to maintain the action, and the latter judgment was affirmed by the supreme court of Kansas.

It is assigned for error that the final judgment—based upon certain provisions of the statutes of Kansas, to be presently referred to—was in violation of the company's rights under the Constitution of the United States.

The facts agreed to—using substantially the language of the parties—make substantially the following case:

The International Text-book Company is a Pennsylvania corporation, and the proprietor of what is known as the International Correspondence Schools at Scranton, in that commonwealth. Those schools have courses in architecture, chemistry, civil, mechanical, electrical, and steam engineering, English branches, French, German, mathematics and mechanics, pedagogy, plumbing, heating, telegraphy, and many other subjects. It has a capital stock, and the profits arising from its business are distributed in dividends, or applied otherwise, as the company may elect. The executive officers of the company, as well as the teachers and instructors employed by it, reside and exercise their respective functions at Scranton. *Its [100 business is conducted by preparing and publishing instruction papers, text-books, and illustrative apparatus for courses of study to be pursued by means of correspondence, and the forwarding, from time to time, of such publications and apparatus to students. In the conduct of its business the company employs local or traveling agents, called solicitor-collectors, whose duties are to procure and forward to the company at Scranton, from persons in a specified territory, on blanks furnished by it, applications for scholarships in its correspondence schools, and also to collect and forward to the company deferred payments on scholarships. In order that applicants may adapt applications to their needs, each solicitor-collector is kept informed by correspondence with the company of the fees to be collected for the various scholarships offered, and of the contract charges to be made for cash or deferred payments, as well as the terms of payment acceptable to the company. In conformity with the contract between the company and its scholars, the scholarship and instruction papers, text-books and illustrative apparatus called for under each accepted application are sent by the company from Scranton directly to the applicant, and instruction is imparted by means of correspondence through the mails, between the company, at its office in that city, and the applicant, at his residence in another state.

During the period covered by the present

transaction, the company had a solicitor-collector for the territory that included Topeka, Kansas, and he solicited students to take correspondence courses in the plaintiff's schools. His office in Kansas was procured and maintained at his own expense, for the purpose of furthering the procuring of applications for scholarships and the collection of fees therefor. The company had no office of its own in that state. The solicitor-collector was paid a fixed salary by the company and a commission on the number of applications obtained and the collections made. He sent daily reports to the company for his territory, those reports showing that for March, 1906, the aggregate [101] collections *on scholarships and deferred payments on subscriptions approached \$500.

At the date of the agreement sued on, and at the time this suit was brought, numerous persons in Topeka were taking the plaintiff's course of instruction by correspondence through the mails. The contracts for those courses were procured by its solicitor-collector assigned to duty in Kansas, and, as stated, payments thereon were collected and remitted by him to the plaintiff at Scranton.

The written contract in question, signed by the defendant at Topeka, Kansas, and accepted by the company at Scranton, showed that he had subscribed for a scholarship covering a course of instruction by correspondence in commercial law, and had agreed to pay therefor \$84, in instalments. When this suit was brought, there remained unpaid on the principal of that subscription the sum of \$79.60.

The present action was brought to recover that sum, with interest, as due the company under the defendant's contract with it. The defendant did not deny making the contract, nor that he was indebted to the company in the amount for which he was sued. But it was adjudged, in conformity with his contention, that by reason of the company's *failure to comply with certain provisions of the statutes of Kansas*, it was not entitled to maintain this action in a court of *Kansas*.

We will now refer to the provisions of the Kansas statute under which the Text-book Company was held not to be entitled to maintain the present action in the courts of the state. The statute, the plaintiff alleges, cannot be applied to it without violating its rights under the Constitution of the United States.

By § 1260 of the Kansas General Statutes of 1901 it is provided, among other things, that a corporation organized under the laws of any other state, territory, or foreign country, and seeking to do business in Kan-

sas, may make application to the state charter board, composed of the attorney general, the secretary of state, and the state bank commissioner, for "permission" *to en- [102] gage in business in that state as a foreign corporation. It is necessary that the application should be accompanied by a fee of \$25, and as a condition precedent to obtaining authority to transact business in the state, a corporation of another state was required to file in the office of the secretary of state its written consent, irrevocable, that process against it might be served upon that officer. § 1261. In passing upon the application, the charter board is authorized to make special inquiry in reference to the solvency of the corporation, and if they determined that such corporation was properly organized in accordance with the laws under which it was incorporated, "that its capital is unimpaired, and that it is organized for a purpose for which a domestic corporation may be organized" in Kansas, then its application is to be granted, and a certificate issued, setting forth the fact that "the application has been granted, and that such foreign corporation may engage in business in this state." Before filing its charter, or a certified copy thereof, with the secretary of state, the corporation is required to pay to the state treasurer, for the benefit of the "permanent school fund," a specified per cent of its capital stock. §§ 1263, 1264. The last-named section was the subject of extended examination in *Western U. Teleg. Co. v. Kansas*, recently decided (216 U. S. 1, ante, 355, 30 Sup. Ct. Rep. 190), and was held to be unconstitutional in its application to the Western Union Telegraph Company, seeking to do local business in Kansas.

But the section which controlled the decision by the state court in the present case is § 1283, which is as follows: "It shall be the duty of the president and secretary or of the managing officer of each corporation for profit, doing business in this state, except banking, insurance, and railroad corporations, annually, on or before the 1st day of August, to prepare and deliver to the secretary of state a complete detailed statement of the condition of such corporation on the 30th day of June next preceding. Such statement shall set forth and exhibit the following, namely: 1st. The authorized capital *stock. 2d. The paid-up capital [103] stock. 3d. The par value and the market value per share of said stock. 4th. A complete and detailed statement of the assets and liabilities of the corporation. 5th. A full and complete list of the stockholders, with the postoffice address of each, and the number of shares held and paid for by each. 6th. The names and postoffice addresses of the officers, trustees, or directors and manager

elected for the ensuing year, together with a certificate of the time and manner in which such election was held . . . and the failure of any such corporation to file the statement in this section provided for within ninety days from the time provided for filing the same shall work the forfeiture of the charter of any corporation organized under the laws of this state, and the charter board may, at any time thereafter, declare the charter of such corporation forfeited; and upon the declaration of any such forfeiture, it shall be the duty of the attorney general to apply to the district court of the proper county for the appointment of a receiver to close out the business of such corporation; and such failure to file such statement by any corporation doing business in this state, and *not organized under the laws of this state, shall work a forfeiture of its right or authority to do business in this state*, and the charter board may at any time declare such forfeiture, and shall forthwith publish such declaration in the official state paper. . . . No action shall be maintained or recovery had in any of the courts of this state by any corporation doing business in this state without first obtaining the certificate of the secretary of state that statements provided for in this section [§ 1283] have been properly made." Laws 1898, chap. 10, § 12, as amended by Laws 1901, chap. 125, § 3.

1. In view of the nature and extent of the business of the International Text-book Company in Kansas, the first inquiry is whether the statutory prohibition against the maintaining of an action in a Kansas court by "any corporation *doing business in this [that] state*" embraces the plaintiff corporation. It must be held, as the state court 104] held, that it does; for *it is conceded that the Text-book Company did not, before bringing this suit, make, deliver, and file with the secretary of state either the statement or certificate required by § 1283; and upon any reasonable interpretation of the statute, that company, both at the date of the contract sued on, and when this action was brought, must be held as "*doing business*" in Kansas. It had an agent in the state, who was employed to secure scholars for the schools conducted by correspondence from Scranton, and to receive and forward any money obtained from such scholars. Its transactions in Kansas, by means of which it secured applications from numerous persons for scholarships, were not single or casual transactions, such as might be deemed incidental to its general business as a foreign corporation, but were parts of its regular business continuously conducted in many states for the benefit of its correspondence schools. While the supreme court of Kan-

sas has distinctly held that the statute did not embrace single transactions that were only incidentally necessary to the business of a foreign corporation, it also adjudged that the business done by the Text-book Company in Kansas was not of that kind, but indicated a purpose to regularly transact its business from time to time in Kansas, and therefore it was to be regarded as doing business in that state, within the meaning of the statute; and that it "was the intention of the legislature that the state should reach every continuous exercise of a foreign franchise," and that it should apply even where the business of the foreign corporation was "purely interstate commerce." *John Deere Plow Co. v. Wyland*, 69 Kan. 255, 257, 258, 76 Pac. 863, 2 A. & E. Ann. Cas. 304; *State ex rel. Shawnee County v. American Book Co.* 65 Kan. 847, 69 Pac. 563; *Thomas v. Remington Paper Co.* 67 Kan. 599, 73 Pac. 909; *Sigel-Campion Live-stock Commission Co. v. Haston*, 68 Kan. 749, 75 Pac. 1028. In our judgment, those rulings as to the scope of the statute were correct. They were in substantial harmony with the construction placed by this court upon a Colorado statute somewhat similar to the Kansas act. A statute passed in execution of a provision in the Colorado Constitution required foreign corporations, as a condition of their authority "to do business" in that state, to make and file with the secretary of *state a [105 certificate covering certain specified matters. An Ohio corporation having made in Colorado a contract for the sale of machinery, to be sent to it from the latter state to Ohio, and the vendor having failed to perform the contract, a suit was brought against him in the Federal court, sitting in Colorado. One of the defenses was the failure of the Ohio corporation to make and file with the secretary of state the certificate required by the Colorado statute before it should be "authorized or permitted to do any business" in Colorado. It became necessary to inquire whether the Ohio corporation, by reason of the above isolated contract, did business in Colorado within the meaning of the Constitution and laws of the latter state. This court said: "Reasonably construed, the Constitution and statute of Colorado forbid, not the doing of a single act of business in the state, but the carrying on of business by a foreign corporation without the filing of the certificate and the appointment of an agent, as required by the statute. . . . The making in Colorado of the *one* contract sued on in this case, by which one party agreed to build and deliver in Ohio certain machinery and the other party to pay for it, did not constitute a carrying on of business in Colorado. . . .

To require such a certificate as a prerequisite to the doing of a *single act of business* when there was no purpose to do any other business or have a place of business in the state would be unreasonable and incongruous." *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 728, 734, 28 L. ed. 1137, 1139, 5 Sup. Ct. Rep. 739, 741.

In view of the agreed facts and the principles announced both by the Kansas supreme court and by this court, we hold that, within the meaning of § 1283 of the Kansas statute, the International Text-book Company was doing business in the latter state at the time the contract in question was made, and was therefore within the terms of that section.

2. But this view as to the meaning of the Kansas statute does not necessarily lead to an affirmance of the judgment below, if, as the plaintiff contends, the business in which it is regularly engaged is interstate in its **106**] nature, and if the statute, "by its necessary operation, materially or directly burdens that business.

It is true that the business in which the International Text-book Company is engaged is of a somewhat exceptional character, but, in our judgment, it was, in its essential characteristics, commerce among the states within the meaning of the Constitution of the United States. It involved, as already suggested, regular and practically continuous intercourse between the Text-book Company, located in Pennsylvania, and its scholars and agents in Kansas and other states. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. More than that; this mode—looking at the contracts between the Text-book Company and its scholars—involved the transportation from the state where the school is located to the state in which the scholar resides, of books, apparatus, and papers, useful or necessary in the particular course of study the scholar is pursuing, and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction. Intercourse of that kind, between parties in different states,—particularly when it is in execution of a valid contract between them,—is as much intercourse in the constitutional sense, as intercourse by means of the telegraph,—“a new species of commerce,” to use the words of this court in *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 9, 24 L. ed. 708, 710. In the great case of *Gibbons v. Ogden*, 9 Wheat. 1, 189, 6 L. ed. 23, 68, this **54** L. ed.

court, speaking by Chief Justice Marshall, said: “Commerce, undoubtedly, is traffic; but it is something more; it is *intercourse*.” Referring to the constitutional power of Congress to regulate commerce among the states and with foreign countries, this court said in the *Pensacola Case*, just cited, that “it is not only the right, but the duty, of Congress, to see to it that *intercourse* among the states and the transmission *of [**107** *intelligence* are not obstructed or unnecessarily encumbered by state legislation.” This principle has never been modified by any subsequent decision of this court.

The same thought was expressed in *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 356, 30 L. ed. 1187, 1188, 1 Inters. Com. Rep. 306, 307, 7 Sup. Ct. Rep. 1126, 1127, where the court said: “Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only *ideas, wishes, orders, and intelligence*.” It was said in the circuit court of appeals for the eighth circuit, speaking by Judge Sanborn, in *Butler Bros. Shoe Co. v. United States Rubber Co.* 84 C. C. A. 167, 183, 156 Fed. 1, 17, that “all interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or *information*, is a transaction of interstate commerce.” If intercourse between persons in different states by means of telegraphic messages conveying intelligence or information is commerce among the states, which no state may directly burden or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different states, by means of correspondence through the mails, is commerce among the states within the meaning of the Constitution, especially where, as here, such intercourse and communication really relate to matters of regular, continuous business, and to the making of contracts and the transportation of books, papers, etc., appertaining to such business. In our further consideration of this case, we shall therefore assume that the business of the Text-book Company, by means of correspondence through the mails and otherwise between Kansas and Pennsylvania, was interstate in its nature.

3. We must next inquire whether the statute of Kansas, if applied to the International Text-book Company, would directly burden its right by means of correspondence through the mails and by its agents, to secure written agreements with *per [**108**

sons in other states, whereby such persons, for a valuable consideration, contract to pay a given amount for scholarships in its correspondence schools, and to have sent to them, as found necessary, from time to time, books, papers, apparatus, and information, needed in the prosecution, in their respective states, of the particular study which the scholar has elected to pursue under the guidance of those who conduct such schools at Seranton? Let us see what effect the statute, by its necessary operation, must have on the conduct of the company's business.

In the first place, it is made a condition precedent to the authority of a corporation of another state, except banking, insurance, and railroad corporations, to do business in Kansas, that it shall prepare, deliver, and file with the secretary of state a detailed "statement," showing the amount of the authorized, paid-up, par, and market value of, its capital stock, its assets and liabilities, a list of its stockholders, with their respective postoffice addresses, and the shares held and paid for by each, and the names and postoffice addresses of the officers, trustees, or directors and managers.

In the next place, the statute denies to the corporation doing business in Kansas the right to maintain an action in a Kansas court, *unless it shall first obtain a certificate of the secretary of state to the effect that the statement required by § 1283 has been properly made.*

Was it competent for the state to prescribe, as a condition of the right of the Text-book Company to do interstate business in Kansas, such as was transacted with Pigg, that it should prepare, deliver, and file with the secretary of state the statement mentioned in § 1283? The above question must be answered in the negative upon the authority of former adjudications by this court. A case in point is *Crutcher v. Kentucky*, 141 U. S. 47, 56, 57, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851, 853, 854, often referred to and never qualified by any subsequent decision. That case arose under a statute of Kentucky regulating agencies of foreign express companies. The statute 109] required as a condition of the right *of the agent of an express company not incorporated by the laws of Kentucky, to do business in that commonwealth, to take out a license from the state auditor, and to make and file in the auditor's office a statement showing that the company had an actual capital of a given amount, either in cash or in safe investments, exclusive of costs. These requirements were held by this court to be in violation of the Constitution of the United States in their application to foreign corpo-

rations engaged in interstate commerce. The court said: "If the subject was one which appertained to the jurisdiction of the state legislature, it may be that the requirements and conditions of doing business within the state would be promotive of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in that business; and that is a subject which belongs to the jurisdiction of the national, and not the state, legislature. Congress would undoubtedly have the right to exact from associations of that kind any guaranties it might deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of Congress, it is to be presumed that Congress has done, or will do, all that is necessary and proper in that regard. Besides, it is not to be presumed that the state of its origin has neglected to require from any such corporation proper guaranties as to capital and other securities necessary for the public safety. If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states, it would not be within the province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, *cannot have the effect of de- [110] priving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject." Again, in the same case: "Would anyone pretend that a state legislature could prohibit a foreign corporation—an English or a French transportation company, for example—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation." Further, in the same case: "We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different states), does also some local business by carrying goods from one point to another within the

state of Kentucky. This is, probably, quite as much for the accommodation of the people of that state as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulation as to license and *capital stock* are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. *These regulations are clearly a burden and a restriction upon that commerce.* Whether intended as such or not, they operate as such. But taxes or license fees, in good faith imposed exclusively on express business carried on wholly within the state, would be open to no such objection." To the same general effect are many other cases. *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *Lyng v. Michigan*, 135 U. S. 166, 34 L. ed. 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, ante, 355, 30 Sup. Ct. Rep. 190. It is true that the statute does not, in terms, require the corporation of another state engaged in [111] interstate commerce to take *out what is technically "a license" to transact its business in Kansas. But it denies all authority to do business in Kansas unless the corporation makes, delivers, and files a "statement" of the kind mentioned in § 1283. The effect of such requirement is practically the same as if a formal license was required as a condition precedent to the right to do such business. In either case it imposes a condition upon a corporation of another state seeking to do business in Kansas, which, in the case of interstate business, is a regulation of interstate commerce and directly burdens such commerce. The state cannot thus burden interstate commerce. It follows that the particular clause of § 1283 requiring that "statement" is illegal and void.

In this connection it is to be observed that by the statute the doors of Kansas courts are closed against the Text-book Company, unless it first obtains from the secretary of state a certificate showing that the "statement" mentioned in § 1283 has been properly made. In other words, although the Text-book Company may have a valid contract with a citizen of Kansas, one directly arising out of and connected with its interstate business, the statute denies its right

to invoke the authority of a Kansas court to enforce its provisions unless it does what we hold it was not, under the Constitution, bound to do; namely, make, deliver, and file with the secretary of state the statement required by § 1283. If the state could, under any circumstances, legally forbid its courts from taking jurisdiction of a suit brought by a corporation of another state, engaged in interstate business, upon a valid contract arising out of such business, and made with it by a citizen of Kansas, it could not impose on the company, as a condition of its authority to carry on its interstate business in Kansas, that it shall make, deliver, and file that statement with the secretary of state, and obtain his certificate that it had been properly made. This court held in *Chambers v. Baltimore & O. R. Co.* 207 U. S. 142, 148, 52 L. ed. 143, 146, 28 Sup. Ct. Rep. 34, that a state may, subject to the restrictions of the Federal Constitution, "determine the limits of the jurisdiction of its courts, and the character of the *con- [112] troversies which shall be heard in them." But it also said in the same case: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution." How far a corporation of one state is entitled to claim in another state, where it is doing business, equality of treatment with individual citizens in respect of the right to sue and defend in the courts, is a question which the exigencies of this case do not require to be definitely decided. It is sufficient to say that the requirement of the statement mentioned in § 1283 of the statute imposes a direct burden on the plaintiff's right to engage in interstate business, and therefore is in violation of its constitutional rights. It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another state, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a statement setting forth certain facts which the state, confessedly, could not control by legislation. It results that the provision as to the statement mentioned in

§ 1283 must fall before the Constitution of the United States, and with it—according to the established rules of statutory construction—must fall that part of *the same section* which provides that the obtaining of the certificate of the secretary of state that such statement has been properly made shall be a condition precedent to the right of the plaintiff to maintain an action in the courts of Kansas. Section 1283, looking at the object for which it was enacted, must be regarded as an entirety. These [113] *parts of the statute are so connected with and dependent upon each other that the clause relating to actions brought in the courts of Kansas cannot be separated from the prior clause in the *same section*, referring to the statement to be filed with the secretary of state, and the former left in force after the latter is stricken down as invalid. As the clause about suits in the courts of Kansas *expressly refers* to the prior clauses in *the same section* prescribing the statement to be filed with the secretary of state, the clause relating to suits would be meaningless without reference to the latter. We cannot suppose, from the words of the statute, that the legislature would have adopted the regulation about actions in the state courts, except for the purpose of enforcing the prior clause in the same section, relating to the statement to be filed with the secretary of state. The several parts of the section are not capable of separation if effect be given to the legislative intent. It is well settled that if a statute is in part unconstitutional, the whole statute must be deemed invalid, if the parts not held to be invalid are so connected with the general scope of the statute that they cannot be separately enforced, or, if so enforced, will not effectuate the manifest intent of the legislature. In *Allen v. Louisiana*, 103 U. S. 80, 84, 26 L. ed. 318, 319, this court referred with approval to what Chief Justice Shaw said on this point in *Warren v. Charlestown*, 2 Gray, 84. Referring to the rule obtaining in cases of statutes in part constitutional and in part unconstitutional, that eminent jurist said: "But, if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them." See also *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct.

Rep. 988; *Huntington v. Worthen*, 120 U. S. 97, 30 L. ed. 588, 7 Sup. Ct. Rep. 469.

*It results that as the part of § 1283 [114] which relates to the statement to be filed with the secretary is unconstitutional, and as the clause in the same section, relating to suits in the state court, is so dependent upon and connected with that part as to be meaningless when standing alone, the section must be held inoperative in all its parts, and as not being in the way of the enforcement in any state court of competent jurisdiction of the plaintiff's right to a judgment against the defendant for the amount conceded to be due from him to the Textbook Company under his contract. The judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Moody heard the argument of this case, participated in its decision in conference, and approves the reversal of the judgment upon the grounds stated in this opinion.

The CHIEF JUSTICE and Mr. Justice McKenna dissent.

Reversed.

SOUTHWESTERN OIL COMPANY, Plff. in Err.,
v.
STATE OF TEXAS.

(See S. C. Reporter's ed. 114-127.)

Constitutional law — due process of law — taxing wholesale dealers in oils.

1. The imposition of an occupation tax on wholesale dealers in oils, under Tex. Gen. Laws 1905, chap. 148, § 9, without exacting a similar tax from wholesale dealers

NOTE.—As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tueker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On due process of law in revenue proceedings—see note to *Read v. Dingess*, 8 C. C. A. 398.

On statutes part valid and part invalid—see notes to *Titusville Iron Works v. Keystone Oil Co.* 1 L.R.A. 361, and *Fayette County v. People's & D. Bank*, 10 L.R.A. 196.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621, and *State v. Loomis*, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

in other articles, does not offend against the due-process-of-law clause of the Federal Constitution.

[For other cases, see Constitutional Law, 586-590, in Digest Sup. Ct. 1908.]

Statutes—when validity may be assailed.

2. Objections to the invalidity under the Federal Constitution of the provisions as to penalties in Tex. Gen. Laws 1905, chap. 148, § 9, taxing wholesale dealers in oils, are not open in a civil suit brought by the state to recover the taxes so imposed.

[For other cases, see Statutes, 53-60, in Digest Sup. Ct. 1908.]

Statutes—invalid in part.

3. The possible invalidity under the due-process-of-law clause of the Federal Constitution of the provisions as to penalties, contained in Tex. Gen. Laws 1905, chap. 148, § 9, taxing wholesale dealers in oils, does not invalidate the wholly independent provisions of that statute for the collection by civil suit of the taxes due the state.

[For other cases, see Statutes, 61-88, in Digest Sup. Ct. 1908.]

Constitutional law—equal protection of the laws—taxing wholesale dealers in oils.

4. Wholesale dealers in oils are not denied the equal protection of the laws by the occupation tax imposed upon such dealers by Tex. Gen. Laws 1905, chap. 148, § 9, although no similar tax is exacted from wholesale dealers in other articles of merchandise, such as sugar, bacon, coal, and iron.

[For other cases, see Constitutional Law, 360-368, in Digest Sup. Ct. 1908.]

[No. 119.]

Argued March 2, 1910. Decided April 4, 1910.

IN ERROR to the Supreme Court of the State of Texas to review a judgment which affirmed a judgment of the Court of Civil Appeals of that state, affirming a judgment of the District Court of Travis County, for the recovery by the state of an occupation tax from a wholesaler dealer in oils. Affirmed.

See same case below, 100 Tex. 647, 103 S. W. 489.

The facts are stated in the opinion.

Mr. George C. Greer argued the cause, and, with Messrs. F. C. Proctor, D. E. Greer, and Greer, Minor, & Miller, filed a brief for plaintiff in error:

The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment. In all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection. 54 L. ed.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 165, 41 L. ed. 671, 17 Sup. Ct. Rep. 255.

This principle must apply to all legislation, including the imposition of taxes.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 237, 33 L. ed. 895, 10 Sup. Ct. Rep. 533.

No exception to the rule exists in the imposition of occupation and license taxes.

W. W. Cargill Co. v. Minnesota, 180 U. S. 469, 45 L. ed. 627, 21 Sup. Ct. Rep. 423.

In determining whether or not a tax imposed violates a Federal safeguard, not the name of the tax, but its substantial nature and effect, will be regarded, and not that tax alone, but the whole scheme of taxation will be considered, to ascertain whether or not, as a practical question, the persons affected have been denied the protection guaranteed by the Federal Constitution.

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 227, 52 L. ed. 1037, 28 Sup. Ct. Rep. 638.

It is not conceivable that the volume of business or extent of profits in a certain article can alone be a reasonable basis of a classification that singles out those dealers from all others, and burdens them with a hostile and destructive discrimination, even though it bears the name of an "occupation tax."

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 104, 46 L. ed. 106, 22 Sup. Ct. Rep. 30.

Mr. James DuBose Walthall argued the cause, and, with Mr. Robert Vance Davidson, filed a brief for defendant in error:

The tax prescribed by § 9 of chapter 148 of the acts of the twenty-ninth legislature of Texas is not an ad valorem or property tax, but an occupation tax.

Texas Co. v. Stephens, 100 Tex. 644, 103 S. W. 481; Producers' Oil Co. v. Stephens, 44 Tex. Civ. App. 327, 99 S. W. 157; Pullman Palace Car Co. v. State, 64 Tex. 274, 53 Am. Rep. 758; State v. Stephens, 4 Tex. 127; Languille v. State, 4 Tex. App. 322; Cooley, Taxn. 3d ed. p. 31; Horn Silver Min. Co. v. New York, 143 U. S. 313, 36 L. ed. 167, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Maine v. Grand Trunk R. Co. 142 U. S. 227, 35 L. ed. 995, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; New York ex rel. New York, C. & H. R. R. Co. v. Miller, 202 U. S. 596, 50 L. ed. 1159, 26 Sup. Ct. Rep. 714; Kehr v. Stewart, 197 U. S. 69, 49 L. ed. 668, 25 Sup. Ct. Rep. 403; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; Gatewood v. North Carolina, 203 U. S. 541, 51 L. ed. 309, 27 Sup. Ct. Rep. 167; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232;

Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289.

Does the statute under consideration violate the 14th Amendment to the Constitution of the United States, prohibiting the state from depriving any person of life, liberty, or property without due process of law, or denying any person within its jurisdiction the equal protection of the laws?

Armour Packing Co. v. Lacy, 200 U. S. 233, 50 L. ed. 456, 26 Sup. Ct. Rep. 232; Connolly v. Union Sewer Pipe Co. 184 U. S. 540-562, 46 L. ed. 679-690, 22 Sup. Ct. Rep. 431; People ex rel. Hatch v. Reardon, 184 N. Y. 431, 8 L.R.A.(N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 A. & E. Ann. Cas. 515, affirmed in 204 U. S. 160, 51 L. ed. 422, 27 Sup. Ct. Rep. 188; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Cook v. Marshall County, 196 U. S. 268, 49 L. ed. 474, 25 Sup. Ct. Rep. 233; Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690; Giozza v. Tiernan, 148 U. S. 662, 37 L. ed. 601, 13 Sup. Ct. Rep. 721; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 A. & E. Ann. Cas. 381; New York ex rel. Twenty-Third Street R. Co. v. New York State Tax Comrs. 199 U. S. 53, 50 L. ed. 85, 25 Sup. Ct. Rep. 715; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 295, 42 L. ed. 1043, 18 Sup. Ct. Rep. 594; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 237, 33 L. ed. 895, 10 Sup. Ct. Rep. 533; Ilome Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; District of Columbia v. Broöke, 214 U. S. 150, 53 L. ed. 945, 29 Sup. Ct. Rep. 560; Pacific Exp. Co. v. Seibert, 142 U. S. 339-351, 35 L. ed. 1035-1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; Michigan C. R. Co. v. Powers, 201 U. S. 293, 50 L. ed. 761, 26 Sup. Ct. Rep. 459; Cox v. Texas, 202 U. S. 446, 50 L. ed. 1099, 26 Sup. Ct. Rep. 671; Texas Co. v. Stephens, 100 Tex. 628, 103 S. W. 481; King v. Mullins, 171 U. S. 435, 43 L. ed. 226, 18 Sup. Ct. Rep. 925.

Mr. Justice Harlan delivered the opinion of the court:

This action was brought by the state of Texas in one of its own courts, against the Southwestern Oil Company, a corporation of that state, to recover the amount of certain taxes alleged to be due under what is known as the Kennedy act (chapter 148, General Laws of Texas, 1905, p. 358), providing **116]** *for the levy and collection of a tax **690**

upon individuals, firms, associations, or other persons, owning, managing, operating, or controlling for profit within the state certain specified kinds of business, including *wholesale* dealers in coal oil, etc., and prescribing penalties for violations of the act. The state recovered judgment for a part of that amount. Upon appeal to the court of civil appeals the judgment was affirmed, and the action of the latter court was afterwards affirmed by the supreme court of Texas.

Upon this writ of error the Southwestern Oil Company contends here, as it contended in the state courts, that the statute under which the state proceeded was in violation of the Constitution of the United States.

The statute in question (§ 9) provides: "Each and every person, association of persons, or corporation created by the laws of this or any other state or nation, which shall engage in their own name, or in the name of others, or in the name of their representatives or agents in this state, in the *wholesale* business of coal oil, naphtha, benzin, or any other mineral oils refined from petroleum, and any and all mineral oils, shall pay an annual tax of 2 per cent upon their gross receipts from any and all sales in this state of any of said articles in § 9 of this act hereinabove mentioned, and an annual tax of 2 per cent of the cash market value of any and all of said articles that may be received or possessed or handled or disposed of in any manner other than by sale in this state; and it is hereby expressly provided that delivery to or possession by any person, association of persons, or corporation in this state, of any of the articles hereinabove mentioned in § 9 of this act, from whatever source the same may have been received, shall, for the purpose of this act, be held and considered such a sale and such ownership and possession of such articles and property (where no sale is made) as will and shall subject the same to the tax herein provided for. Said tax herein provided for shall be paid to the state treasurer quarterly, and every such person, agent, association of persons, *or **[117]** corporation so owning, controlling, or managing such business, shall, on or before the 1st day of April, and quarterly thereafter, report to the comptroller, under oath of the president, treasurer, superintendent, or some other officer of said corporation or association, or some duly authorized agent thereof, the amount received by them from such business in this state. Should any person, association of persons, or corporation, or the officers or agents of any such corporation, person, or association of persons herein named, fail to make the report herein provided for, and pay said taxes, for thirty

days after the termination of any quarter of the year, then he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than fifty nor more than one hundred dollars. Each and every day after said thirty days have expired shall be deemed a separate offense. In addition thereto, in the event of the failure of the officers or agents of any such company or corporation to make the reports and pay said taxes, for thirty days after the termination of any quarter of the year, each and every such company or corporation, or their officers or agents so failing, shall forfeit and pay to the state the sum of \$25 for each day said report and payment are delayed, which forfeiture and taxes shall be sued for by the attorney general in the name of the state. For the purpose of suits and prosecutions provided for in this article, venue and jurisdiction are hereby expressly conferred upon the courts of Travis county, and service may be had upon any officer or agent of such company or corporation in the state, and such service shall, in all respects, be held legal and valid. The tax herein levied shall be in addition to all other taxes levied by law."

The defendant insists that the statute is inconsistent with the 14th Amendment of the Constitution of the United States, in the following particulars: That it arbitrarily selects and levies upon the *wholesale* business in coal oil, naphtha, benzin, or other mineral oils refined from petroleum, and any and all mineral oils, a tax of from **118**] fifty to one hundred times *greater than is levied by the state upon *wholesale* business in other articles; that it denies to the defendant the equal protection of the laws, in that the failure of the wholesale dealer to pay the required tax for thirty days is made a misdemeanor, and subjects such dealer, upon conviction, to a fine of not less than fifty nor more than one hundred dollars, each day after the expiration of the thirty days being deemed a separate offense; and, in addition, subjects him to a forfeiture of \$25 for each day's delay in making the report required and paying the taxes imposed, while the only punishment prescribed against a wholesale dealer in other articles was a fine in any sum not less than the taxes due, and not more than double that sum and the cost of prosecution, the taxpayer in such case having the right to a dismissal of the prosecution on the payment of the tax and costs of prosecution and procuring the license to pursue or follow the occupation for the pursuing of which, without license, the prosecution was instituted; no prosecution to be commenced against any person after the procuring of said license, if the license

procured covers the time actually followed in said occupation or calling. Penal Code, art. 112.

The transcript contains three principal assignments of error, one of which is that the state court should have held § 9 of the statute to be unconstitutional as laying a tax or burden on interstate commerce. It may be observed that no such defense was made by the company in its answer, and we need not stop to consider the question whether such a defense would have merit. Besides, the certificate made by the supreme court of Texas, at the request of the Oil Company, shows that the alleged invalidity of the statute was based entirely on the 14th Amendment. Again, no point under the commerce clause is urged in the brief of the company. In this court it contends only that § 9 of the statute contravenes the 14th Amendment. In our consideration of that proposition we assume, in conformity with the decision of the state court, that the statute is not in violation *of any provi- **[119]** sion of the Constitution or statute of Texas. That is a local question, with which this court is not concerned on this writ of error. We are only concerned to inquire whether the statute is inconsistent with the 14th Amendment, either as depriving the taxpayer of property without due process of law, or as denying the equal protection of the laws.

Looking at the clause of the Amendment prohibiting the deprivation of property without due process of law, it is to be remembered that the provision to that effect appeared in most of the state Constitutions long before the Amendment was adopted, and that principle was accepted everywhere as vital in the American systems of government. But the Amendment, although negative in its words, had the effect to incorporate into the fundamental law of each state a rule theretofore prescribed by the Constitution of the United States for the general government and its agencies. So that, prior to the adoption of the 14th Amendment, the states were controlled, in imposing and collecting taxes, entirely by their own fundamental law; and if they departed from due process of law in matters involving the deprivation of property, the taxpayer injuriously affected by its action could not, *for that reason*, prior to the Amendment, invoke for his or its protection any provision of the Constitution of the United States. But upon the adoption of the 14th Amendment,—whatever their own Constitutions may then, or have subsequently, declared,—the states became bound, as was the United States by the 5th Amendment, not to deprive any person of property without due process of law. Still it was never contemplated, when the Amend-

ment was adopted, to restrain or cripple the taxing power of the states, whatever the methods they devised for the purposes of taxation, unless those methods, by their necessary operation, were inconsistent with the fundamental principles embraced by the requirements of due process of law and the equal protection of the laws in respect of rights of property.

120] *Can it be predicated of the statute of Texas that its provisions for the imposition and collection of taxes are not conformable to due process of law? We think not. The tax in question is an occupation tax only. The statute has been so construed by the state court, and counsel for the Oil Company accept that construction as the law that should be applied in this case. The tax was imposed by the legislature, charged with the duty of providing the means necessary for the support of the state government. That branch of the state government alone could declare what taxes should be imposed and upon whom or upon what kinds of business imposed. If the state seeks, directly, by civil suit, or indirectly, by criminal prosecution in one of its courts, to enforce the provisions of the statute, the way is open for the taxpayer, in his defense, to raise the question of the constitutional validity either of the statute as a whole, or of any method prescribed in it for the collection of the tax. No element of due process of law seems to be wanting unless it be, as contended by the Oil Company, that the penalties prescribed for failing to make the "reports" required by the statute are so severe and exacting as to make it unsafe for the taxpayer to question the validity of such penalties, and thereby interfere with or suspend the collection of the taxes by insisting that they have been imposed in disregard of due process of law. But this point, as to the severity and exacting character of the penalties, need not be now considered, because no penalties are claimed by the state in this action and no judgment therefor was rendered. Besides, the provision as to penalties is not so necessarily connected with the other parts of the statute as to vitiate the entire act, even if that provision should be held to be void. The right of the state, by a civil suit, to recover the taxes imposed, is wholly independent of its right, by suit or prosecution, to recover the prescribed penalties. If the provisions as to penalties should be stricken down, there will still be left a complete act providing for the collection by civil suit of **121]** the taxes due the *state. The rule is well settled that if one part of a statute is valid and another invalid, the former may be enforced, if it be not so connected with or dependent on the other as to make it clear

that the legislature would not have passed that part without the part that may be deemed invalid.

But it is contended that the statute contravenes the 14th Amendment, in that it denies to the Oil Company the equal protection of the laws. This position is based mainly on the ground that the statute, by imposing a tax on *wholesale* dealers of coal oil, naphtha, benzin, mineral oils refined from petroleum, and all other mineral oils, while omitting to put any such tax whatever on wholesale dealers in other articles of merchandise,—such, for instance, as sugar, bacon, coal, and iron,—so discriminates against wholesale dealers in the several articles specified in § 9 as to deny them the equal protection of the laws. This view gives to the Amendment a scope that could not have been contemplated at the time of its adoption. The tax in question is conceded to be an occupation tax simply. It was imposed under the authority of the state Constitution, providing that the legislature may "impose occupation taxes, both upon natural persons and upon corporations other than municipal, doing any business in this state . . . except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax." [Art. 8, § 1.] It is not questioned that the state may classify occupations for purposes of taxation. In its discretion it may tax all, or it may tax one or some, taking care to accord to all *in the same class* equality of rights. The statute, in respect of the particular class of wholesale dealers mentioned in it, is to be referred to the governmental power of the state, in its discretion, to classify occupations for purposes of taxation. The state, keeping within the limits of its own fundamental law, can adopt any system of taxation or any classification that it deems best for the common good and the maintenance of its government, provided such classification be not in violation of the 14th Amendment.

*A leading case on the general subject is *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533, 535. In that case a question arose as to whether a statute of Pennsylvania, subjecting bonds and other securities issued by corporations, to a higher rate of taxation than was imposed on other moneyed securities, was a denial of the equal protection of the laws to corporations. This court held that there was no discrimination which the state was not competent to make, saying: "All corporate securities are subject to the same regulations. The provision in the 14th Amendment, that no state shall deny to any person within its jurisdiction

the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usages, are within the discretion of the state legislature, or the people of the state, in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the 14th Amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all [123] those constitutional provisions *and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt."

In *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593, involving the constitutional validity of a law taxing corporate franchises and business, the court held that the statute was not a denial of the equal protection of laws. It said that the Amendment "does not prevent the classification of property for taxation,—subjecting one kind of property to one rate of taxation, and other kind of property to a different rate,—distinguishing between franchises, licenses, and privileges, and visible and tangible property, and between real and personal property. Nor does the Amendment prohibit special legislation. Indeed, the greater part of all legislation is

special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York, all corporations, joint stock companies, and associations of the same kind, are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of *the same class*."

So, in *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 562, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431, 440: "A tax may be imposed only upon certain callings and trades, for when the state exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a state could not tax any property or *calling unless, at the [124] same time, it taxed all property or all callings. Its discretion in such matters is very great, and should be exercised solely with reference to the general welfare, as involved in the necessity of taxation for the support of the state. A state may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States."

There are many other cases in which the court considered the meaning and scope of the constitutional guaranty of the equal protection of the laws. We will refer to a few of them.

In *Kentucky R. Tax Cases*, 115 U. S. 321, 337, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57, 63, the court sustained, as not inconsistent with the equal-protection clause of the 14th Amendment, a Kentucky statute providing for the assessment of railroad property for purposes of taxation in a mode different from that prescribed as to ordinary real estate, or as to the property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas, and water companies. It said that "the rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of *each class*, so that the law shall operate equally and uniformly upon all persons in *similar circumstances*. There is no objection, therefore, to the discrimination made as between railroad companies and other

corporations in the methods and instrumentalities by which the value of their property is ascertained." In *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 294, 42 L. ed. 1037, 1043, 18 Sup. Ct. Rep. 594, which involved the constitutionality of an inheritance-tax law, the court recognized the power of the state to "distinguish, select, and classify objects of legislation," by laws which did not violate the settled usages and established practices of our government. In *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43, a state enactment imposing a license tax on the business of refining sugar and molasses was held not to be a denial of the equal protection of the laws because of the exemption from such tax of planters and farmers who ground and refined their own sugar and molasses. In *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423, a statute requiring a license to operate a warehouse for the receipt of grain, located upon the right of way of a railroad, but which did not require a license as to a similar warehouse not located on any right of way, was not a denial of the equal protection of the laws to the first-named class. In *Cook v. Marshall County*, 196 U. S. 268, 49 L. ed. 473, 25 Sup. Ct. Rep. 233, which involved the validity of a cigarette-tax law that made a distinction between jobbers and wholesale dealers in cigarettes, the court said: "There is a clear distinction in principle between persons engaged in selling cigarettes generally or at retail, and those engaged in selling by wholesale to customers without the state. They are two entirely distinct occupations. One sells at retail, and the other at wholesale,—one to the public generally, and the other to a particular class; one within the state, the other without. From time out of mind it has been the custom of Congress to impose a special license tax upon wholesale dealers different from that imposed upon retail dealers. A like distinction is observed between brewers and rectifiers, wholesale and retail dealers in leaf tobacco and liquors, manufacturers of tobacco and manufacturers of cigars, as well as peddlers of tobacco. It may be difficult to distinguish these several classes in principle, but the power of Congress to make this discrimination has not, we believe, been questioned." In *Armour Packing Co. v. Laev*, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232, a state law imposing a license tax on meat-packing houses did not deny the equal protection of the laws to persons or corporations engaged in such business, because a like tax was not imposed on persons engaged in the business of selling the prod-

ucts of such houses, or on those engaged in packing articles of food other than meat.

In our judgment, the objection that, within the true meaning of the 14th Amendment, the statute of Texas has the effect to deny to the Oil Company the equal protection of the laws, does not rest upon any solid basis. The statute makes no distinction among such wholesale dealers as handle the particular articles specified in § 9. The state had the right to classify such dealers separately from those who sold, by wholesale, other articles than those mentioned in that section. The statute puts the constituents of each of those separate classes on the same plane of equality. It is not arbitrary legislation, except in the sense that all legislation is arbitrary. If it be within the power of the legislature to enact the statute, then arbitrariness cannot be predicated of it in a court of law. And it cannot be held to be beyond legislative power simply because of its classification of occupations. What were the special reasons or motives inducing the state to adopt the classification of which the Oil Company complains, we do not certainly know. Nor is it important that we should certainly know. It may be that the main purpose of the state was to encourage retail dealing in the particular articles mentioned in § 9. If the statute had its origin in such a view, we do not perceive that this court can deny the power of the state to proceed on that ground. We may repeat what was said in *Delaware Railroad Tax*, 18 Wall. 206, 231, 21 L. ed. 888, 896, that "it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." But we will not speculate as to the motives of the state, and will assume—the statute, neither upon its face nor by its necessary operation, not suggesting a contrary assumption—that the state has in good faith sought, by its legislation, to protect or promote the interests of its people. It is sufficient for the disposition of this case to say that, except as restrained by its own Constitution or by the Constitution of the United States, the state of Texas, by its legislature, has full power to prescribe any system of taxation which, in its judgment, is best or necessary for its people and government; that, so far as the power of the United States is concerned, the state has the right, by any rule it deems proper, to classify persons or businesses for the purposes of taxation, subject to the condition that such classification shall not be in violation of the Constitution of the United States; that

the requirement by the state, that all wholesale dealers in *specified articles* shall pay a tax of a given amount on their occupation, without exacting a similar tax on the occupations of wholesale dealers in other articles, cannot, on the face of the statute or by reason of any facts within the judicial knowledge of the court, be held, within the meaning of the 14th Amendment, to deprive the taxpayer of his property without due process of law, or to deny him the equal protection of the laws; and that the Federal court cannot interfere with the enforcement of the statute simply because it may disapprove its terms, or question the wisdom of its enactment, or because it cannot be sure as to the precise reasons inducing the state to enact it.

For the reasons herein stated, the judgment is affirmed.

UNITY BANKING & SAVING COMPANY,
NY, Appt.,
v.

GILBERT BETTMAN, Trustee of Holzman & Company, Bankrupts, and Richard Fritz.

(See S. C. Reporter's ed. 127-136.)

Corporations — unauthorized transfer of stock — forgery.

No interest, legal or equitable, was acquired as against the true owner, in the absence of any laches or negligence on his part, under an attempted pledge of a stock certificate by means of a forged power of attorney by a firm of brokers who held the same as evidence of the owner's financial responsibility, and under an express agreement that it was not to pass out of their possession.

[For other cases, see Corporations, 487-489, in Digest Sup. Ct. 1908.]

[No. 126.]

Argued March 4, 7, 1910. Decided April 4, 1910.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the District Court for the Southern District of Ohio, sustaining the title of the owner of a stock certificate as against a claim founded on an attempted pledge by means of a forged power of attorney by a bankrupt partnership which held the same as a basis for credit, and under an express agreement that it was not to pass out of their possession. Affirmed.

See same case below, 87 C. C. A. 96, 159 Fed. 916.

54 L. ed.

Statement by Mr. Justice Harlan:

The only question to be determined in this case relates to the ownership of fifty shares of preferred stock in the Philip Carey Manufacturing Company, a corporation of Ohio.

On or about May 13th, 1905, Richard Fritz, the owner of such shares, placed the certificate for them in the hands of a member of the partnership of Holzman & Company, brokers, with or through whom Fritz had some dealings. The deposit of the stock with that firm was upon an express agreement that it was to be held by them only to show Fritz's financial responsibility, and was not to pass out of their possession. There was no change in the terms or conditions of that contract. The certificate was in the name of Fritz Brothers, and was thus indorsed:

For value received, I, the undersigned, hereby sell and transfer to Richard Fritz fifty shares of stock within mentioned and described, and hereby appoint true and lawful attorney irrevocable, with power and [of] substitution to transfer said stock on the books of the company. Witness hand and seal this 5th day of January, 1905.

Fritz Brothers.

Per Otto H. Fritz.

Witness, Max Wintler.

On May 15th, 1905, without the knowledge or consent of Fritz, this certificate was pledged by Holzman & Company with the Unity Banking & Saving Company, as a substituted security for a note, dated March 21st, 1905, for \$10,000, which that firm had executed to the bank, other security of substantially the same value being withdrawn at the time of the substitution. That transaction had no connection with any dealings by Holzman & Company for or on behalf of Fritz.

When the pledge to the bank was made, there was pinned to the certificate a blank power of attorney, purporting to have been signed May 13th, 1905, by Richard Fritz in the presence of Ross Holzman, the active member of the firm of *Holzman & [129] Company. None of the blanks in the power of attorney were then filled out, and the only writing on the paper included the date, the name of Richard Fritz in the blank for the signature, and Ross Holzman in the blank for the attestation.

Upon the petition of certain creditors of Holzman & Company, that partnership and the individuals composing it were, on July 1st, 1905, adjudicated bankrupts by the district court of the United States for the southern district of Ohio, the petition charging that the act of bankruptcy was com-

mitted May 25th, 1905. Boyden was the first trustee in the bankruptcy case. He subsequently resigned and was succeeded by Bettman. The case was sent to a referee in bankruptcy to take such further proceedings as might be necessary.

Richard Fritz filed in the bankruptcy proceeding a claim, supported by affidavit, that he owned the certificate of stock placed with Holzman & Company, and which, as above stated, was afterwards pledged by that firm, without the authority or knowledge of Fritz, with the Unity Banking & Saving Company. He neither signed, nor authorized to be signed for him, the blank power of attorney of May 13th, 1905, and his name to that paper was a forgery. It does not appear who committed the forgery. But at the time of the hearing of the case, Ross Holzman was beyond the jurisdiction of the court and in parts unknown. The referee so stated.

The relief sought by Fritz was, among other things, an order requiring the delivery to him of the above stock in the Philip Carey Manufacturing Company, free from the claims of all the parties.

At the time of the hearing below, the certificate for the stock had come under the control of the court. The Banking & Saving Company asserted its right to the possession of the stock and to retain the certificate therefor, with authority to apply the proceeds of the sale of the stock on the loan for which it had been pledged to the bank. 130] The trustee asked *the determination of the controversy between Richard Fritz and the manufacturing company, and for the protection of the interests represented by him as trustee. He contended that if Fritz did not sign the power in question, he authorized it to be signed for him.

The cause was sent to a referee in bankruptcy, who found that Richard Fritz had never signed the above power of attorney, nor authorized anyone to sign it for him; that he was the owner of the fifty shares of stock represented by the certificate; and that he was entitled to the possession of them, free of all liens and interests, either by the Unity Banking & Saving Company or of the trustee in bankruptcy. The referee thus stated his conclusion of law from the facts found by him: "Where F deposits with a broker a certificate of stock belonging to F, and in his name, without any indorsement or power to execute or transfer of said stock, upon an agreement that said stock is to be held by said broker as an evidence of F's financial responsibility only, and is not to leave the broker's possession, and the broker pledges said certificate to a bank as security upon a note of the broker for money loaned by the bank to the broker for general use of the broker, the bank holds

said certificate subject to all the conditions of the original deposit by F with the broker, and F is not estopped to claim title to said certificate as against the bank by the mere placing of said certificate in the hands of the broker, or the further fact that, in the course of dealings between F and the broker, large balances have, at various times, been owed by F to the broker, when it appears that no demand for the payment of said balances was made upon F, or notice served upon him, changing the conditions of the deposit of said stock, and further, that, at the conclusion of the dealings between F and the broker, F is a creditor, and not a debtor, of said broker."

This order, upon being brought before the court in bankruptcy for review, was affirmed. The case was then carried by appeal to the circuit court of appeals, which affirmed the *decree of the district [131 court. Only the Unity Banking & Saving Company appealed to this court.

Mr. Constant Southworth argued the cause, and, with Mr. Louis J. Dolle, filed a brief for appellant:

Fritz and the bankrupts are charged with knowledge that their dealings were illegal.

Re A. B. Baxter & Co. 81 C. C. A. 355, 152 Fed. 137, 11 A. & E. Ann. Cas. 437; Wood v. Hubbell, 10 N. Y. 479.

Hence, Richard Fritz has no standing in this court of equity.

Irwin v. Williar, 110 U. S. 499, 511, 28 L. ed. 225, 230, 4 Sup. Ct. Rep. 160; Flag v. Baldwin, 38 N. J. Eq. 231, 48 Am. Rep. 308; Lester v. Buel, 49 Ohio St. 252, 34 Am. St. Rep. 556, 30 N. E. 821; Barnard v. Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203; Higgins v. McCrea, 116 U. S. 671, 29 L. ed. 764, 6 Sup. Ct. Rep. 557; Baxter v. Dencen, 98 Md. 181, 64 L.R.A. 949, 57 Atl. 601, 1 A. & E. Ann. Cas. 147; Plank v. Jackson, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280.

Bankruptcy proceedings are governed by the rules of equity.

Elliott v. Toeppner, 187 U. S. 327, 47 L. ed. 200, 23 Sup. Ct. Rep. 133; Swarts v. Siegel, 54 C. C. A. 399, 117 Fed. 13; Re Rochford, 59 C. C. A. 388, 124 Fed. 182; Re Cooper Bros. 159 Fed. 956; Goldman v. Smith, 93 Fed. 182.

Interventions in bankruptcy proceedings are governed by the rules of equity pleading.

Dokken v. Page, 77 C. C. A. 674, 147 Fed. 438; Barton v. Barbour, 104 U. S. 126, 134, 26 L. ed. 672, 676; Rouse v. Hornsby, 161 U. S. 588, 591, 40 L. ed. 817, 818, 16 Sup.

Ct. Rep. 610; *Mercantile Trust Co. v. Pittsburgh & W. R. Co.* 53 C. C. A. 207, 115 Fed. 475; *Loveland, Bankr.* 3d ed. pp. 34, 88, 458, 459.

The answer of the Unity bank is evidence, and proves that the disputed signature is genuine and adopted by Richard Fritz.

Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. Rep. 201; *Beals v. Illinois, M. & T. R. Co.* 133 U. S. 290, 33 L. ed. 608, 10 Sup. Ct. Rep. 314; *Vigel v. Hopp*, 104 U. S. 441, 26 L. ed. 765; *Slesinger v. Buckingham*, 8 Sawy. 469, 17 Fed. 454; *Carpenter v. Providence Washington Ins. Co.* 4 How. 185, 219, 11 L. ed. 931, 946; *Childs v. N. B. Carlstein Co.* 76 Fed. 86; *Hayward v. Eliot Nat. Bank*, 4 Cliff. 294, Fed. Cas. No. 6,273; *Kane v. Schuylkill F. Ins. Co.* 199 Pa. 201, 48 Atl. 989; *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601, Fed. Cas. No. 5,902; *Southern Development Co. v. Silva*, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881.

The referee erred in giving no weight to the circumstantial evidence which shows that Richard Fritz adopted the signature to the power of attorney.

Wood v. Hubbell and Re A. B. Baxter & Co. supra.

The referee wrongfully placed the burden of proof on the Unity bank.

Bourda v. Jones, 110 Wis. 52, 85 N. W. 671; *Rosenbloom v. Cohen*, 46 Misc. 80, 91 N. Y. Supp. 385; *Hendricks v. Robinson*, 2 Johns. Ch. 283, affirmed in 17 Johns. 438; *Wood v. Hubbell, supra*; *United States v. American Bell Teleph. Co.* 167 U. S. 224, 42 L. ed. 144, 17 Sup. Ct. Rep. 809; *Lexington Fire, L. & M. Ins. Co. v. Paver*, 16 Ohio, 332; *Strader v. Mullane*, 17 Ohio St. 626; *Stitt v. Wilson, Wright (Ohio)* 505; *Sprague v. Dodge*, 48 Ill. 142, 95 Am. Dec. 523; *Lalone v. United States*, 164 U. S. 255, 41 L. ed. 425, 17 Sup. Ct. Rep. 74; *Conner v. Groh*, 90 Md. 674, 45 Atl. 1024; *Kansas Mill Owners' & Mfrs. Mut. F. Ins. Co. v. Rammelsberg*, 58 Kan. 531, 50 Pac. 446.

The bankrupts had the right to rehypothecate the Carey stock to raise money to carry out Fritz's orders. The Unity bank acquired, therefore, a valid lien to the extent of its advance.

Lawrence v. Maxwell, 64 Barb. 102, affirmed in 53 N. Y. 19; *Whitlock v. Seaboard Nat. Bank*, 29 Misc. 84, 60 N. Y. Supp. 611; *Martin v. Megargee*, 212 Pa. 558, 61 Atl. 1023; *Horton v. Morgan*, 19 N. Y. 170, 75 Am. Dec. 311; *Caswell v. Putnam*, 120 N. Y. 152, 24 N. E. 287; *Mayo v. Knowlton*, 134 N. Y. 250, 31 N. E. 985; *Berlin v. Eddy*, 33 Mo. 426; *Price v. Gover*, 40 Md. 103.

The Unity bank has at least all the rights
54 L. ed.

of the bankrupts by way of lien, set-off, or counterclaim on the Carey certificate.

Talty v. Freedman's Sav. & T. Co. 93 U. S. 321, 23 L. ed. 886; *Belden v. Perkins*, 78 Ill. 449; *Donald v. Suckling*, L. R. 1 Q. B. 585, 21 Eng. Rul. Cas. 301; *Reardon v. Patterson*, 19 Mont. 231, 47 Pac. 956; *National Cash Register Co. v. Cervone*, 76 Ohio St. 23, 80 N. E. 1033; *Lahmers v. Schmidt*, 35 Minn. 434, 29 N. W. 169; *Dintruff v. Crittenden*, 1 Thomp. & C. 143; *Hawkins v. Oswald*, 2 Woodw. Dec. 395; *Knickerbocker Trust Co. v. Coyle*, 139 Fed. 792; *National Exch. Bank v. McLoon*, 73 Me. 505, 40 Am. Rep. 388; *Jones, Liens*, 2d ed. § 43.

Richard Fritz was negligent, and must bear any loss that may occur.

First Nat. Bank v. Baird, 73 C. C. A. 96, 141 Fed. 862; *Brown v. Blydenburgh*, 7 N. Y. 141, 57 Am. Dec. 506; *Kernohan v. Durham*, 48 Ohio St. 24, 12 L.R.A. 41, 26 N. E. 982; *Syracuse Sav. Bank v. Merrick*, 182 N. Y. 387, 75 N. E. 232; *Hoffmaster v. Black*, 78 Ohio St. 1, 21 L.R.A.(N.S.) 52, 125 Am. St. Rep. 679, 84 N. E. 423, 14 A. & E. Ann. Cas. 877; 4 Cyc. Law & Proc. p. 85, note 13.

The presumption of law is against the commission of a crime.

Broom, Legal Maxims, 8th Am. ed. p. 947.

Mr. Theodore Horstman argued the cause and filed a brief for appellee Richard Fritz.

Mr. Justice Harlan, after stating the case as above, delivered the opinion of the court:

Briefly outlined, the case, as disclosed by the above statement, is this: The certificate of stock in the Carey Manufacturing Company was placed in the possession of Holzman & Company under an express agreement that it should not go out of their possession, but be held simply for the purpose of showing Fritz's financial responsibility; that Holzman & Company had no authority to pledge the stock with the Unity Banking & Saving Company as security for the payment of their individual note for \$10,000 to that institution; that the pledging of the stock with the bank by Holzman & Company was without Fritz's knowledge; that his signature to the blank power of attorney was unauthorized by him and was a forgery; that Fritz did not, by anything said, done, or omitted by him, lead the bank to believe that he had executed such power of attorney, or had authorized anyone to do so for him; and that he never, in any way, ratified the forgery of his name, or approved the pledging of the stock to the Unity Banking & Saving Company for the individual debt of Holzman & Company.

135] *In view of these facts,—which the referee as well as the district and circuit courts of appeals correctly held to have been established by the evidence,—it would seem unnecessary to cite authorities to show that, as between the bank and Fritz, the bank did not acquire any interest, legal or equitable, in the stock represented by the certificate placed in the possession of Holzman & Company under the circumstances stated. The bank no doubt relied upon the integrity of that firm, and acted in the belief that Fritz had in fact signed the blank power of attorney or authorized it to be signed for him. But that belief was not, according to the evidence, superinduced by anything said, done, or omitted by Fritz. He was not chargeable with laches or negligence. The bank, having elected to rely upon Holzman & Company, must stand the consequences. It cannot say that it was misled by Fritz to its prejudice. It could not, therefore, as between itself and Fritz, take anything in virtue of the forgery. As against the true owner, a right of property cannot be acquired by means of a forged written instrument relating to such property. This is the general rule. An exception to the rule arises where the owner by laches, or by culpable, gross negligence, or by remaining silent when he should speak, has induced another, proceeding with reasonable caution, to act with reference to the property, in the belief that the instrument was genuine, or would be so recognized by the owner. In such cases, the owner would be equitably estopped to rely upon the fact of forgery, as against the person who was misled by his conduct. There are no facts in this case from which could arise an exception to the general rule.

Nor, in view of the facts, need we follow the example of counsel and enter upon an examination of the cases bearing on the general inquiry as to the circumstances under which a broker who, by the act of the owner, comes into the lawful possession of a stock certificate,—but without the legal title having been transferred to him,—may retain the certificate as security for any balance ascertained upon settlement due

136] *him on account of dealings for or on behalf of such customer. We say this because it appears and it is so found, that, at the close of the business transacted by Holzman & Company for Fritz, the latter was a creditor, not a debtor, of that firm.

In any aspect in which the case can be properly viewed, and for the reasons stated, the judgment sustaining Fritz's claim to the stock and certificate in question must be affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, Plff. in Err.,

v.

STATE OF ARKANSAS.

(See S. C. Reporter's ed. 136-150.)

Error to state court—Federal question—decision on non-Federal ground.

1. The ruling of a state court that the power to penalize a railway company for failure to furnish cars on demand arose from a state statute instead of from a rule adopted by the railroad commission, which was challenged as repugnant to the Federal Constitution, does not eliminate the Federal questions from the case, so as to require the dismissal of a writ of error from the Federal Supreme Court, where the constitutional defenses asserted by the pleadings and embraced in the instructions asked and refused were not confined to the mere order as such, but plainly challenged the power of the state to inflict the penalty for the failure to furnish the cars under the circumstances disclosed by the pleadings.

[For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

Commerce—state regulation—carrier's duty to furnish cars.

2. Interstate commerce is unconstitutionally regulated by Kirby's Ark. Dig. §§ 6803, 6804, making it the carrier's duty to supply cars to shippers on demand, under which a carrier will either be compelled to desist from the interchange of cars with connecting lines for the purpose of moving interstate commerce because of a refusal of the state courts to permit it to avail itself, as causing and excusing its default, of the rules and regulations adopted for the interchange of cars by the American Railway Association, which govern 90 per cent of the railways in the United States, or will be obliged to conduct such business with the certainty of being subjected to the heavy penalties provided by the statute.

[For other cases, see Commerce, III. j, in Digest Sup. Ct. 1908.]

[No. 111.]

Argued January 26, 27, 1910. Decided
April 4, 1910.

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Circuit Court of Arkansas County, in that state, imposing a penalty on a railroad company for its refusal to furnish cars to a shipper on demand. Reversed and remanded for further proceedings.

See same case below, 85 Ark. 311, 122 Am. St. Rep. 33, 107 S. W. 1180.

The facts are stated in the opinion.

Mr. Roy F. Britton argued the cause, and, with Messrs. Nicholas J. Gantt, Jr., William T. Wooldridge, Frank G. Bridges, and Samuel H. West, filed a brief for plaintiff in error:

Order No. 305 of the railroad commission of Arkansas, or §§ 6803, 6804, of Kirby's Digest, as construed by the supreme court of Arkansas, being the necessary basis for this suit, and being, by their terms, and as so construed, a burden on interstate commerce, there is a Federal question involved, and this court has jurisdiction.

Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1177; Leathe

note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania. 29 L. ed. U. S. 158.

On the duties and liabilities of carriers as to furnishing facilities for transportation—see note to Harp v. Choctaw, O. & G. R. Co. 61 C. C. A. 414.

On the duty of carrier to furnish cars to shipper—see notes to Houston, E. & W. T. R. Co. v. Campbell, 43 L.R.A. 225, and Di Giorgio Importing & S. S. Co. v. Pennsylvania R. Co. 8 L.R.A. (N.S.) 108.

Validity under commerce clause of statutory penalty for carrier's failure to furnish freight cars.

The decision in *ST. LOUIS S. W. R. CO. v. ARKANSAS* was foreshadowed by a prior ruling in a case involving an interstate shipment, that the Texas statute penalizing the failure of a railway company to furnish cars to a shipper within a certain number of days after the latter's requisition in writing, in the sum of \$25 per day for each car not so furnished, and admitting of no excuse except such as arises from "strikes or other public calamity," was an unconstitutional regulation of interstate commerce. *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491 (reversing 36 Tex. Civ. App. 609, 83 S. W. 53).

It is true that the exact question involved in this case was the validity of the statute. 54 L. ed.

v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158.

A regulation of the instrumentalities of interstate commerce is a regulation of that commerce, and is repugnant to the commerce clause of the United States Constitution.

Gloucester Ferry Co. v. Pennsylvania; *United States v. E. C. Knight Co.*; and *Johnson v. Southern P. Co.*,—*supra*; *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Louisville & N. R. Co. v. Central Stock Yards*

applied, as it had been by the state courts, to an interstate shipment. But the Supreme Court, in its opinion, pointedly refers to the failure of the statute to make any exception in cases of an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states as well as in other places within the same state.

Subsequently the supreme court of Texas upheld the statute as to intrastate shipments. *Allen v. Texas & P. R. Co.* 100 Tex. 525, 101 S. W. 792. In so doing, however, it took a different view of the statute from that adopted by the Federal court, saying that the exceptions, "strikes or other public calamities," were not exclusive, and did not prevent the carrier from showing that its failure was due to no omission of duty on its part.

Following *Houston & T. C. R. Co. v. Mayes*, *supra*, an Arkansas statute imposing an absolute duty to furnish cars to shippers in cases of interstate shipments was held invalid in *St. Louis, I. M. & S. R. Co. v. Hampton*, 162 Fed. 693, as an unlawful interference with interstate commerce.

And in *Southern R. Co. v. Com.* 107 Va. 771, 17 L.R.A. (N.S.) 364, 60 S. E. 70, a rule of the Virginia state corporation commission, imposing a penalty of \$1 per day for a railway company's failure to furnish, within four days from demand, the cars needed for interstate as well as intrastate shipments, was held to be an invalid interference with interstate commerce, although power to suspend the operation of the rule "if justice demands" was reserved,—at least, when such rule was applied to a state

Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; *Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; *Adams Exp. Co. v. Kentucky*, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Central Stock Yards Co. v. Louisville & N. R. Co.* 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

The order of the railroad commission and the statutes of Arkansas, as applied to the facts in this case, impose a direct burden on interstate commerce.

Houston & T. C. R. Co. v. Mayes, supra; *McNeill v. Southern R. Co.* 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; *United States v. E. C. Knight Co. and Wabash, St. L. & P. R. Co. v. Illinois*, supra; *Southern R. Co. v. Com.* 107 Va. 771, 17 L.R.A. (N.S.) 364, 60 S. E. 70; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rehman*, 138 U. S. 78, 34 L. ed. 862, 2 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855.

The order and statutes are void because Congress has legislated with respect to their subject-matter in the act to regulate commerce, approved February 4, 1887, and amendments thereto.

Pennsylvania R. Co. v. Hughes, 191 U. S.

477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802.

It is not necessary that the state court expressly pass on the Federal questions, if the effect of its decision is to deny the right set up by the one claiming it under the Constitution of the United States.

Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605.

There can be no question that the police power of the state cannot be exercised in a way to infringe upon the Federal Constitution.

Railroad Commission Cases, 116 U. S. 307, 331, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191; *Central R. Co. v. Murphey*, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 A. & E. Ann. Cas. 514.

Nor is it material by what authority of the state the power is exercised, whether by an act of the legislature, or by rule of the railroad commission, or by the judgment of the state court itself. If the act of any of these governmental departments impinges on the exclusive jurisdiction of Congress, or deprives any person of due process of law or the equal protection of the laws, this court will review the decision below.

Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527.

The state court in the case at bar could not have reached its judgment without deciding the Federal matter involved.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407.

The question whether a right or privilege claimed under the Constitution or laws of

of facts which, because of shortage of cars due to unprecedented demand, rendered it impossible to comply with the rule without disobeying it in other parts of the state, or disobeying the rules of other states.

Practically the same question involved in the principal case was raised in *Southern R. Co. v. Melton*, 133 Ga. 277, 65 S. E. 665, and a contrary conclusion reached. Here it was contended that a rule of the state railroad commission penalizing in the sum of \$1 per day the carrier's failure to furnish cars to a shipper within thirty days (Sundays and legal holidays excepted) after demand imposed a burden upon interstate commerce, even when applied to shipments wholly within the state, because such rule has the effect of withdrawing equipments necessary to take care of the carrier's interstate business; but the court overruled the contention, saying that arguments of

possible inconvenience, possible need for cars elsewhere, etc., could not prevail.

Patterson v. Missouri P. R. Co. 77 Kan. 236, 15 L.R.A. (N.S.) 733, 94 Pac. 138, is in its facts singularly like *Houston & T. C. R. Co. v. Mayes*, supra. The Kansas statute differed from the Texas statute in that the penalty was \$1 per day instead of \$25, and that to the excuses of "strikes or other public calamities," recognized by the Texas statute, the Kansas act added "unavoidable accidents." These differences, slight though they seem, were regarded as sufficient to sustain the statute as applied to a shipment between two points within the state, passing over a route partly outside of such state, the court relying upon the statement in *Houston & T. C. R. Co. v. Mayes*, that the Texas statute was "not far from the line of proper police regulation."

the United States was distinctly and sufficiently pleaded and brought to the notice of the state court is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state.

Carter v. Texas, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687.

Both because of its indirect and necessary effect upon interstate commerce, and because it approves of a regulation of the instrumentalities of interstate commerce, the decision of the Arkansas supreme court is an invalid encroachment upon the power of Congress to regulate commerce among the states.

Gibbons v. Ogden, 9 Wheat. 210, 6 L. ed. 73; *Hall v. DeCuir*, supra; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Interstate Commerce Commission v. Illinois C. R. Co.* 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; *Baltimore & O. R. Co. v. United States*, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; *Interstate Commerce Commission v. Chicago & A. R. Co.* 215 U. S. 479, 54 L. ed. 291, 30 Sup. Ct. Rep. 163; *United States v. Colorado & N. W. R. Co.* 15 L.R.A. (N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, 13 A. & E. Ann. Cas. 893.

Mr. Hal L. Norwood submitted the cause for defendant in error. Messrs. F. E. Brown and Pettit & Pettit were on the brief:

The law of Arkansas recognizes and establishes the common-law excuses for failure to furnish sufficient shipping facilities.

St. Louis Southwestern R. Co. v. Clay County Gin Co. 77 Ark. 362, 92 S. W. 531.

The law of Arkansas, which is simply declaratory of the common law, requiring railroads to furnish cars, subject to reasonable excuses, is not a burden on interstate commerce.

Calvert, Regulation of Commerce, p. 5; *Richmond Elevator Co. v. Pere Marquette R. Co.* 10 Inters. Com. Rep. 636; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 118; *United States ex rel. Coffman v. Norfolk & W. R. Co.* 109 Fed. 821.

Mr. Justice White delivered the opinion of the court:

Prior to October, 1905, the railroad commission of Arkansas promulgated a rule by which, within five days after written application by a shipper, it was made the duty of a railway company, under the conditions prescribed in the rule, to deliver freight cars to such shipper, for the purpose of enabling

him to load freight. The rule in question, known as order No. 305, is in the margin.†

*Complaint was made by Philip [141] Reinsch before the commission, charging the St. Louis Southwestern Railway Company with having violated this rule, in that it was fifty-one freight cars short in complying with written applications made at various times in October, November, and December, 1905, and January, 1906, for the delivery at a station called Stuttgart,

†It is ordered by the commission that its rules be so amended that when a shipper makes written application to a railroad company for a car or cars, to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of the freight, and its final destination, the railroad company shall furnish same within five days from 7 o'clock A. M. the day following such application. Provided, that when a shipper orders a car or cars and does not use the same, he shall pay demurrage for such time as he holds the car or cars, at the rate of \$1 per car per day, dating from 7 o'clock A. M. after the car or cars are placed.

Or, when the shipper making such application specifies a future day on which he desires to make a shipment, giving not less than five days' notice thereof, computing from 7 o'clock A. M. the day following such application, the railroad company shall furnish such car or cars on the day specified in the application.

When freight in car loads or less is tendered to a railroad company, and correct shipping instructions given, the railroad agent must immediately receive the same for shipment, and issue bills of lading therefor; and whenever such shipments have been so received by any railroad company, they must be carried forward at the rate of not less than 50 miles per day of twenty-four hours, computing from 7 o'clock A. M. the second day following the receipt of shipment. Provided, that in computing the time of freight in transit there shall be allowed twenty-four hours at each point where transferring from one railroad to another, or re-handling freight is involved.

The period during which the movement of freight is suspended on account of accident, or any cause not within the power of the railroad company to prevent, shall be added to the free time allowed in this rule, and counted as additional free time.

The commission reserves the right, on its own motion, to suspend the operation of these rules, or any one or more of them, in whole or in part, whenever it shall appear that justice demands such action, and the commission will, upon complaint, hear and act upon application for a like suspension.

Nothing in these rules shall apply to shipment of live stock and perishable freight where the rules of this commission or the laws of the state require the more prompt furnishing of cars or movement of freight than provided for by these rules.

142] *of a much larger number of freight cars. The commission found that the railway company was short in the delivery of cars, as alleged, and that its failures in that respect not only violated order No. 305, previously referred to, but also § 10 of an act of March 11, 1899, embodied in Kirby's Digest as § 6803. It also declared that by these violations of the statute and rule of the commission the railway company had become subject to penalties in favor of the state of Arkansas, as provided in § 18 of the act of 1899, being § 6813 of Kirby's Digest, which penalties were to be enforced as therein provided. Conformably to the section in question, the prosecuting attorney for the proper county commenced this action in the name of the state against the railway company, to recover penalties to the amount of \$1,950. Rule No. 305 of the commission was recited, the proceedings before the commission were detailed, and the order made by the commission, finding the defaults on the part of the railway company, was set out, and upon these considerations the prayer for the statutory penalty was based.

A demurrer having been overruled, an answer was filed on behalf of the railway company. By that answer it was alleged that the company was engaged in the transportation of interstate shipments of freight over its line of railroad in the states of Arkansas, Illinois, Louisiana, and Missouri, and that its equipment of freight cars for the transaction of its business, both interstate and state, was ample. That, anticipating the possible increase of business, both interstate and state, and as a precautionary measure, the company had, prior to the autumn of 1905, endeavored to contract for the construction of a large number of additional freight cars, but failed to do so, because the car manufacturers had such a press of work that they were unable to take the order. That thereupon, in an effort to provide for every future contingency, the corporation had, at a very large expense, commenced the construction of a plant of large capacity to enable it to manufacture its own cars, and was pressing the same to 143] completion in the *shortest possible time. It was alleged that at the time of the alleged defaults there was an extraordinary demand for cars, both for the movement of interstate and local traffic; and when, as the result of this condition, the shortage developed, the company had equally distributed its cars to the shippers along its line, giving no preference to interstate over local shippers, or to local over those desiring cars for interstate shipments. It was alleged that it would

have been impossible for the company to comply with rule No. 305 without discriminating against its interstate commerce shippers, and therefore obedience to the rule would have resulted in a direct burden upon interstate commerce. Referring to the interstate commerce business of the company, which it was alleged moved over its own line through the states of Arkansas, Illinois, Louisiana, and Missouri, and thence by connecting roads throughout the United States and Canada, it was charged the burden imposed upon the company to deliver cars to local shippers without reference to the effect and operation of such delivery upon the interstate commerce business of the company would be a direct burden upon interstate commerce, and therefore repugnant to the Constitution of the United States, and that the same result would flow from enforcing the command of the commission as embodied in its rule No. 305. The rule, moreover, was especially assailed as being repugnant not only to the commerce clause, but to the 14th Amendment, both because of the inherent nature of the duty which the rule sought to impose, and also because of the unreasonable conditions which were expressed therein.

There was a trial to a jury. Without going into detail it suffices to say that specific instructions were asked, in reiterated form, by the defendant company, concerning its asserted defenses under the Constitution of the United States; that is, the repugnancy to the Constitution of the rule of the commission and of the statute imposing penalties upon it for its failure to furnish cars. After verdict against the company for \$1,350, and judgment thereon, the cause was taken to the *supreme court of the [144 state of Arkansas, and from the action of that court in affirming the judgment (85 Ark. 311, 122 Am. St. Rep. 33, 107 S. W. 1180) this writ of error is prosecuted.

The question for decision will be simplified by analyzing the action of the court below,—that is, by stating the facts which it deemed were established, and by precisely fixing the issues and principles governing the same which the court stated and applied. Clearing the way to consider the proposition which it conceived the case involved in its fundamental aspect, the supreme court of Arkansas at once disposed of the contention that the commission was without power to adopt rule No. 305 by the statement that the power to do so was expressly conferred by statutes of the state. The court did not pass on the contentions concerning the alleged conflict between the rule and the Constitution of the United States, because it was expressly declared that it was not at all necessary to do so. This was based upon the

conclusion that the duty to furnish the cars which had been demanded arose from statutory provisions (Kirby's Dig. §§ 6803, 6804) which were but expressive of the common law, and that the liability for the penalty which was imposed by the judgment below equally resulted, considering the default as alone arising from violations of the statutory duty.

The statutory duty to supply cars on application having been thus ascertained, and the failure of the company to furnish after demand not being disputed, the court was brought to consider what it declared to be the only question in the case; that is, "Whether the undisputed evidence introduced by appellant presented a sufficient excuse for the failure to furnish the cars." In so far as adequate excuse could arise from the complete discharge by the company of the duty to equip its road with a sufficient number of cars, it was recognized that the proof was ample; indeed, the court said:

"In fact, the appellant was shown to have a larger car equipment than the average freight-carrying road, and the failure to furnish cars was wholly due to an inability [145] to regain its cars which were sent to other roads carrying freight from its own line."

Coming, then, to state the facts concerning the cause which the court expressly found was wholly responsible for the failure to deliver all the cars asked for, it was pointed out:

"The appellant is an originating line, originating about 70 per cent of its traffic and receiving about 30 per cent. To illustrate its situation, during the month of November, 1905, it had in revenue service 9,517 cars, of which it averaged daily 3,982 in use on its own lines, 5,525 off its line, and 2,519 foreign cars in use. In other words, a daily balance of exchange of 1,473 cars was against it, and its shortage in cars was only about 650 per day."

Directing attention to the fact that the preponderant originating business of the road led to a preponderance of interstate over domestic or local traffic, and that such interstate traffic would be greatly impeded, if not paralyzed, by breaking bulk at the state line and refusing to give continuous transportation, by not allowing its cars, when loaded, to move beyond its line to the roads of connecting carriers, the court was brought to consider whether thus permitting the cars to move for the purpose of continuous interstate commerce traffic was, in and of itself, a fault entailing legal responsibility under the statute for a refusal to deliver cars for local traffic when requested.

54 L. ed.

In holding the negative of this proposition the court said:

"The evidence indisputably establishes that it is a benefit to the shipping public to interchange cars, and not to refuse to send cars off the line. . . . It is unquestionably good for the public that the railroads of the United States have a system of interchange of cars, instead of each road hauling to its termini only, and thereby force reloading and reshipment. The inconvenience and expense of such a system would at once condemn it as failing to meet public requirements. It is unquestionably the policy of both state and Federal legislation to facilitate, if not require, an interchange of cars. The most recent illustration of this policy is found in § 17 of the act of April 19, 1907 (Acts 1907, p. 463). For one railroad company to be an Ishmaelite among its associates would operate disastrously to its shippers. The shippers of Arkansas expect the public carriers to put their cotton to the spinners in New England, and their fruit to the North and their lumber and coal to the four quarters of the Union, without change from consignor to consignee."

Thus deciding that the mere delivery of cars for through transportation was not a factor in determining whether there was legal fault, the court came to consider whether there was anything in the arrangement by which the cars in question were permitted to go off the line, which in and of itself constituted fault and consequent responsibility for failure to furnish all the cars required in time of shortage. Reviewing the evidence on this subject, it was found that the company was a member of an association known as the American Railway Association, which had adopted rules governing the interchange of cars from one road to another, with provisions for the return thereof and for compensation therefor, the association embracing and its rules governing 90 per cent of the railroads of the United States. Fixing thus the system which controlled the company in the interchange of its cars, it was determined that the mere formation of an association for such purpose was not repugnant to the laws against combinations in restraint of trade, the court, after referring to various state decisions to that effect, saying:

"The result of these and other decisions, as summed up in an excellent text-book, is that these associations are lawful, and their rules and regulations, when reasonable, will be upheld. 2 Hutchinson, Carr. 3d ed. § 861. Mr. Elliott says that such associations formed for the purpose of making and enforcing reasonable regulations to facilitate busi-

ness and secure the prompt loading, unloading, and return of cars, cannot be held illegal, upon the ground that the constituent companies, by becoming members, surrender [147] their corporate *functions and control to the association. 4 Elliott, Railroads, § 1568."

Having thus sustained the right of the road to deliver its cars for the purpose of continuous transportation beyond its line in interstate commerce, and sanctioned the general method by which it was sought to regulate and control the transmission and return of such cars, that is, by membership in the American Railway Association, the nature and character of the rules of the association were considered. Without going into detail, or following the statements of the court on the subject, it suffices to say that, analyzing the rules of the association, the court concluded that the regulations were inefficient in many respects, did not provide sufficient penalties to secure the prompt return of cars by roads which might receive the same, but, on the contrary, afforded a temptation in time of car shortage, inducing a road having the cars of another road to retain and use them, paying the penalty, as to do so would afford it an advantage. Pointing out that the general result of the operation of the rules of the American Railway Association for the interchange of cars had proven ineffective in the past, it was held that the company was at fault for delivering its cars to other roads for the movement of interstate commerce subject to the regulations of the American Railway Association, and therefore the penalty imposed in the judgment was rightly assessed.

As the penalty, which the court sustained, was enforced solely because of its conclusion as to the inefficiency of the rules and regulations of the American Railway Association, which governed 90 per cent of the railroads in the United States, the court was evidently not unmindful that the carrier before it was powerless, of its own motion, to change the rules thus generally prevailing, and therefore was necessarily either compelled to desist from the interchange of cars with connecting carriers for the purpose of the movement of interstate commerce, or to conduct such business with the certainty of being subjected to the penalties which the [148] state statute provided *for. We say this, since the court said: "It may be better for the appellant to suffer these ills than to sail under a black flag, and refuse to send its cars beyond its line. That is not a question for the court. Until the appellant carrier shows reasonable rules and regulations

for the interchange of cars, it cannot avail itself of these rules of interchange as causing and excusing its default to the public, for the rules here shown have proved unreasonable and inefficient before this default occurred." And the gravity of the ban on interstate commerce which it was thus recognized would result from the ruling made cannot be more vividly portrayed than by once again quoting the statement of the court on the subject, saying: "For one railroad company to be an Ishmaelite among its associates would be disastrous to its shippers." If the railroad company, compelled to be a law unto itself because of its inability to change, by its own isolated will, the rules of the American Railway Association, should prefer to subject itself to the penalties inflicted by the state statute rather than bring disaster to its shippers, the seriousness of the burden to which interstate commerce would be subjected cannot be better illustrated than by saying that, by the provisions of the state statute, the penalty upon the carrier for each violation of the act or of the rules and regulations of the commission was not less than five hundred nor more than three thousand dollars.

When, by thus following the careful analysis made by the court below, the contentions which the case present are circumscribed and the issues to which all the controversies are reducible are accurately defined, we think no serious difficulty is involved in their solution. In the first place, it is suggested by the defendant in error that no Federal question arises for decision, and therefore the writ of error should be dismissed. This rests upon the theory that, as the court below put the rule of the commission, No. 305, out of view, and declared in its statement of the case that no extraordinary or unusual rush of business on the line of the defendant company *oc- [149] casioned the car shortage, therefore no ground of Federal cognizance remained; as, in other respects, the action of the court below was, in effect, placed purely upon matter of local concern broad enough to sustain its judgment. The contention is plainly without merit. It is to be conceded that the ruling of the court as to the irrelevancy of the rule adopted by the commission eliminates from consideration so much of the answer and of the instructions asked by the company and refused, relating to the repugnancy, of the order to the commerce clause of the Constitution, both on account of its inherent operation and because of unreasonable provisions, which, it was alleged, it contained. But the

constitutional defenses which were asserted by the answer, and which were embraced in the instructions asked and refused, were not confined to the mere order as such, but plainly challenged the power of the state to inflict the penalty for the failure to furnish the cars under the circumstances disclosed by the answer. And the ruling of the court, that the asserted power arose from the statute instead of from the rule adopted by the commission, but changed the form without in any way minimizing or obscuring the completeness of the Federal defense which was made in the pleading and necessarily passed upon by the court below.

Coming to the merits, we think it needs but statement to demonstrate that the ruling of the court below involved necessarily the assertion of power in the state to absolutely forbid the efficacious carrying on of interstate commerce, or, what is equivalent thereto, to cause the right to efficiently conduct such commerce to depend upon the willingness of the company to be subjected to enormous pecuniary penalties as a condition of the exercise of the right. It is to be observed that there is no question here of a regulation of a state forbidding an unequal distribution of cars by a carrier for the benefit of interstate to the detriment of local commerce. This is the clear result of the finding below as to the proportion of the originating traffic of the road, and the extent of the cars retained and those permitted to go beyond the line of the road for the purposes of interstate commerce. If it be that the court below was right in its assumption that the rules of the American Railway Association, governing, as was conceded by the court, 90 per cent of the railroads, and hence a vast proportion of the interstate commerce of the country, are inefficient to secure just dealing as to cars moved by the carriers engaged in interstate commerce, that fact affords no ground for conceding that such subject was within the final cognizance of the court below, and could by it be made the basis of prohibiting interstate commerce or unlawfully burdening the right to carry it on. In the nature of things, as the rules and regulations of the association concern matters of interstate commerce inherently within Federal control, the power to determine their sufficiency, we think, was primarily vested in the body upon whom Congress has conferred authority in that regard.

The judgment of the Supreme Court of the State of Arkansas is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Mr. Chief Justice Fuller dissents.

ROBERT H. TODD, Appt.,

v.

HIGINIO ROMEU.

(See S. C. Reporter's ed. 150-157.)

Lis pendens — in Porto Rico — purchaser pending suit.

1. The pendency of a suit to subject real property registered in the name of an alleged fraudulent grantee to the payment of a judgment against the grantor does not create a defect in the title, or engender a lien on the property, so as to make applicable the doctrine of the Spanish and Porto Rican courts that one who acquires a right in or to property with knowledge of a defective title or of an existing lien is not an innocent third party, and is not entitled to rights which depend for their existence upon that relation.

[For other cases, see *Lis Pendens*, II., in Digest Sup. Ct. 1908.]

Lis Pendens — in Porto Rico — purchaser pending suit.

2. Knowledge of the pendency of a suit to subject real property registered in the name of an alleged fraudulent grantee to the payment of a judgment against the grantor, and of the right to apply to the court for the statutory cautionary notice, does not deprive a purchaser having such knowledge of the attitude of an innocent third party, and subject the property in his hands to a responsibility for the result of the suit to the extent which would have been the case had such notice been demanded and recorded.

[For other cases, see *Lis Pendens*, II., in Digest Sup. Ct. 1908.]

[No. 408.]

Submitted January 10, 1910. Decided April 4, 1910.

APPEAL from the District Court of the United States for Porto Rico to review a decree enjoining a judgment creditor from proceeding against real property in the hands of a purchaser from the fraudulent grantee of the judgment debtor. Affirmed.

See same case below, 4 Porto Rico Fed. Rep. 445.

The facts are stated in the opinion.

Mr. N. B. K. Pettingill submitted the cause for appellant:

Any proper and sufficient proof of notice which would be sufficient to destroy the good faith of an intending purchaser, and make it equitable that he be charged with the claim or lien of a person other than his vendor, will, under the Spanish law and the mortgage law, result in his being so charged.

58 Juris. Civil de España, p. 460; 102 Juris. Civil de España, p. 390; 77 Juris.

Civil de España, pp. 56, 69; 79 Juris. Civil de España, pp. 252, 260; 95 Juris. Civil de España, p. 773; 100 Juris. Civil de España, p. 679; Cobian v. del Valle Franco, 1 Porto Rico, 29; Voigt de Castro v. Rivas, 1 Porto Rico, 60.

In the jurisdictions of those states of the Union which have derived their systems of jurisprudence from the civil law, the same rule prevails.

Sampson v. Ohleyer, 22 Cal. 211; Sharp v. Lumley, 34 Cal. 615; Wise v. Griffith, 78 Cal. 152, 20 Pac. 675; Christie v. Sherwood, 113 Cal. 530, 45 Pac. 820; Hibernia Sav. & L. Soc. v. Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Splane v. Mitchell-tree, 2 La. Ann. 265; Bach v. Abbott, 6 La. Ann. 809; Swan v. Moore, 14 La. Ann. 845; Brian v. Bonvillain, 52 La. Ann. 1806, 28 So. 261.

In Louisiana the rule seems to be different as to the effect of notice of unrecorded mortgages, or of those not reinscribed, as required by law; but that is clearly the result of an unusual statutory provision, and does not affect the application of the ordinary rule otherwise.

Ridings v. Johnson, 128 U. S. 212, 32 L. ed. 401, 9 Sup. Ct. Rep. 72; Lacassagne v. Chapuis, 144 U. S. 119, 36 L. ed. 368, 12 Sup. Ct. Rep. 659.

No brief was filed for appellee.

Mr. Justice White delivered the opinion of the court:

Todd, a judgment creditor of Pedro and Juan Agostini, sued Anna Merle to subject property registered in her name to the payment of the judgment, on the ground that she was a mere interposed person, resulting [153] from simulated conveyances to *her made by the Agostinis. To enforce a decree in his favor Todd advertised the property for sale. Romeu, alleging himself to be an innocent third person, who had bought the property pending the suit, filed a bill to enjoin. A demurrer on behalf of Todd having been sustained, and a final decree entered against Romeu, he brought the cause to this court. The judgment was reversed and the case remanded. Romeu v. Todd, 206 U. S. 358, 51 L. ed. 1093, 27 Sup. Ct. Rep. 724.

In virtue of leave given him by the court below, Todd answered, and alleged that Romeu was not an innocent third person, because he had bought with notice of the pendency of the suit. A demurrer on the ground that this answer stated no defense was sustained, and a final decree was rendered enjoining Todd from proceeding against the property. This appeal is prosecuted by Todd, and the question for decision is thus stated in the brief filed on his behalf: "What is the law of Porto Rico as to the

effect of bringing home to an intending purchaser of real estate knowledge or notice of a defect in the title to, or of a lien upon, such real estate in favor of some person other than the vendor, where such knowledge or notice is not required (acquired?) from the registry of properties, such defect or lien not being recorded?" Under the assumption that the pending suit, by operation of law, dismembered the ownership of Merle in the property to which the suit related, pending the same, or operated, from the fact of its pendency, to create a lien upon the property, decisions of the supreme courts, both of Porto Rico and of Spain, are referred to as establishing that one who acquires a right in or to property, with knowledge of a defective title or of an existing lien, is not a third party, and therefore is not entitled to rights which depend for their existence upon that relation. Conceding, for the sake of the argument, that the decisions relied on announce the principle which it attributed to them, we think they are here inapposite. We say this because their applicability depends upon the erroneous assumption upon which the entire argument necessarily proceeds; that is to say, upon the theory *that, by operation of [154] law, the effect of the pending suit against Merle was either to create a defect in the title of the property standing in her name, or to engender a lien on the same.

When the case was previously here we held: (a) That, differing from the ancient Spanish law, the modern Spanish law did not deprive an owner of property of the right, because a suit was brought against him concerning the same, to dispose of the property *pendente lite*. Pp. 363, 364. But while this was the case, the modern law, in order to prevent this right from depriving suitors of the ultimate benefit to result from the successful prosecution of suits, and to protect the public, provided for a system of cautionary notices, by means of which suitors in the cases provided for could put upon the public record a notice concerning the pendency of their suits, thus protecting those who dealt with property upon the faith of the recorded title, leaving the owner the power to dispose of his property pending a suit, and, at the same time, saving to those who sued the enjoyment of their ultimate rights if they recorded a cautionary notice.

(b) As these requirements of the local law were incompatible and in conflict with the doctrine of *lis pendens* prevailing in the courts of the United States, it was held that that doctrine did not obtain in Porto Rico, because the legislation of Congress concerning that island contemplated the fostering, and not the overthrow, of the local laws, especially those governing the title to real

estate. P. 364. (c) Applying these rulings, it was decided that as Todd had not availed of the privilege of the local law by applying for and recording a cautionary notice, the court below had erroneously decided that the property in the hands of Romeu, an innocent third person, who had bought from Merle on the faith of the record title, was liable to Todd as the result of the decree ultimately rendered in his favor.

It thus becomes apparent that the assumption as to dismemberment of ownership and consequent defective title, or a lien on the property arising solely by the pendency of the Todd suit, upon which the case before [155] us primarily depends, is *without foundation, and was expressly decided to be so by our previous ruling. The case, then, if it has any foundation at all, can only rest upon the hypothesis that as, by the pendency of the suit, the law gave the right to obtain a cautionary notice and put the same upon the public records, so that, if the suit ultimated in favor of the complainant, the person buying the property or dealing concerning the same pending the suit would do so subject to rights finally established in favor of the complainant, therefore the knowledge of the suit and of the rights arising from it as a result of the privilege of registering a cautionary notice deprived the person having such knowledge of the attitude of an innocent third party, and subjected the property in his hands to a responsibility for the result of the suit to the extent which would have been the case had the notice been recorded. But this also depends upon an erroneous assumption as to the operation and effect of the local law as to cautionary notice. In that law, as expressly held in the previous opinion, the provision as to cautionary notices which was applicable to the suit of Todd v. Merle was embraced in the mortgage law, and was as follows (article 42): "Cautionary notices of their respective interests in the corresponding public registries may be demanded by: 1. The person who enters suit for the ownership of the real property, or for the creation, declaration, modification, or extinction of any property right." This provision is followed by nine other paragraphs, specifying particular cases in which a cautionary notice is authorized, none, however, of these paragraphs, having any relation to the case in hand. But the right to have a cautionary notice and to record it in order to cause the pendency of the suit to be operative against property involved in the suit, against persons buying, pending the suit, on the faith of the registered title, was not an absolute one arising in and by the effect of the pendency of the suit, but was contingent; that is to say, could only arise as

the result of an application made to the court to grant the cautionary notice, and by a judgment of the court awarding the same. This *clearly follows from a subsequent provision of the mortgage law, saying (art. 43):

"In the case of No. 1 of the preceding article, no cautionary notice may be made unless it is so ordered by a judicial decree issued at the instance of a person having a right thereto, and by virtue of a document sufficient in the opinion of the judge."

In other words, the right in the case specified to the cautionary notice was not absolute, but relative. That is to say, the law, considering the right of an owner to dispose of his property and the injustice which would arise from limiting such right in every case merely because a suit was brought against him concerning the property, gives the right to the cautionary notice in such case, not merely because of the commencement of the suit, but makes it depend upon an express order of the court granting the cautionary notice. As, therefore, the right to a cautionary notice did not arise in and by virtue of the pendency of the suit, and could only have come from a judicial decree which was never applied for and never rendered, it must follow that the assumption that there was an existing dismemberment of ownership, or lien, arising from the conception that there was the absolute right to the cautionary notice, has no foundation upon which to rest. It results that the contention reduces itself to this; that Romeu, the purchaser, who bought the property on the faith of the recorded title, and in the absence of a cautionary notice, was bound because he had knowledge of the suit, although, by operation of law, the suit had no effect whatever upon the right of the owner to dispose of the property during its pendency, since the steps which the law provided as necessary to limit the right of the owner had not been taken. Thus, to bring the proposition relied upon to establish that error was committed by the court below to its ultimate conclusion is to demonstrate its want of merit.

Of course, our ruling is confined to the case before us, and we do not, therefore, intimate an opinion as to whether the *doctrine that notice is equivalent [157 to registry is or is not compatible with the public policy manifested by the requirements of the mortgage law prevailing in Porto Rico. And upon the hypothesis that the doctrine that notice is equivalent to registry is not incompatible with the requirements of the mortgage law, we must not be understood as deciding that one who bought where no cautionary notice had been registered, but with knowledge

of a pending suit from which, owing to its character, the law gave an absolute right, without the prerequisite of judicial action, to the cautionary notice, would not be liable to the extent of the property acquired *pendente lite* for the ultimate results of the suit. See, among others, paragraph 2 of article 42 of the mortgage law, in connection with the second paragraph of article 43 of the same law.

Affirmed.

CHARLES A. DAVIS, Executor of the Estate of Frank E. Jandt, Deceased, Plff. in Err.,

v.

CLEVELAND, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY et al.

(See S. C. Reporter's ed. 157-179.)

Error to circuit court—sufficiency of certificate of jurisdiction.

1. Formal defects in the certificate as to jurisdiction filed by a Federal circuit court under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 5, for the purpose of sustaining a writ of error from the Federal Supreme Court, are not material, where the record clearly shows that the only matter tried and decided in the circuit court was one of jurisdiction.

[For other cases, see Appeal and Error, 931-937, in Digest Sup. Ct. 1908.]

NOTE.—On direct review in Federal Supreme Court of judgments of district and circuit courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* 13 L.R.A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; and *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158.

Attachment or garnishment of foreign railway cars as affecting interstate commerce.

DAVIS v. CLEVELAND, C. C. & ST. L. R. Co. can hardly be regarded as finally settling this much vexed question, the court itself saying that the case did not call for a very comprehensive decision on the subject, and contenting itself with deciding that the cars, situated as the record tends to show they were when attached, were not exempt from process under the state laws. Some, at least, of these cars, were, when attached, empty, and had not started on their return trip. And there are a number of decisions that cars so situated are subject to attachment.

Thus, the levy of an attachment against a nonresident railroad company on one of its freight cars standing empty and idle on the

Error to circuit court—jurisdiction below.

2. The jurisdiction of a Federal circuit court as a Federal court is so involved as to sustain a direct writ of error from the Federal Supreme Court under the act of March 3, 1891, § 5, in a judgment dismissing the suit on the ground of the invalidity of the attachment and garnishment of the property of the nonresident defendant, and upon the lack of a general appearance by such defendant.

[For other cases, see Appeal and Error, 908-911, in Digest Sup. Ct. 1908.]

Appearance—general or special—motion to quash attachment and garnishment.

3. A nonresident defendant over whom personal jurisdiction has not been obtained may appear specially in a suit in a Federal circuit court for the sole purpose of moving to quash the service of writs of attachment and garnishment upon its property in the district, on the ground that such property was not subject to attachment or garnishment.

[For other cases, see Appearance, 64-66, in Digest Sup. Ct. 1908.]

Commerce—attachment of railway cars.

4. Cars owned by a foreign railway company, which have temporarily come into the state in the course of interstate transportation, through the agency of other carriers, are subject to attachment under the state laws, despite the provisions of the interstate commerce act and of U. S. Rev. Stat. § 5258, U. S. Comp. Stat. 1901, p. 3564, securing continuity of transportation.

track of a railroad within the state has been upheld as not interfering with interstate commerce. *Southern P. Co. v. Brown*, 131 Ga. 245, 62 S. E. 177.

And the attachment of a foreign railway car when not in actual use is upheld as not forbidden by the commerce clause of the Federal Constitution, nor by U. S. Rev. Stat. § 5258, U. S. Comp. Stat. 1901, p. 3564, and the interstate commerce act of February 4, 1887, enacted by Congress in pursuance of a power vested in it by such clause. *DeRochemont v. New York C. & H. R. R. Co.* 75 N. H. 158, —L.R.A. (N.S.) —, 71 Atl. 868.

A distinction between a car in actual use and one that is idle may also be inferred from the statement in *Johnson v. Union P. R. Co.* 29 R. I. 80, 132 Am. St. Rep. 799, 69 Atl. 298, that, as it did not appear whether or not the car was in actual use by the garnishee in the course of interstate commerce, or was idle, the court thought it unnecessary to decide the question whether or not the attachment of rolling stock under such circumstances was an interference with interstate commerce.

The same may also be said of *Southern Flour & Grain Co. v. Northern P. R. Co.* 127 Ga. 626, 9 L.R.A. (N.S.) 853, 119 Am. St. Rep. 356, 56 S. E. 742, 9 A. & E. Ann. Cas. 437, which, according to the official head-

Commerce — garnishment of freight due nonresident carrier.

5. Sums due to a foreign railway carrier from other carriers as the former's share of freight on interstate shipments may be garnished under the state laws, despite the provisions of the interstate commerce act and of U. S. Rev. Stat. § 5258, U. S. Comp. Stat. 1901, p. 3564, securing continuity of transportation.

[No. 123.]

Argued March 3, 4, 1910. Decided April 4, 1910.

IN ERROR to the Circuit Court of the United States for the Northern District of Iowa, to review a judgment dismissing, for want of jurisdiction over person or property, a suit against a foreign railway company in which writs of attachment and garnishment were issued and levied upon cars belonging to such company in the possession of other carriers, and sums of money due from such other carriers as the defendant carrier's share of the freight on interstate shipments. Reversed and remanded for further proceedings.

See S. C. below, on motion to quash, 146 Fed. 403.

The facts are stated in the opinion.

Mr. Wilbur Owen argued the cause, and, with Mr. Elbert H. Hubbard, filed a brief for plaintiff in error:

The rolling stock of railway corporations

note, holds that a freight car received by a domestic railway company from a connecting company of another state, while loaded with freight, under a contract that, instead of being unloaded and reloaded at the point of intersection without the state, it may be taken to its destination within the state, there to be reloaded and returned, is not exempt from attachment sought to be issued by the service of a summons of garnishment for the collection of a debt alleged to be due by the connecting carrier, on the ground that the impounding of the car is such an interference with interstate commerce as to violate U. S. Rev. Stat. § 5215, U. S. Comp. Stat. 1901, p. 3501, or the commerce clause of the Federal Constitution. In its opinion the court said: "It is readily seen that there is a time while in this state that the car becomes empty, and, returning, may or may not be employed in the business of transportation. The fact of present transportation of freight is therefore eliminated. The question finally is resolved into this: Is an unloaded car which is generally employed by a steam railroad company as a part of its equipment in the transportation of freight from one state into another exempt from the process of attachment, regularly instituted for the collection of a debt?"

A finding that a foreign railway car was

is personal property, over which they have the power of alienation, and is subject to seizure when not in actual use, by attachment or execution or other valid process, the same as other personal property.

Boston, C. & M. R. Co. v. Gilmore, 37 N. H. 410, 72 Am. Dec. 336; Coe v. Columbus, P. & I. R. Co. 10 Ohio St. 372, 75 Am. Dec. 518; Louisville, N. A. & C. R. Co. v. Boney, 117 Ind. 501, 3 L.R.A. 435, 20 N. E. 432; Buffalo Coal Co. v. Rochester & State Line R. Co. 8 W. N. C. 126; Williamson v. New Jersey Southern R. Co. 29 N. J. Eq. 311; Randall v. Elwell, 52 N. Y. 521, 11 Am. Rep. 747; Potter v. Hall, 3 Pick. 368, 15 Am. Dec. 226; Hall v. Carney, 140 Mass. 131, 3 N. E. 14; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; 2 Elliott, Railroads, p. 587; Drake, Attachm. 7th ed. § 252a; 4 Cyc. Law & Proc. p. 557.

Steamships and other vessels are just as much instruments of interstate commerce, and just as much subject to the acts of Congress, as are railroad cars; yet this court and other courts have held that though they were engaged in interstate commerce, that fact did not prevent their seizure under attachment or other process issued by authority of a state court, and that their sequestration under state laws was not a regulation of commerce between the states, even though such seizure might prevent or obstruct a voyage of an interstate character.

not being used in interstate commerce so as to be exempt from seizure was affirmed in Missouri P. Co. v. Kennett, 79 Kan. 232, 99 Pac. 269, where there was nothing in the record to show where the car came from, whether or not it was going anywhere, or whether it was loaded or empty. The court said that the carrier had the burden of proof; had all the facts in its possession and could have shown the truth; and that its conduct led to the conclusion that a disclosure of all the facts would have been prejudicial to it.

There are cases, however, which hold that a foreign railway car coming into the state on interstate business may wait a reasonable time after unloading for a return shipment without incurring liability to attachment.

A car of a foreign corporation which has come into the state loaded with freight on an interstate shipment, to be returned promptly, subject to a *per diem* demurrage for delay, and which is to take back another load of freight if ready for shipment within a reasonable time, cannot be subjected to attachment without unlawfully interfering with interstate commerce, although the car may be permitted to stand in the yard for a few days after it is unloaded. Seibels v. Northern C. R. Co. 80 S. C. 133. 16 L.R.A. (N.S.) 1026, 61 S. E. 435.

The Winneboga (Iroquois Transp. Co. v. De Laney Forge & Iron Co.) 205 U. S. 354, 51 L. ed. 836, 27 Sup. Ct. Rep. 509; Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254; The Robert Dollar, 115 Fed. 218; Ex parte McNeil, 13 Wall. 236, 20 L. ed. 624; Nimick v. Louisiana Tehuantepec Co. 16 La. Ann. 46; Sibley v. Fernie, 22 La. Ann. 163; Haerberle v. Barringer, 29 La. Ann. 410; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819.

Congress has passed laws inflicting severe penalties upon anyone who interferes with the transportation of the United States mail, yet it has been held that a boat owned by a mail contractor may be attached if the mail be not on the boat at the time. It is not enough that, in consequence of the seizure, the contractor is put to inconvenience, and that there ensues a delay in the mail. The seizure itself must be a wilful obstruction.

Parker v. Porter, 6 La. 169; Waples, Attachm. § 723; Briggs v. Strange, 17 Mass. 405; 4 Cyc. Law & Proc. p. 569.

The fact that chattels belonging to a nonresident or a resident either were, when seized upon attachment, execution, or re-

plevin, subjects of interstate commerce, or were in transit from one state to another, has never been regarded as preventing their actual seizure if within the jurisdiction of the court issuing the process, and they can even be held by garnishment of the carrier if not too late to arrest the shipment.

Morrel v. Buckley, 20 N. J. L. 667; Santa Fe P. R. Co. v. Bossut, 10 N. M. 322, 62 Pac. 977; 5 Am. & Eng. Enc. Law, p. 239; Waples, Attachm. 2d ed. § 449; Moore, Carriers, pp. 34, 229, 232; Adams v. Scott, 104 Mass. 164; Landa v. Holck, 129 Mo. 663, 50 Am. St. Rep. 459, 31 S. W. 900; The Robert Dollar, 115 Fed. 222.

The cars in question when attached were not engaged in interstate commerce. They were, with one exception, standing "empty and idle" upon the tracks of the garnishees; they had reached their destination and had been unloaded. The garnishees were not before the court asserting any desire or intention to use them for any purpose. There was no evidence of any intention to reload them. The courts of the state in which they were found had complete jurisdiction over them for the purpose of enforcing the

A railway car of a foreign railway company, sent into the state with freight to be delivered there, may not, in view of U. S. Rev. Stat. § 5258, and of the interstate commerce act of February 4, 1887, be subjected to attachment while empty, but waiting, according to the regular course of business, a reasonable time for a return shipment. Connery v. Quincy, O. & K. C. R. Co. 92 Minn. 20, 64 L.R.A. 624, 104 Am. St. Rep. 659, 99 N. W. 365, 2 A. & E. Ann. Cas. 347. The court said that had the car seized in this case been delayed longer than was necessary in the course of business to return it to the place from whence it came, or had it been diverted within the state to uses and purposes exceptional to its presence there, under the demands of interstate commerce, with the consent of the owning corporation, a different proposition would be presented.

Cars in use, being loaded with interstate freight not delivered to the consignee, cannot be subjected to attachment without unlawfully interfering with interstate commerce. George D. Shore & Bro. v. Baltimore & O. R. Co. 76 S. C. 472, 57 S. E. 526, 11 A. & E. Ann. Cas. 909.

A foreign railway car from which the interstate freight has not been entirely unloaded is not the subject of attachment, nor may the railway company in possession of such car be garnished by reason of its possession, received from another railway company, against which an attachment has been issued. Wall v. Norfolk & W. R. Co. 52 W. Va. 485, 64 L.R.A. 501, 94 Am. St. Rep. 948, 44 S. E. 294.

Michigan C. R. Co. v. Chicago & M. L. S. R. Co. 1 Ill. App. 399, may fairly be assigned to the list of cases regarding such seizures as interfering with interstate com-

merce, although the court does not, in so many words, rest its decision upon the commerce clause. The court held that public policy forbade the garnishment of a railroad company for foreign railroad cars in its possession under the usual running arrangement by which, instead of unloading freight from the cars of the one carrier to the cars of the other at the point of connection, each received from the other the cars loaded with freight, and hauled them to the place of destination on its own line of road, and, after discharging the freight, returned the cars as soon as possible in the due course of business. The court said that "if the statute should be allowed the operation sought to be given it in the present case, it would, beyond doubt, very seriously interfere with the transportation of freights by railroad, according to the method which experience seems to have developed as the speediest, most economical, and best. Our railroads extend into all parts of the country and traverse all the various states of the Union, forming one great and complicated system of internal communication, so that for most of the practical purposes of transportation each railroad, instead of constituting a separate line, is only a part or member of this general system. Cars may be loaded at any point upon one railroad, and transported without unloading to the point of destination on any other railroad, however distant. It cannot be doubted that this method of conducting the carrying business of the country greatly subserves the public convenience, and should not be interfered with for the mere prosecution of individual and private ends, except for very strong and controlling reasons."

lien of attachment, and they were subject to state laws.

Norfolk & W. R. Co. v. Com. 93 Va. 749, 34 L.R.A. 105, 57 Am. St. Rep. 827, 24 S. E. 837.

The Federal statutes (U. S. Rev. Stat. § 5258, U. S. Comp. Stat. 1901, p. 3564) authorizing through shipments are permissive only, and impose no affirmative duties upon railway companies.

6 Am. & Eng. Enc. Law, p. 609; Kentucky Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; Moore, Carriers, 453, 454.

In order that a state law, or the action of state authorities under such law, should be construed "a regulation of commerce between the states," the operation of such law, or the action of such state authorities, must be a direct interference or regulation, and directly and substantially hurtful to such commerce; not a mere incidental or casual interruption or regulation, or remotely hurtful.

Sherlock v. Alling, *supra*; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28.

Debts due a principal defendant from a garnishee are subject to garnishment wherever the garnishee could be sued by the defendant.

14 Am. & Eng. Enc. Law, pp. 804, 816; Harvey v. Great Northern R. Co. 50 Minn. 405, 17 L.R.A. 84, 52 N. W. 905; Drake, *Attachm.* 7th ed. § 597; Mooney v. Buford & G. Mfg. Co. 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32; Mooney v. Union, P. R. Co. 60 Iowa, 346, 14 N. W. 343; German Bank v. American F. Ins. Co. 83 Iowa, 491, 32 Am. St. Rep. 316, 50 N. W. 53; National F. Ins. Co. v. Chambers, 53 N. J. Eq. 468, 32 Atl. 663; Blake v. Williams, 6 Pick. 286, 17 Am. Dec. 372; Minor, *Confl. L.* § 125; Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co. 127 Mo. 242, 27 L.R.A. 651, 48 Am. St. Rep. 626, 29 S. W. 1010; Cross v. Brown, 19 R. I. 220, 33 Atl. 147; Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 A. & E. Ann. Cas. 1084; Neufelder v. German American Ins. Co. 6 Wash. 336, 22 L.R.A. 287, 36 Am. St. Rep. 166, 33 Pac. 870; Mobile & O. R. Co. v. Barnhill, 91 Tenn. 399, 30 Am. St. Rep. 889, 19 S. W. 21; Smith v. Taber, 16 Tex. Civ. App. 154, 40 S. W. 156; Pomeroy v. Rand, Mc N. & 54 L. ed.

Co. 157 Ill. 176, 41 N. E. 636; Cousens v. Lovejoy, 81 Me. 467, 17 Atl. 495; Fithian v. New York & E. R. Co. 31 Pa. 114; Barr v. King, 96 Pa. 485; National Bank v. Huntington, 129 Mass. 444; Cahoon v. Morgan, 38 Vt. 236; Towle v. Wilder, 57 Vt. 622; Moshassuck Felt Mill v. Blanding, 17 R. I. 297, 21 Atl. 538.

The statutes of Iowa inhibit special appearances.

Des Moines State Bank v. Van, 12 Iowa, 523; Rahn v. Greer, 37 Iowa, 627; Lesure Lumber Co. v. Mutual F. Ins. Co. 101 Iowa, 514, 70 N. W. 761; Moffitt v. Chicago Chronicle Co. 107 Iowa, 412, 78 N. W. 45; Blondel v. Ohlman, 132 Iowa, 257, 109 N. W. 806; Sam v. Hochstadler, 76 Tex. 162, 13 S. W. 535; Lucas v. Patton (Tex. Civ. App.) 107 S. W. 1143.

The Iowa statute is binding upon Federal courts held within that state.

Amy v. Watertown, 130 U. S. 304, 32 L. ed. 947, 9 Sup. Ct. Rep. 530.

Cases where a special appearance has been allowed by this court in a jurisdiction wherein the state laws prohibit the same are cases where to refuse the defendant the right to appear for a special purpose would be to nullify an act of Congress relating to the practice and forms of proceeding in the courts of the United States, and hence the state law must yield to the superior law of Congress governing the practice of the United States courts.

Southern P. Co. v. Denton, 146 U. S. 208, 210, 36 L. ed. 945, 946, 13 Sup. Ct. Rep. 44; Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859.

There is a wide distinction between a special appearance *eo nomine*, as defined by the rules of the common law, to object to process over the person, such as is attempted to be made in the case at bar, and an appearance made for a particular or special purpose, whether special or general, to raise the question of statutory bar or personal privilege which forbids the court to proceed with the cause against the person. The latter objection can be raised by any appearance, either special or general.

Spurrier v. Wirtner, 48 Iowa, 486; Cribula v. Pitt's Sons' Mfg. Co. 48 Iowa, 528; Murray v. Wilcox, 122 Iowa, 188, 64 L.R.A. 534, 101 Am. St. Rep. 263, 97 N. W. 1087; Southern P. Co. v. Denton, 146 U. S. 208, 36 L. ed. 945, 13 Sup. Ct. Rep. 44.

A special appearance is never allowable except for the single purpose of objecting to the jurisdiction of the court over the person of the defendant.

3 Cyc. Law & Proc. pp. 502, 511, 527; 2 Enc. Pl. & Pr. pp. 620, 621, 625; Elliott v.

Lawhead, 43 Ohio St. 171, 1 N. E. 577; Fitzgerald & M. Constr. Co. v. Fitzgerald, 137 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36; Welch v. Ayres, 43 Neb. 326, 61 N. W. 635; Abbott v. Semple, 25 Ill. 107; State v. Buck, 46 La. Ann. 656, 15 So. 531; Mahr v. Union P. R. Co. 140 Fed. 921; Perrine v. Knights Templar's & M. Life Indemnity Co. 71 Neb. 267, 98 N. W. 481, 101 N. W. 1017; Dudley v. White, 44 Fla. 264, 31 So. 830; Ray v. Trice, 48 Fla. 297, 37 So. 582; Reed v. Chilson, 142 N. Y. 152, 36 N. E. 884; Lowe v. Stringham, 14 Wis. 222; Rogers v. McCord-Collins Mercantile Co. 19 Okla. 115, 91 Pac. 864; Wabash Western R. Co. v. Brow, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126.

The alleged special appearance and motion and affidavit under it contain many matters which cannot be urged by a special appearance, and many allegations of fact which do not relate to jurisdiction.

Mahr v. Union P. R. Co. *supra*; Foushee v. Owen, 122 N. C. 360, 29 S. E. 770; Tidrick v. Sulgrove, 38 Iowa, 339.

An appearance to a writ of attachment is a general appearance,—especially where it is coupled with objections requiring evidence to sustain, or objections to the jurisdiction *in rem*, or moves to quash for matters not going to irregularity in process or service thereof, and sought to be sustained by matters *dehors* the record.

Waples, *Attachm.* 2d ed. §§ 658, 702; Wood v. Young, 38 Iowa, 102; Whiting v. Budd, 5 Mo. 443; Evans v. King, 7 Mo. 411; Withers v. Rodgers, 24 Mo. 340; Greenwell v. Greenwell, 26 Kan. 530; Gorham v. Tanquerry, 58 Kan. 233, 48 Pac. 916; Burnham v. Lewis, 65 Kan. 481, 70 Pac. 337; Nichols & S. Co. v. Baker, 13 Okla. 1, 73 Pac. 302; Roy v. Union Mercantile Co. 3 Wyo. 417, 26 Pac. 996; Duncan v. Wickliffe, 4 Met. (Ky.) 118; Raymond v. Nix, 5 Okla. 656, 49 Pac. 1110; Gans v. Beasley, 4 N. D. 140, 59 N. W. 714; Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931.

Although the defendant in error did not ask for dismissal of the action in its written motion filed under its alleged special appearance, the record discloses that on June 6th a second judgment was rendered on motion of the defendant, quashing the service of notice on the defendant, dismissing plaintiff's cause of action, and rendering judgment in defendant's favor and against the plaintiff for \$129.70. This was error and is a general appearance.

Teater v. King, 35 Wash. 138, 76 Pac. 688; Welch v. Ayres, *supra*; Bucklin v. Strickler, 32 Neb. 602, 49 N. W. 371; Everett v. Wilson, 34 Colo. 476, 83 Pac. 211.

By the record as a whole, the petition for writ of error, and the certificate of the court

below, it appears that the sole question considered or decided was that the court had no jurisdiction over the person or property of the defendant. This fully answers the requirements of the law.

United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; United States v. Larkin, 208 U. S. 333, 52 L. ed. 517, 28 Sup. Ct. Rep. 417; Shields v. Coleman, 157 U. S. 177, 39 L. ed. 663, 15 Sup. Ct. Rep. 570; Re Lehigh Min. & Mfg. Co. 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375; Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Chappell v. United States, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 285, 46 L. ed. 913, 22 Sup. Ct. Rep. 681; Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490.

The power of the court is directly involved at the threshold of the proceeding, jurisdiction over the person and property of the defendant in error is challenged, and the case falls within the rule announced in *Shepard v. Adams*, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; *Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *St. Louis Cotton Compress Co. v. American Cotton Co.* 60 C. C. A. 80, 125 Fed. 201; *Board of Trade v. Hammond Elevator Co.* 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740.

Mr. William H. Farnsworth argued the cause, and, with Messrs. Frank L. Littleton and Shull, Farnsworth, & Sammis, filed a brief for defendant in error:

The certificate of the trial court as to the jurisdictional question was not granted in time, as required by law.

The Bayonne, 159 U. S. 687, 40 L. ed. 306, 16 Sup. Ct. Rep. 185; Chappell v. United States, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; Colvin v. Jacksonville, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; Chamberlin v. Peoria, D. & E. R. Co. 55 C. C. A. 54, 118 Fed. 32.

If the certificate granted by the trial court on the 28th day of September, 1906, can now be considered by this court as the certificate upon which this appeal is to be considered, it is clearly insufficient under the law, in that it does not state upon what question the judgment was rendered.

Shields v. Coleman, 157 U. S. 178, 39 L. ed. 663, 15 Sup. Ct. Rep. 570; Maynard v. Hecht, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; Chappell v. United States, *supra*; Hollowell v. United States, 209 U. S. 101, 52 L. ed. 702, 28 Sup. Ct. Rep. 498; Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119.

If any jurisdictional question is presented to this court by this appeal, it is not such a jurisdictional question as is contemplated by the judiciary act of 1891, which shall be certified directly to this court.

Louisville Trust Co. v. Knott, *supra*; Bache v. Hunt, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208; Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; Mexican C. R. Co. v. Eckman, 187 U. S. 432, 47 L. ed. 246, 23 Sup. Ct. Rep. 211; Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; Shoemith v. Meyer Boot & Shoe Mfg. Co. 198 U. S. 582, 49 L. ed. 1172, 25 Sup. Ct. Rep. 804; Fowler v. Osgood, 205 U. S. 535, 51 L. ed. 919, 27 Sup. Ct. Rep. 789; United States v. Larkin, 208 U. S. 333, 52 L. ed. 517, 28 Sup. Ct. Rep. 417.

The case was taken to the circuit court of appeals by writ of error, and there argued on its merits; hence, this appeal or writ of error should have been to the circuit court of appeals.

McLish v. Roff, 141 U. S. 661-669, 35 L. ed. 893-895, 12 Sup. Ct. Rep. 118.

It is an attempt to prosecute two appeals, which this court has repeatedly decided cannot be done.

Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; Union & Planters' Bank v. Memphis, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604.

The constitutional question which the defendant's special appearance developed was one merely of interpretation, and the jurisdiction of the Federal court did not at all rest upon that question. Therefore, under the certificate upon which the writ of error was granted in this case, no appeal lies directly to this court, and the writ of error should be dismissed.

Ex parte Jones, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222; Rouse v. Letcher, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266; Benjamin v. New Orleans, 169 U. S. 161, 42 L. ed. 700, 18 Sup. Ct. Rep. 298; Borgmeyer v. Idler, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; Ayres v. Polsdorfer, 187 U. S. 585, 47 L. ed. 314, 23 Sup. Ct. Rep. 196; Spencer v. Duplan Silk Co. 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174.

The purpose and policy of Congress has been constantly to protect and often to require the formation and operation of continuous lines of transportation. Almost without exception it has authorized, and generally has required, the owners of railroad bridges built under its authority to allow the use of their bridges and tracks for the passage of trains of connecting companies.

54 L. ed.

Union P. R. Co. v. Chicago, R. I. & P. R. Co. 2 C. C. A. 174, 10 U. S. App. 98, 51 Fed. 309.

It is impossible to ignore the great public policy in favor of continuous lines thus declared by Congress, and it is in effectuation of this policy that such business arrangements as will make such connections effective are made.

Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173.

These cars were engaged in interstate commerce and under control of Congress, notwithstanding some of the cars were empty and awaiting their return to their owner in completion of an interstate journey.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Connery v. Quincy, O. & K. C. R. Co. 92 Minn. 20, 64 L.R.A. 624, 104 Am. St. Rep. 659, 99 N. W. 365, 2 A. & E. Ann. Cas. 347; George D. Shore & Bros. v. Baltimore & O. R. Co. 76 S. C. 472, 57 S. E. 526, 11 A. & E. Ann. Cas. 909.

There is a distinction between merchandise, which may or may not become articles of interstate commerce, and cars or other instruments which are used in moving interstate commodities, which may have stopped temporarily on their journey.

Johnson v. Southern P. Co. *supra*.

The state laws cannot be permitted to impede or impair interstate traffic, or the usefulness of the facilities for such traffic.

Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Dubuque & S. C. R. Co. v. Richmond, 19 Wall. 584, 22 L. ed. 173; Chicago & N. W. R. Co. v. Forest County, 95 Wis. 80, 70 N. W. 77; Buncombe County v. Tommey, 115 U. S. 122, 29 L. ed. 305, 5 Sup. Ct. Rep. 626, 1186; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; 4 Elliott, Railroads, 1st ed. § 1664; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Asso. 91 C. C. A. 39, 165 Fed. 1; Leisy v. Hardin, 135 U. S. 139, 34 L. ed.

143, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. ed. 1060; *Easton v. Iowa*, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. Rep. 288; *Central R. Co. v. Murphey*, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 A. & E. Ann. Cas. 514; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560, 21 L. ed. 710; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Kelley v. Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802.

It is a direct interference with and burden upon interstate commerce, within the inhibition of the acts of Congress controlling such commerce, to permit the attachment or garnishment of cars so engaged in a foreign jurisdiction.

Michigan C. R. Co. v. Chicago & M. L. S. R. Co. 1 Ill. App. 399; *Connery v. Quincy, O. & K. C. R. Co. and Shore v. Baltimore & O. R. Co.* supra; *Seibels v. Northern C. R. Co.* 80 S. C. 133, 16 L.R.A. (N.S.) 1026, 61 S. E. 435; *Wall v. Norfolk & W. R. Co.* 52 W. Va. 485, 64 L.R.A. 501, 94 Am. St. Rep. 948, 44 S. E. 294; *Chicago & N. W. R. Co. v. Forest County*, supra.

The interstate commerce act, enjoining upon railway common carriers the duty of providing and establishing through routes, and the railway act of Congress, authorizing and empowering steam railroads to provide and furnish connections and through transportation, create a distinction between water craft engaged in interstate commerce and railway companies so engaged, as to the right of foreign attachment.

The *St. Louis*, 48 Fed. 312; *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173.

There was an actual situs of the debt, which situs was foreign to the jurisdiction of the court entertaining the action, and there was no personal service in the state where the action was instituted.

Drake, Attachm. 3d ed. § 474; *Shinn, Attachm.* 2d ed. §§ 490, 491, 494; *Atchison, T. & S. F. R. Co. v. Maggard*, 6 Colo. App. 85, 39 Pac. 985; *Central Trust Co. v. Chattanooga, R. & C. R. Co.* 68 Fed. 685; *Nye v. Liscombe*, 21 Pick. 263; *Gold v. Housatonic R. Co.* 1 Gray, 424; *Singer Mfg. Co. v. Fleming*, 39 Neb. 686, 23 L.R.A. 210, 42 Am. St. Rep. 613, 58 N. W. 226; *Drake v. Lake Shore*

& M. S. R. Co. 69 Mich. 168, 13 Am. St. Rep. 382, 37 N. W. 70; *Illinois C. R. Co. v. Smith*, 70 Miss. 344, 19 L.R.A. 577, 35 Am. St. Rep. 651, 12 So. 461; *McShane v. Knox*, 103 Minn. 268, 20 L.R.A. (N.S.) 271, 114 N. W. 955.

As to the right of garnishment, there is a distinction clearly drawn between accounts payable anywhere and those payable in a place certain by contract.

Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *Harris v. Balk*, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 A. & E. Ann. Cas. 1084.

The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel to move the quashing of the service and the discharge of the attached property.

Harkness v. Hyde, 98 U. S. 476, 479, 25 L. ed. 237, 238; *Southern P. Co. v. Denton*, 146 U. S. 208-210, 36 L. ed. 945, 946, 13 Sup. Ct. Rep. 44; *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126; *Goldey v. Morning News*, 156 U. S. 518-523, 39 L. ed. 517-519, 15 Sup. Ct. Rep. 559; *Clark v. Wells*, 203 U. S. 164, 51 L. ed. 138, 27 Sup. Ct. Rep. 43; *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36; *Cady v. Associated Colonies*, 119 Fed. 420.

Special appearances are even allowable under the state practice of Iowa where the objection is that service is unauthorized.

Wilson v. Stripe, 4 G. Greene, 551, 61 Am. Dec. 138; *Hastings v. Phoenix*, 59 Iowa, 394, 13 N. W. 346; *Cox v. Allen*, 91 Iowa, 462, 59 N. W. 335; *Chittenden v. Hobbs*, 9 Iowa, 417; *Murray v. Wilcox*, 122 Iowa, 188, 64 L.R.A. 534, 101 Am. St. Rep. 263, 97 N. W. 1087; *Cibula v. Pitt's Sons' Mfg. Co.* 48 Iowa, 528.

A state statute which gives to a special appearancee, made to challenge the court's jurisdiction, the force and effect of a general appearance, so as to confer jurisdiction over the person of the defendant, is not binding upon the Federal courts, and will not be conformed to by them.

Bates, Fed. Eq. Proc. (1908) § 934; *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 496-520, 38 L. ed. 248-257, 14 Sup. Ct. Rep. 401; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

Mr. Justice McKenna delivered the opinion of the court:

This case presents a question of jurisdiction arising from the levy in attachment

proceedings on freight cars alleged to have been engaged, when attached, in interstate commerce. The case is here on certificate.

Plaintiff in error, as executor of the estate of Frank E. Jandt, brought an action against the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company for causing the death of Jandt, a statute of Illinois giving such an action to the personal representative of a person whose death has been caused by "wrongful act, neglect, or default." The cause of action arose in Illinois. The action was brought, however, in the district court of Woodbury county, state of Iowa, and under the laws of the latter state writs of attachment and garnishment were issued and levied upon certain cars of the C. C. C. & St. L. Ry. Co. in the possession of the other defendants in error, referred to hereafter as the garnishee companies. Notice of garnishment was duly served on the garnishee companies, and each of them filed answers. Plaintiff in the action, and we will so refer to him, controverted by proper pleadings the answers, and demanded that evidence be taken on the issues joined.

The original notice was served on the C. C. C. & St. L. Ry. Co., at its principal place of business in the state of Ohio; also notice of attachment and garnishment. It filed a petition for removal of the action to the circuit court of the United States for the northern district of Iowa, western division. 166] Its petition *alleged that it was a corporation duly formed and organized under the laws of Indiana, and that the plaintiff was a citizen of Iowa. The petition was granted and the case duly removed to the circuit court of the United States. On the second of October, 1905, the C. C. C. & St. L. Ry. Co. filed a motion, which was denominated a motion to quash and set aside service, in which it stated that it appeared specially for the purpose of the motion only, "to quash and set aside the service of attachment and garnishment attempted to be made in the cause by plaintiff against the defendant's property." The motion was supported by an affidavit. The affidavit stated that the company was incorporated under the laws of Indiana and Ohio, and conducted and operated lines of railway in those states and in Illinois, with its principal place of business in Cincinnati, Ohio; that it was not incorporated in Iowa, and had no agent or agency of any character in that state; that it was a common carrier of freight and passengers, and in the carrying on of such business it owned and operated cars for the transportation of freight and merchandise through the various states; that in the conduct of such business it had

arrangements, contracts, and agreements with various connecting railroad companies doing business as common carriers, including all of the railway companies attached and garnished in the action by plaintiff, under which those companies accepted from it, at points on its line of road, its cars loaded with goods and merchandise destined for various points on their respective lines, to be transported through the various states to destinations, constituting interstate shipments of commerce. It was stated that it was provided in the agreement that such connecting carriers should have the right to reload the cars received by them, and so use the same in returning them to the place where received, and that in all cases the cars of the company were to be returned to it in the usual and ordinary course of transit as soon as the nature and character of the business would permit. It was further stated that, under the laws *of [167 Congress, the company was bound to furnish cars so loaded, to be transported continuously from one state to another without being unloaded, and that, under the same laws, connecting carriers were bound to receive the same and transport them from one state to another. That, in pursuance of the agreements and laws of Congress, the cars attached were delivered by the C. C. C. & St. L. Ry. Co. to the other companies, and so received by them; that the cars were part of the company's rolling stock, and were necessary to enable it to perform its duties as a common carrier; that by reason of the commerce clause of the national Constitution and of the interstate commerce act the cars could not be levied upon; that the company had not been served personally or by publication, and had not appeared to the action or any writ issued in the cause. It was further stated that none of the garnishee companies was indebted to the company, and that any accounts which might be due from the garnished companies were only by reason of the contracts and agreements for the use of the cars, as heretofore stated, under which the permits for the use of the cars were arranged between the companies "by wheelage or mileage of such cars, and were constantly and hourly changed from bills due one company to bills due the other company, which bills were satisfied and settled by such exchange of service and use of each other's cars. And such agreements and contracts are to be discharged, satisfied, and settled only in the city of Chicago and state of Illinois, where the same are made, and such accounts, or debts, if any, in favor of this defendant, have no situs in the state of Iowa." The affidavit was supplemented by two others.

Plaintiff filed a "resistance" to the motion

to quash and to the motion of the garnishee companies, and alleged that a special appearance was "unwarranted and unauthorized by law;" and that, as the purpose sought by the motion of the defendant company could only be had by a general appearance, the special appearance should be construed to be such, and subject the "person of the 168] defendant as well as the property *actually attached, and the property and money of the defendant sought to be reached by garnishment proceedings, to the jurisdiction of the court." The ground of this conclusion was stated, with some repetition, to be that the special appearance was not for the purpose of raising any question of lack of notice, or notice of defect or irregularity of process, but to contest the right to attach property by evidence outside the record of the case, and required the court to pass upon the merits of the attachment. Plaintiff denied that the property attached was engaged in interstate commerce or in the transportation of interstate commerce at the time they were attached, that they were not in use at the time they were attached, but were standing empty upon the tracks of the railway companies in whose possession they were found, and denied the existence of the agreements and arrangements between the C. C. C. & St. L. Ry. Co. and the other companies in regard to the cars, and that no contractual rules existed between them; that the cars were not necessary, either to that company or to the other companies, to enable them to perform their duties as common carriers, and alleged that they were subject to attachment as other personal property. It was stated that the garnishee companies had no interest in the attached cars, and none of them had served notice of interest or ownership on the plaintiff nor on the sheriff.

The answers of five of the garnishee companies denied indebtedness to the C. C. C. & St. L. Ry. Co., averred the existence of agreements as to the cars, substantially as set out by that defendant, also their duties as common carriers under the acts of Congress, and that the cars were in their possession in pursuance of the agreements with the defendant, and were to be returned empty or loaded, in the usual and customary course of business. The other companies also denied indebtedness to the C. C. C. & St. L. Ry. Co., and in effect set up the defense that the cars were in interstate commerce business.

On the 22d of May, 1906, the court sustained the motion to quash the judgment 169] and discharge the garnishees *thereunder. On June 6 "the court" (we quote from the record) "rendered further judgment, dismissing the said cause of action as to said principal defendant, on the ground that the

court had no jurisdiction of the defendant or the attached property of the defendant, and taxed the costs in the case to the plaintiff."

The time for the allowance and filing the bill of exceptions was extended to October 28, 1906, and on the 28th of September it was allowed, the order reciting that the date "being one of the regular days of the May, A. D., 1906, term of said court." The bill of exceptions also recited that it was submitted to the court, with a prayer that it "be signed and certified by the judge, and approved by him, and made a part of the record in said case, preparatory to the prosecution of a writ of error from the said circuit court of the United States to the Supreme Court of the United States." It concludes as follows:

"And the court, having examined said transcript of the record, papers, and proceedings, hereby certifies that the same contains the entire record in said cause, including the plaintiff's petition, the answers of the garnishees, the defendant's motion to quash and set aside service, and the plaintiff's resistance thereto, and all of the proceedings had thereunder in reference thereto, including the opinion, orders, and judgment of the court thereon, and the exceptions of the plaintiff thereto, and all of the record submitted to the court upon which the judgment herein was rendered.

"On consideration whereof, the court does allow the writ of error upon the plaintiff giving bond according to law in the sum of \$500, which shall operate as a supersedeas bond.

"And in this case, I, the undersigned, judge of the circuit court of the United States in and for the northern district of Iowa, western division, further hereby certify that in sustaining the motion to quash the attachment and discharging the garnishees, and in dismissing the action as to the principal defendant, and taxing the costs to the plaintiff, the sole question *con- [170] sidered and determined by the court was that the court had no jurisdiction over the person of the defendant or of the property involved, and that the appearance of the principal defendant, as shown by the record, was a special, and not a general, appearance, and that the same did not subject said principal defendant and its property to the jurisdiction of the court.

"This certificate is made conformable to the act of Congress of March 3, 1891, chapter 517, 26 Stat. at L. 826, U. S. Comp. Stat. 1901, p. 488, and the opinion filed herein is made a part of the record, and will be certified and sent up as part of the proceeding, together with this certificate."

For the opinion of the court, see 146 Fed. 403.

A writ of error was sued out from the circuit court of appeals according to the admission of counsel, though there is nothing in the record to show it, which writ was dismissed. 84 C. C. A. 453, 156 Fed. 775.

A motion is made to dismiss the writ of error, and in support of the motion it is urged (1) that the certificate as to jurisdiction was not granted during the term at which the judgment was rendered; (2) that the writ of error was not perfected in time, as required by law, in that the writ and certificate were allowed on the 28th of September, 1906, and were not prosecuted in this court until April, 1908; (3) that the certificate is not sufficient in law nor proper in form, in that it does not state any facts or propositions of law upon which the question of the court's lack of jurisdiction rested; (4) that the jurisdiction of the court as a Federal court was not put in issue; (5) that the case having been taken to the circuit court of appeals, and there decided, that the writ of error should be to that court, and not to the circuit court, the latter court, it is urged, having lost jurisdiction of the case; (6) there is no certificate of a jurisdictional question in the order allowing the writ of error.

The first and second grounds in support of the motion to dismiss are based upon a mis- [171] apprehension of the record. The *term at which the judgment was rendered had not expired when the certificate of jurisdiction was made, and the writ of error was allowed on the 18th of March, 1908, not on September 28, 1906, as contended by defendants in error.

The grounds of the motion based on the form or sufficiency of the certificate are not tenable. Even if we should admit, which we do not, that the certificate is not, as it is contended, in proper form, the record shows clearly that the only matter tried and decided in the circuit court was ~~one~~ of jurisdiction. This is sufficient. *United States v. Larkin*, 208 U. S. 333, 339, 52 L. ed. 517, 520, 28 Sup. Ct. Rep. 417.

The other grounds urged to support the motion to dismiss all depend upon the proposition whether the question of the jurisdiction of the circuit court as a Federal court was presented. If so, the writ of error from the circuit court of appeals is no bar to the present writ of error. *Exeelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; *United States v. Larkin*, supra. And if so, the way is clear to a decision of the question on the merits.

As we have shown, the circuit court decided that it had no jurisdiction over either

the person or the property of the principal defendant, the C. C. C. & St. L. Ry. Co. The first, nonjurisdiction over the person, depending, as the court considered, upon the second, nonjurisdiction over the property, as we understand the opinion. And this view of it the circuit court of appeals took.

The latter court stated the questions to be: "Was defendant's appearance to contest the validity of the attachments and garnishments a general one? Were the ears and credits of defendant subject to attachment and garnishment? In other words, did the trial court secure such dominion over person or property by appearance or process as authorized it to proceed to trial of the action and render a valid judgment upon the issues involved? The trial court answered them in the negative and dismissed the action for want of jurisdiction. In respect of the essential character of these questions, they are not distinguishable from *one of the le- [172] gality of the service of summons upon a defendant. They do not pertain to the merits of the case, and did not arise during the progress of a trial. They lay at the threshold, and upon an affirmative answer depended the power of the court to hear and decide the cause. In legal phraseology that power is termed 'jurisdiction.' It is none the less a jurisdictional matter in the case of attachment and garnishment of property of a nonresident because the power of the court to proceed to trial depends, in the absence of the defendant, upon its lawful seizure of his property. The question of jurisdiction was decided in favor of defendant, and the decision disposed of the case." For these propositions the court cited *Board of Trade v. Hammond Elevator Co.* 198 U. S. 428, 49 L. ed. 1114, 25 Sup. Ct. Rep. 740; *United States v. Jahn*, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; *St. Louis Cotton Compress Co. v. American Cotton Co.* 60 C. C. A. 80, 125 Fed. 196; and, as we have seen, dismissed the case on the ground that this court alone had the power to review the decision of the circuit court. We concur in the views of the circuit court of appeals, for which also may be cited *Kendall v. American Automatic Loom Co.* 198 U. S. 477, 49 L. ed. 1133, 25 Sup. Ct. Rep. 768. The motion to dismiss is denied.

The ruling of the circuit court dismissing the action is attacked upon the grounds (1) that the appearance of the C. C. C. & St. L. Ry. Co. was a general appearance, and, being so, the railway company submitted itself to the jurisdiction of the court, "regardless of the seizure of the attached property;" (2) that the property was subject to attachment.

1. It is not controverted that, if the property was subject to attachment, the pro-

cedure prescribed by the laws of Iowa was duly observed, and hence, it is contended, that the property having been seized under the jurisdiction of the court, under valid, regular process, the motion to quash the attachment was based on matters *dehors* the record, going to the jurisdiction of the court over the subject-matter of the action, and the court had jurisdiction over the person of the railway company. "A special appearance," it is contended, "can never serve a 173] *dual or triple purpose, but is only allowed for the sole purpose of objecting to the jurisdiction of the court over the person of the defendant."

The ruling of the circuit court, we think, was broader than plaintiff conceives it to have been. It appears from the record that the C. C. C. & St. L. Ry. Co. was a corporation of Indiana and Ohio, and that certain of its freight cars were attached in Iowa in the hands of the garnishee companies, and that there were certain credits due to it from some of the latter companies, on account of interstate commerce freight. In other words, it fairly appears upon the face of the complaint in the action and the attachment papers that the cars had been sent into the state in the transportation of interstate commerce. It is true, it was also contended, that an issue was presented by the affidavits upon the motion to quash as to what contractual arrangements existed between the company and the other companies as to the right of the latter companies to reload the cars and so return them, but there was no dispute that it was their duty to receive them. Besides, the bill of exceptions contains the following: "No evidence is submitted by the plaintiff in opposition to the motion of defendant to quash the attachment, or in support of its pleading controverting the answer of the several garnishees, and the matters are submitted upon the record, including such motion and admission of the pleadings."

The question, therefore, was submitted to the court, whether the cars, under the circumstances, were engaged in interstate commerce when they were attached; and the court considered it to be immaterial that the cars had not started on a return trip, saying that "the cars of defendant, when brought into the state of Iowa to complete an interstate shipment of property, were being used in interstate commerce, and were being so used while waiting, at least a reasonable time, to be loaded for the return trip."

The court further decided that debts, if any, which were due from the garnishee companies to the C. C. C. & St. L. Ry. Co. for its share of the price of carriage were "as 174] much a part of *interstate commerce,

as defined by the Supreme Court, as the actual carriage of their property."

2. The next contention of plaintiff is that the appearance of the C. C. C. & St. L. Ry. Co. was a general appearance, and submitted its person to the jurisdiction of the court. In other words, it is contended that the person over whom personal jurisdiction has not been obtained cannot appear specially to set aside the attachment of his property, which we must assume, in order to completely exhibit the contention, is valid. We cannot concur in the contention. It is supported, it is true by some cases, but it is opposed by more. Drake, *Attachm.* § 112, and cases cited. The stronger reasoning, we think, too, is against the contention. A court, without personal service, can acquire no jurisdiction over the person, and when it attempts to assert jurisdiction over property, it should be open to the defendant to specially appear to contest its control over such property; in other words, to contest the ground of its jurisdiction. *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237; *Southern P. Co. v. Denton*, 146 U. S. 206, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; *Goldey v. Morning News*, 156 U. S. 518, 523, 39 L. ed. 517, 519, 15 Sup. Ct. Rep. 559; *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 278, 41 L. ed. 431, 434, 17 Sup. Ct. Rep. 126.

The appearance of the C. C. C. & St. L. Ry. Co. was not to object to the subject-matter of the action, as it is contended by plaintiff. The subject-matter of the action is a demand for damages, which can only be prosecuted to efficient judgment and be satisfied out of the property attached. *Clark v. Wells*, 203 U. S. 164, 51 L. ed. 138, 27 Sup. Ct. Rep. 43. The jurisdiction of the court, therefore, depended upon the attachment, and the appearance to set that aside was an appearance to object to the jurisdiction. In other words, the defendant was only in court through its property, and it appeared specially to show that it was improperly in court.

These contentions being disposed of, we are brought to the question whether the cars were "immune from judicial process" because engaged in interstate commerce. The question has come up in several of the state courts and different views have been taken. The question has been answered in the *affirmative in *Michigan C. R. Co.* [175 v. *Chicago & M. L. S. R. Co.* 1 Ill. App. 399; *Connery v. Quincy, O. & K. C. R. Co.* 92 Minn. 20, 64 L.R.A. 624, 104 Am. St. Rep. 659, 99 N. W. 365, 2 A. & E. Ann. Cas. 347; *Shore v. Baltimore & O. R. Co.* 76 S. C. 472, 57 S. E. 526, 11 A. & E. Ann. Cas. 909; *Seibels v. Northern C. R. Co.* 80 S. C. 133, 16 L.R.A. (N.S.) 1026, 61 S. E. 435; *Chicago & N. W.*

R. Co. v. Forest County, 95 Wis. 80, 70 N. W. 77; Wall v. Norfolk & W. R. Co. 52 W. Va. 485, 64 L.R.A. 501, 94 Am. St. Rep. 948, 44 S. E. 294. A negative answer has been pronounced in the following cases: De Rochemont v. New York C. & H. R. R. Co. 75 N. H. 158, —L.R.A.(N.S.)—, 71 Atl. 868; Southern Flour & Grain Co. v. Northern P. R. Co. 127 Ga. 626, 9 L.R.A.(N.S.) 853, 119 Am. St. Rep. 356, 56 S. E. 742, 9 A. & E. Ann. Cas. 437; Southern R. Co. v. Brown, 131 Ga. 245, 62 S. E. 177; Cavanaugh v. Chicago, R. I. & P. R. Co. 75 N. H. 243, 72 Atl. 694. See also Humphreys v. Hopkins, 81 Cal. 551, 6 L.R.A. 792, 15 Am. St. Rep. 76, 22 Pac. 892. Cavanaugh v. Chicago, R. I. & P. R. Co. supra, may be assigned to the list of cases giving a negative answer. In that case there was an attachment of credits or funds representing the sending carrier's part of transportation charges on interstate freight. The attachment was sustained. In Wall v. Norfolk & W. R. Co. the levy was upon cars which were unloading. In the case in 1 Ill. App. the condition or situation of the cars does not clearly appear. In the other cases, the cars were not in use when attached. In most of the cases there is a full and able discussion of the principles involved. In Humphreys v. Hopkins it was taken for granted that the cars were subject to process, the case going off on another point.

The answer to the question is, therefore, certainly not obvious, and counsel, realizing it, have pressed many considerations on our attention. Their arguments result in certain contentions. The plaintiff's contention is, that even though the cars in question had been or were to be used in interstate commerce, their attachment was not a regulation of such commerce, and that they were as legally subject to attachment as the property of any other nonresident. The contention of the defendants is an exact antithesis of that of plaintiff. It is that the state laws cannot be permitted to impede or impair interstate traffic or the usefulness of the facilities for such traffic. And, further, that the provisions of the interstate commerce act, providing for the establishment of through routes, and § 5258 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3564), providing for the connection of railroads, exempt the cars from attachment.

In our discussion we may address ourselves to the contention of defendants. They do not contend that the laws of the state have the purpose to interfere with the interstate commerce, or are directly contrary to the acts of Congress. They do contend, however, that "to permit the instrumentalities used in the interchange of traffic by rail-

way common carriers to be seized on process from various state courts does directly burden and impede interstate traffic within the inhibition of the acts of Congress." In other words, that the acts of Congress constitute a declaration of exemption of railroad property from attachment, and, of course, from execution as well, by reason of their provisions for continuity of transportation.

This can only result if there is incompatibility between the obligations a railroad may have to its creditors and the obligations which it may have to the public, either from the nature of its service or under the acts of Congress. Obligations it surely will have to creditors, inevitable even in providing equipment for its duties,—inevitable in its performance of them. It would seem, therefore, that the contentions of the defendants are but deductions from the broader proposition that all of the property of the railroad company is put apart in a kind of civil sanctuary. And one case (Wall v. Norfolk & W. R. Co. supra) seems to give this extent to the exemption. Indeed, the decision in the case at bar seems to do so, the court holding, as we have seen, that the C. C. & St. L. Ry. Co.'s share of the compensation for earriage was as much a part of interstate commerce as the actual carriage of property. A still broader proposition under the contention might be urged. If the property have such character that all obligations of the company must yield to the public use or to the obligations imposed by Congress, the railroad company itself, it might be contended, cannot burden its property, and that its property is taken from it as an asset of credit, the means, it may be, of performing the very duties enjoined upon it; and the anomaly *will be presented of the du- [177 ties it is to perform becoming an obstacle to acquiring the means of performing them. Indeed, the further consequence might be said to follow that the rolling stock of a railroad is exempt from taxation; at least, so far as taxation might be attempted to be enforced against the rolling stock. We realize that a proposition may be generally applicable and yet involve embarrassment when pushed to a logical extreme. If this be so of the contentions of defendant, it may be so of the counter contentions which would subject the cars of a railroad company to attachment process, however engaged or wherever situate.

It is very certain that when Congress enacted the interstate commerce law it did not intend to abrogate the attachment laws of the states. It is very certain that there is no conscious purpose in the laws of the states to regulate, directly or indirectly, interstate commerce. We may put out of the

case, therefore, as an element, an attempt of the state to exercise control over interstate commerce in excess of its power. Indeed, the questions in this case might arise upon process issued out of the circuit court of the United States under the Federal statutes. For, by §§ 915 and 916 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 684), remedies "by attachment or other process," before judgment, and "by execution or otherwise," after judgment, are given litigants in common-law causes in the circuit and district courts of the United States.

The questions in the case, therefore, depend for their solution upon the interpretation of Federal laws. Are the laws of the states for the enforcement of debts (laws which we need not stop to vindicate as necessary foundations of credit, and because they give support to commerce, state and interstate) and the Federal laws which permit or enjoin continuity of transportation, so far incompatible that the provisions of the latter must be construed as displacing the former? We do not think so. Section 5258 of the Revised Statutes is permissive, not imperative. It removed the "trammels interposed by state enactments or by existing [178] laws of Congress" to the "powers of railroad companies to make continuous lines of transportation. *Dubuque & S. C. R. Co. v. Richmond*, 19 Wall. 584, 589, 22 L. ed. 173, 176. The interstate commerce act, however, has a different character. It restricts the powers of the railroads. It regulates interstate railroads and makes it unlawful for them, by any "means or devices," to prevent "the carriage of freight from being continuous from the place of shipment to the place of destination."[†]

The interstate commerce law, therefore, is directed against the acts of railroad companies which may prevent continuity of transportation. Section 5258 of the Revised Statutes was directed against the trammels of

[†]Sec. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being, and being treated as, one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith, for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this act. [24 Stat. at L. 382, chap. 104, U. S. Comp. Stat. 1901, p. 3159.]

state enactments then existing or which might be attempted. In neither can there be discerned a purpose to relieve the railroads from any obligations to their creditors, or take from their creditors any remedial process provided by the laws of the state, and, as we have seen, provided by Federal law as well. May it be said that such result follows from the use of property in the public service? A number of cases may be cited against such contention. We have already pointed out what might be contended as its possible if not probable consequences. In a recent case in this court, a lien imposed under the law of Michigan upon a vessel to be used in domestic and foreign trade was sustained. To the contention that the enforcement of the lien while the vessel was engaged in interstate commerce was unlawful and *void, in view [179] of the exclusive control of Congress over the subject, we answered: "But it must be remembered that concerning contracts not maritime in their nature, the state has authority to make laws and enforce liens, and it is no valid objection that the enforcement of such laws may prevent or obstruct the prosecution of a voyage of an interstate character. The laws of the states enforcing attachment and execution in cases cognizable in state courts have been sustained and upheld. *Johnson v. Chicago & P. Elevator Co.* 119 U. S. 388-398, 30 L. ed. 447-450, 7 Sup. Ct. Rep. 254. The state may pass laws enforcing the rights of its citizens which affect interstate commerce, but fall short of regulating such commerce in the sense in which the Constitution gives exclusive jurisdiction to Congress. *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. ed. 819; *Kidd v. Pearson*, 128 U. S. 1, 23, 32 L. ed. 346, 351, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132." *The Winnebago (Iroquois Transp. Co. v. De Laney Forge & Iron Co.)* 205 U. S. 354, 362, 51 L. ed. 836, 840, 27 Sup. Ct. Rep. 509.

The interference with interstate commerce by the enforcement of the attachment laws of a state must not be exaggerated. It can only be occasional and temporary. The obligations of a railroad company are tolerably certain, and provisions for them can be easily made. Their sudden assertion can be almost instantly met; at any rate, after short delay, and without much, if any, embarrassment to the continuity of transportation. However, the pending case does not call for a very comprehensive decision on the subject. We only decide that the cars situated as this record tends to show that they were when attached, and the amounts due from the garnishee companies to the C. C. C. & St. L. Ry. Co., were not exempt from process un-

der the state laws, and that the court had, therefore, jurisdiction of them, and through them of the C. C. C. & St. L. Ry. Co.

Judgment reversed and the cause remanded with directions to proceed in accordance with this opinion.

Mr. Justice Holmes took no part in the decision.

180] *CHICAGO, ST. PAUL, MINNEAPOLIS, & OMAHA RAILWAY COMPANY, Appt.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 180-189.)

Transportation of mail—compensation—land-aided railroads.

A railway company carrying the mails over a continuous route which includes certain land-aided railroads is only entitled to the land-grant rates for those portions of the route, under the provisions of the act of July 12, 1876 (19 Stat. at L. 82, chap. 179, U. S. Comp. Stat. 1901, p. 2722), § 13, that railroad companies whose railroad was constructed in whole or in part by a grant of land made by Congress on the condition that the mails should be transported over their roads at such price as Congress should by law direct should receive only 80 per cent of the compensation fixed by that act for similar service for non-land-aided roads, which provisions must be construed as extending not only to the original land-aided companies, but to every other company carrying the mails over such roads.

[For other cases, see Postoffice, IV. c, in Digest Sup. Ct. 1908.]

[No. 133.]

Argued March 9, 10, 1910. Decided April 4, 1910.

A PPEAL from the Court of Claims to review an award for less than the amount claimed by a railway company carrying the mails over a continuous route which includes certain land-aided railroads. Affirmed.

See same case below, 43 Ct. Cl. 595.

The facts are stated in the opinion.

Mr. Samuel A. Putman argued the cause and filed a brief for appellant.

Mr. Charles W. Bunn also filed a brief for appellant.

Assistant Attorney General John Q. Thompson argued the cause, and, with Mr. Philip M. Ashford, filed a brief for appellee.

Mr. Justice McKenna delivered the opinion of the court:

The question in this case is the legality of certain deductions made by the Postmaster General from the amount *which, [181

it is contended, is due appellant for carrying the mails between Minneapolis, Minnesota, and Sioux City, Iowa, over postal route No. 121,045. The appellant sought to recover the sum of forty thousand dollars (\$40,000). The court of claims gave judgment for only thirty-three hundred eighty-nine dollars and fifty three cents (\$3,389.53), rejecting the balance of the claim on the authority of *Astoria & C. River R. Co. v. United States*, 41 Ct. Cl. 284.

The controversy turns upon the application of certain acts of Congress, granting parts of the public domain to appellant and to companies with which it has agreements. The acts provide that the United States mail shall be transported on such roads at such rates as Congress may by law direct. Act of May 15, 1856, 11 Stat. at L. 9, chap. 28; act of March 3, 1857, 11 Stat. at L. 195, chap. 99. Subsequently it was provided as follows:

"Sec. 13. That railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only eighty per centum of the compensation authorized by this act." Act of July 12, 1876, 19 Stat. at L. 82, chap. 179, U. S. Comp. Stat. 1901, p. 2722.

The postal route begins at Minneapolis and consists of land-aided and non-land-aided roads. The following diagram, taken from the government's brief, though not drawn to any scale of measurement, exhibits with enough accuracy for illustration the aided and non-aided parts of the route and the companies which received aid: [See following page.]

It will be observed that appellant is the direct beneficiary of the road from St. Paul south 237.81 miles to a point north from a place marked as Le Mars. It used the other parts of the route under the contracts with the other companies, and it is found that from some time prior to October 1, 1900, appellant used the tracks of such other companies to "form a continuous route for the operation of its mail trains, made up of its own rolling stock, and controlled and operated by its *own servants, between [182 Minneapolis and Sioux City, except that within the last-named city it did not use the station of the Illinois Central Company, but had a station of its own." It is also found that appellant operated its trains over the tracks of the Great Northern Company under a contract in writing with the predecessor of the latter company, the St. Paul, Minneapolis, & Manitoba Railway Company, and operated its trains



over the Illinois Central Company under a contract with the predecessor of that company, the Iowa Falls & Sioux City Railroad Company. By the first contract, ap- 183] pellant is given "the *right and privilege to run such of its locomotives, engines, cars, and trains, handled by its own employees, as shall be reasonably necessary for the efficient and full transaction of its business to and from the city of Minneapolis, and all points on the second party's road, east of St. Paul, over the *main track* of the first party, as now constructed." It was provided that the amount of the monthly rental should be a sum of money equal to one twelfth part of the annual interest at the rate of $6\frac{1}{2}$ per cent per annum on one half the value of the property of the first party, which the second party is entitled to use under the contract. And in addition, such proportion of cost of maintaining and repairing the properties, "as the number of

wheels per mile" appellant should "run over the said property or any part thereof, bears to the whole number of wheels per mile run over the same." It was provided that the earnings of all local business done by appellant over the railroad should belong to the party of the first part, but the appellant was not obliged to do such business. The contract was to continue twenty-five years.

The contract of the appellant with the Iowa Falls & Sioux City Railway Company may be said, as far as the question in the case is concerned, to be substantially the same. Its provision as to the use of tracks is more comprehensive. It permits also appellant to do local business, 60 per cent of the gross receipts of which, however, are to be paid to the Iowa Falls Company. There is a provision for maintenance and repairs, based on car mileage. The rental stipulated is \$450 per mile for the use of each mile of main track.

It is found that appellant had no part in the construction of the tracks of the Great Northern Company or of the Illinois Central Company, and received no benefit on account of their construction by grants of land or otherwise; that ever since the construction of the tracks the respective companies owning them have operated trains and transported United States mails over them, and that the use of the tracks by those companies does not appear to have 184] been limited by appellant *using them; that the tracks of the Great Northern Company between University Switch and St. Paul are a portion of postal route No. 141,004 between St. Paul and Fargo, North Dakota, and those belonging to the Illinois Central between Le Mars and Sioux City are a portion of postal route No. 143,021 between Dubuque and Sioux City, Iowa. That prior to October 1, 1900, the Postmaster General designated the line of railroad between Minneapolis and Sioux City as postal route No. 141,025, and has maintained it ever since, and that between that date and September 30, 1906, appellant has carried mails over such route, but the Postmaster General has allowed for the whole of the route only 80 per cent of the compensation allowed and fixed by law for similar service for non-land-granted roads. A table of reductions is given, showing the deductions for the periods mentioned, amounting in all to \$33,301.17.

The contentions of the parties are foreshadowed by the facts which we have recited. It may be conceded, appellant says, that the grants of land to the companies to which they were made "completed contracts between them and the United States," and it may be further conceded, it is said, "that by these contracts privity was established between the United States and these various railroad companies." But succession to the obligation of the contract is denied because appellant "has not succeeded to the title or any part of the title of these respective roads, nor has it in any way, directly or indirectly, received any benefit from the respective grants, or done any other thing which creates privity of contract between it and the United States, or which makes it, in the language of the 13th section of the act of 1876, a railroad company 'whose railroad was constructed in whole or in part by a grant of land,' " etc.

This distinction is earnestly insisted on and is made the foundation of the argument of the appellant. It makes irrelevant, it is urged, the consideration of the obligations of the other companies, and by overlooking 185] it the court of *claims fell into error in *Astoria & C. River R. Co. v. United States*, supra, and continued the

error in its judgment in the case at bar. But did the court of claims overlook it? It was urged in *Astoria & C. River R. Co. v. United States*, as it is urged in this, to justify the distinction that the "owning and aided companies," to adopt counsel's designation, are and always have been "ready to perform all the service due them under the terms of their contract with the United States," and it seems to us that the court of claims did not misunderstand or overlook the contention. A court does not overlook a contention because it rests its decision upon a proposition which, if true, the contention is not true. To bring forward a proposition upon which the question to be proved depends answers necessarily opposing propositions. And this is what the court of claims did. It decided that the power reserved to Congress was over the property, not alone over the companies who owned it, and extended to every use of it, whether by the owning companies or any company who received a right from them. That proposition, if true, necessarily determined the judgment against the *Astoria & Columbia River Railway Company* in the cited case. It is opposed to the proposition decided in that case by the circuit court of the United States for the district of Oregon, and which is relied upon by appellant in this case. That case was brought by the United States to enjoin the *Astoria & Columbia River Railway Company* for charging for the transportation of army supplies from Portland, carried by that company over the tracks of the Northern Pacific Railroad Company, which it used under a contract with the latter company. The suit was based on the fact that the Northern Pacific was a land-aided road. The injunction was refused. The court sustained the contention which was made (and which was repeated in the court of claims and is repeated here), that the power reserved to Congress attached in effect to the company, not to the property. The circuit court said: "The defendant's use of the Northern Pacific Railroad track *between Portland and Goble does [186 not affect the transportation due from the latter company to the plaintiff. It is still open to the latter to have its freight carried over every part of the railroad of the land-grant company at 50 per cent of the regular rate. This is the extent of its right. And this right, as already appears, has not been affected by the use of a part of that company's track by the defendant company. It is a matter of no consequence to the plaintiff [United States] how many railroads use this particular track of the Northern Pacific Company, nor what their traffic rates are, so long as the latter company continues

to afford all the facilities for transportation over every part of its road required by the plaintiff." 131 Fed. 1006.

The order denying application for injunction was pleaded in the court of claims, as it appears from the opinion of the court, as *res judicata* of the "subject-matter" there involved, and therefore the full breadth of the contentions of the railroad company in the circuit court and of the decision of that court was considered by the court of claims, and all of the elements of decision and all the distinctions which depended upon them the court must have taken into account in rendering its decision.

We are brought, then, to the question whether the decision of the court was right. Certain concessions are made by appellant at the outset of the argument. It is conceded that the acceptance of the land grants by the "owned and aided companies" completed a contract between them and the United States, and that privity was established between them and the United States. That is, privity (we use the word, as we presume that counsel does, in the sense of party for the United States, and the companies are parties, not successors, to rights or obligations) of contract,—a personal obligation,—that is, not an obligation which attached to the property and covered every use of it. This is necessarily what appellant means, though 187] it is confused in discussion. *Appellant quotes the statute to show that the obligation is on the *companies*, not on the *roads*, as follows: "That railroad companies whose railroad was constructed . . . by grant of land . . . shall receive only eighty per centum of the compensation authorized by this act."

And further, it points out, as we have seen, that it has not succeeded "to the title or any part of the title" of the roads, nor "directly or indirectly receives any benefit from the respective grants." And, finally, it urges that if appellant "is a mere licensee, owing no contractual duty as a corporate individual to the government, owning no railroad property which is pledged to the government as security for the performance of any duty, and operating its trains on the joint track in such manner as to interfere in no wise with its licensor in the transaction of its business and the performance of its contractual duty to the government, it is difficult to understand how appellant can be held to fall within the terms of the 13th section of the act of 1876, or why it does not stand upon the same footing as any other company without privity with the United States."

This is stating by periphrase the simple proposition that there is a contract only between the United States and each of the

aided companies, in which such company "has bound itself" [we quote from appellant's brief] "to operate trains for the transportation of the government business." And "whenever," appellant says, "one of these companies shall fail to perform its duty, whatever relief the United States may be entitled to must be sought by appropriate proceedings directed against the delinquent company." Appellant joins to this as a concession that the "railroad property" of an aided company "is pledged to secure the performance" of its obligation. In what way is not pointed out, or how the security can be availed of.

The opposite contention to that of appellant is, therefore, what it was decided to be by the court of claims,—that the obligation is upon the property of an aided company, and "attaches to all of the uses of [188 the property, whether by the "owned and aided companies" or any other company. We concur with the decision of the court of claims, and we think further discussion is not necessary, except to notice some of the reasons urged against the decision.

We have noticed and commented on one concession of appellant. Another is made, which we quote with its qualifications, as follows: "We do not contend that a land-aided road can be sold, either in whole or in part, so as to avoid its obligations to the government. To this extent we concede that the obligation runs with the railroad aided by land grant, but the act does not say that companies permitted simply to run trains on the road shall suffer reductions. They receive no aid from the grant, and are neither within the terms or the reason of the statute." Of course, the statute did not deal with other companies or with deductions. It would be very strange if it had. It either imposed a service on the companies or on the road as well. If on the companies alone, there would necessarily be exclusion of all others. If on the roads as well, it would comprehend all that used them. If a difference in degree of use, or a participation in the use by other companies than the aided ones, had been intended, it would have been expressed. The concession as to the effect of the sale or lease of the road is fatal. As we have already said, the obligation is either upon the aided companies, to be enforced by remedies against them, or it is on the property as well; and if on the property, necessarily on it by whatever company or person it is used.

It is further contended in the brief filed for the Great Northern that the condition of earning its grant was the building of a single track, and it or its grantors, it is said, has provided several. It has therefore, it is further said, "a surplus of track ca-

capacity, and, by contract, permits the Omaha [appellant] and other companies to run their trains over its tracks." To this it is only necessary to reply that the service that the government reserved was coextensive 189] with *the road as constituted under the grant, and attached to as many tracks as should be used.

Again, it is urged that if the Omaha company had built its own road, there would be no assertion of a right to deduct from its mail pay, and that it is to run over the Great Northern, the latter not being made thereby less useful or efficient, is for its purpose equivalent to building its own road. An answer to this is contained in what we have said. We may add, however, that the appellant no doubt considered the advantages and disadvantages of the alternative presented before making its selection, but it could not have supposed, nor can we admit, that it could lessen rights in property because it could acquire like property for itself.

Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173, and Lake Superior & M. R. Co. v. United States, 93 U. S. 442, 23 L. ed. 965, are cited as authorities against our conclusion. We content ourselves by saying that they have not that effect. On United States v. Astoria & C. R. Co. 131 Fed. 1006, we have commented.

Judgment affirmed.

BOSTON CHAMBER OF COMMERCE, the
Central Wharf & Wet Dock Corporation,
and the Boston Five Cents Savings Bank,
Plffs. in Err.,

v.

CITY OF BOSTON.

(See S. C. Reporter's ed. 189-195.)

Eminent domain — uniting estates to increase damages — due process of law.

The owners respectively of the fee of land taken for a public street and of an easement of way, light, and air over such land, and the holder of a mortgage on the same, subject to the easement, cannot successfully claim to have been denied rights under U. S. Const., 14th Amendment, because they were not permitted to pool their interests and have the damages assessed in a lump

NOTE. — As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

54 L. ed.

sum, and estimated as if the land was the sole property of one owner.

[For measure of damages in eminent domain, see *Damages*, VI. m, in *Digest Sup. Ct.* 1908.]

[No. 99.]

Argued March 2, 3, 1910. Decided April 4, 1910.

IN ERROR to the Superior Court of the State of Massachusetts to review a judgment entered pursuant to the mandate of the Supreme Judicial Court of that state, sustaining the rulings of the Superior Court, and ordering judgment for less than the amount claimed as damages in eminent domain proceedings. Affirmed.

See same case below, in Supreme Judicial Court, 195 Mass. 338, 81 N. E. 244.

The facts are stated in the opinion.

Messrs. **Charles A. Williams** and **Charles S. Hamlin** argued the cause and filed a brief for plaintiffs in error:

The use which the owner of the land taken is making of the land at the time of the taking is absolutely and wholly immaterial.

Mississippi & R. River Boom Co. v. Paterson, 98 U. S. 403, 25 L. ed. 206; *Maynard v. Northampton*, 157 Mass. 219, 31 N. E. 1062; *Eastern R. Co. v. Boston & M. R. Co.* 111 Mass. 132, 15 Am. Rep. 13; *Providence & W. R. Co. v. Worcester*, 155 Mass. 35, 29 N. E. 56; *Conness v. Com.* 184 Mass. 541, 69 N. E. 341; *Fales v. Easthampton*, 162 Mass. 422, 38 N. E. 1129.

Where one man owned a life estate and the other man owned the remainder in fee, subject to the life estate, neither, without co-operation of the other, could convey a clear title to the whole estate; yet both suing together could recover the full value of the fee.

Edmands v. Boston, 108 Mass. 535.

If what is taken is practically coextensive with the fee, and if the taking deprives the owner of the beneficial interest in the land, then it makes no difference in the quantum of the damage which he has sustained, whether the taking be a taking of an easement or a taking of the fee.

Lawrence v. Boston, 119 Mass. 126; *Edmands v. Boston*, supra; *Chase v. Worcester*, 108 Mass. 67; *Parks v. Boston*, 15 Pick. 198; *Pitkin v. Springfield*, 112 Mass. 509; *New England Teleph. & Teleg. Co. v. Boston Terminal Co.* 182 Mass. 397, 65 N. E. 835; *Sears v. Crocker*, 184 Mass. 586, 100 Am. St. Rep. 577, 69 N. E. 327.

The owners of different estates or interests in the land taken together constitute the owners of the land; they are entitled to recover full damages, which are to be apportioned

tioned between them according to their interests.

Re Eleventh Ave. 81 N. Y. 436; Re Board of Street Opening, 27 App. Div. 265, 50 N. Y. Supp. 621; Winthrop v. Welling, 2 App. Div. 229, 37 N. Y. Supp. 729; Re Canal Place, 115 App. Div. 458, 101 N. Y. Supp. 397, 191 N. Y. 525, 84 N. E. 1109; Re Jerome Ave. 120 App. Div. 297, 105 N. Y. Supp. 319.

Mr. Thomas M. Babson argued the cause and filed a brief for defendant in error:

Damages, when property is taken, are to be assessed as of the time of the taking.

Parks v. Boston, 15 Pick. 198; Cobb v. Boston, 109 Mass. 438; Pitkin v. Springfield, 112 Mass. 509; Burt v. Merchants' Ins. Co. 115 Mass. 1; Bates v. Boston Elev. R. Co. 187 Mass. 328, 72 N. E. 1017.

The construction of the statute by the highest court of the state of Massachusetts gave the plaintiffs in error just compensation, measured by the loss caused them. The decision of the court entitled them to receive the value of what they have been deprived. To have awarded more would have been unjust to the public. At the time of the taking of the easement of public travel, the land taken was already subject to rights of way and to rights of light and air not only to the central wharf and wet dock corporation, but to its assign; and the owner of the land so taken may be limited in his recovery to nominal damages.

Bartlett v. Bangor, 67 Me. 460; Walker v. Manchester, 58 N. H. 438; Wilkins v. Manchester, 74 N. H. 275, 67 Atl. 560; Re Ethel Street, 3 Misc. 403, 24 N. Y. Supp. 689; Olean v. Stevner, 135 N. Y. 341, 17 L.R.A. 640, 32 N. E. 9; Re Adams, 141 N. Y. 297, 36 N. E. 318; People ex rel. Washburn v. Gloversville, 128 App. Div. 49, 112 N. Y. Supp. 387; Gamble v. Philadelphia, 162 Pa. 413, 29 Atl. 739; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

Servitudes which diminish the value of land are a legitimate ground for a reduction of damages.

Tobey v. Taunton, 119 Mass. 411; Crowell v. Beverly, 134 Mass. 98; See also Allen v. Boston, 137 Mass. 319; New England Teleph. & Teleg. Co. v. Boston Terminal Co. 182 Mass. 400, 65 N. E. 835.

193] *Mr. Justice Holmes delivered the opinion of the court:

This is a petition for the assessment of damages caused by the laying out of a public street over 2,955 square feet of land at the apex of a triangle between India street and Central Wharf street, in Boston, the latter being a private way between Milk

street and Atlantic avenue, laid out by the same order, as part of the same street. The chamber of commerce had a building at the base of the triangle, and owned the fee of the land taken. The Central Wharf & Wet Dock Corporation, which owned other land abutting on the new street, had an easement of way, light, and air over the land in question, and the Boston Five Cents Savings Bank held a mortgage on the same, subject to the easement. These three were the only parties having any interests in the land. They filed an agreement in the case that the damages might be assessed in a lump sum, the city of Boston refusing to assent, and they contended that it was their right, as matter of law, under the Massachusetts statute, Rev. Laws chap. 48, §§ 20-22, and the 14th Amendment, to recover the full value of the land taken, considered as an unrestricted fee. The city, on the other hand, offered to show that the restriction being of great value to the Central Wharf & Wet Dock Corporation, the damage to the market value of the estate of the chamber of commerce was little or nothing, and contended that the damages must be assessed according to the condition of the title at the date of the order laying out the street. It contended that the jury could consider the improbability of the easement being released, as it might affect the mind of a possible purchaser of the servient estate, and that the dominant owner could recover nothing, as it lost nothing by the superposition of a public easement upon its own. The parties agreed that if the petitioners were right, the damages should be assessed at \$60,000, without interest; but, if the city was right, they should be \$5,000. The judge before whom the case was tried ruled in favor of the city, and this ruling was sustained by the supreme *judicial court, upon report. [194 195 Mass. 338, 81 N. E. 244. A judgment was entered in the court where the record remained, and then the case was brought here.

We assume in favor of the petitioners, the plaintiffs in error, that their only remedy was under the statute; and we give them the benefit of the doubt in interpreting the decision of the court, so far as to take it to mean that the statutes of Massachusetts authorize the taking of land held as this was, with no other compensation than according to the principle laid down. In short, we assume in their favor that the constitutional question is open, and that the case properly is not to be dismissed. But we are of opinion that upon the only possible question before us here the decision was right.

Of course, we accept the construction given to the Massachusetts statute by the state court. *Maiorano v. Baltimore & O. R. Co.*

213 U. S. 268, 272, 53 L. ed. 792, 795, 29 Sup. Ct. Rep. 424. The only question to be considered is whether, when a man's land is taken, he is entitled, by the 14th Amendment, to recover more than the value of it as it stood at the time. For it is to be observed that the petitioners did not merely contend that they were entitled to have the jury consider the chance of getting a release, for whatever it might add to the market value of the land, as the city merely contended that the jury should consider the chance of not getting one. The petitioners contended that they had a right, as matter of law, under the Constitution, after the taking was complete and all rights were fixed, to obtain the connivance or concurrence of the dominant owner, and by means of that to enlarge a recovery that otherwise would be limited to a relatively small sum. It might be perfectly clear that the dominant owner never would have released short of a purchase of the dominant estate,—in other words, that the servitude must have been maintained in the interest of lands not before the court,—but still, according to the contention, by a simple joinder of parties after the taking, the city could be made to pay for a loss of theoretical creation, suffered by no one in fact.

The statement of the contention seems to 195] us to be enough. *It is true that the mere mode of occupation does not necessarily limit the right of an owner's recovery. *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 408, 25 L. ed. 206, 208; *Louisville & N. R. Co. v. Barber Asphalt Pav. Co.* 197 U. S. 430, 435, 49 L. ed. 819, 822, 25 Sup. Ct. Rep. 466. But the Constitution does not require a disregard of the mode of ownership,—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is, What has the owner lost? not, What has the taker gained? We regard it as entirely plain that the petitioners were not entitled, as matter of law, to have the damages estimated as if the land was the sole property of one owner, and therefore are not entitled to \$60,000 under their agreement. See *Bartlett v. Bangor*, 67 Me. 460, 468; *Walker v. Manchester*, 58 N. H. 438, 441; *Gamble v. Philadelphia*, 162 Pa. 413, 29 Atl. 739; *Re Adams*, 141 N. Y. 297, 36 N. E. 318; *Olean v. Steyner*, 135 N. Y. 341, 346, 17 L.R.A. 640, 32 N. E. 9; *Crowell v. Beverly*, 134 Mass. 98. There is some subordinate criticism under the alternative agreement, giving them only \$5,000. It is no 54 L. ed.

ticed that this was conditioned upon the petitioners not being entitled, as just stated, and upon the admissibility of the evidence offered by the city, and upon the substantial correctness of the requests for rulings; and it is said that the evidence was not admissible. It seems to us that the worst objection to it was that it was offered to prove the obvious. But, taking the agreement fairly, we think it meant only to contrast broadly the position of the two sides, and made the result depend upon which was right.

Judgment affirmed.

*MISSOURI PACIFIC RAILWAY [196
COMPANY, Plff. in Err.,

v.

STATE OF NEBRASKA. (No. 127.)

MISSOURI PACIFIC RAILWAY COM-
PANY, Plff. in Err.,

v.

STATE OF NEBRASKA EX REL. FARM-
ERS' ELEVATOR COMPANY OF
STRAUSVILLE, NEBRASKA. (No.
128.)

(See S. C. Reporter's ed. 196-208.)

Constitutional law — due process of law — compulsory construction of side track or switch.

The compulsory construction and maintenance by a railway company, under Neb. Sess. Laws 1905, chap. 105, §§ 1, 6, at its own expense, and without a preliminary hearing, under penalty of a heavy fine for refusal, of the side tracks or switches necessary to reach grain elevators which may be erected adjacent to the right of way, cannot be justified as an exercise of the police power, but such statute takes the property of the railway company without due process of law, even if construed as operating only when the demand for such facilities is reasonable.

[For other cases, see Constitutional Law, 458-466, in Digest Sup. Ct. 1908.]

[Nos. 127, 128.]

Argued March 7, 1910. Decided April 4, 1910.

NOTE.—On the duties and liabilities of carriers as to furnishing facilities for transportation—see note to *Harp v. Choctaw, O. & G. R. Co.* 61 C. C. A. 414.

As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court of Cass County, in that state, imposing a fine on a railway company for its refusal to construct and maintain, at its own expense, the side track or switch necessary to reach a grain elevator erected adjacent to its right of way. Reversed. Also

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court of Richardson County, in that state, granting a mandamus compelling a railway company to construct such switch or side track. Reversed.

See same case below, No. 127, 81 Neb. 15, 115 N. W. 614; No. 128, 81 Neb. 174, 115 N. W. 757.

The facts are stated in the opinion.

Mr. Balie P. Waggener argued the cause, and, with Mr. James W. Orr, filed a brief for plaintiff in error:

The railway company is deprived of the use of its property, and in effect the property itself, without any judicial investigation, or any kind of investigation as to the reasonableness of or necessity for such appropriation. This is not due process of law.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 99, 44 L. ed. 88, 20 Sup. Ct. Rep. 33; Ex parte Young, 209 U. S. 148, 52 L. ed. 724, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764; Missouri P. R. Co. v. Nebraska, 164 U. S. 403; 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

The railroad company is not a common carrier as to private sidings or spur tracks, and the state has no power to force a railroad company to deliver its cars thereon.

Mann v. Pere Marquette R. Co. 135 Mich. 210, 97 N. W. 721; Jones v. Newport News & M. Valley Co. 13 C. C. A. 95, 31 U. S. App. 92, 65 Fed. 736; Mercantile Trust Co. v. Columbus, S. & H. R. Co. 90 Fed. 148; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246.

The provision of the state Constitution which says "the property of no person shall be taken or damaged for public use without just compensation therefor" means precisely what it says. In no event can it be taken except for public use, nor can it be damaged except for a public use, nor can it be either taken or damaged for even a public use without just compensation.

Chicago, K. & N. R. Co. v. Hazels, 26 Neb. 364, 42 N. W. 93; Gottschalk v. Chicago, B.

& Q. R. Co. 14 Neb. 559, 16 N. W. 475, 17 N. W. 120.

The taking of private property does not necessarily mean the taking of real estate, but provisions of the various constitutions and acts of legislature and Congress apply as well to the taking of personal property as of real property; and where, as in the case at bar, the railway company is not only required to part with the possession of certain portions of its real estate, but also with its money, for the purpose of constructing and operating a railroad on that real estate, the taking of the money is as much inhibited by the Constitution as would be the physical taking of a portion of its right of way or its real estate.

Welton v. Dickson, 38 Neb. 767, 22 L.R.A. 496, 41 Am. St. Rep. 771, 57 N. W. 559; Chicago, B. & Q. R. Co. v. State, 50 Neb. 399, 69 N. W. 955.

Taking property for public use is where the land or other property of an individual is taken from him for the use of the government or public, and where, if the property were not paid for, the burden would fall chiefly upon the person whose property is taken, and not upon the general public; in such case, payment must be made to prevent inequality.

Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647.

When Congress, under its power to regulate commerce, condemns and appropriates a lock and dam belonging to a navigation company on a navigable river, its action does not destroy the state franchise, and just compensation requires payment for the franchise to take tolls as well as for the value of the tangible property.

Monongahela Nav. Co. v. United States, 148 U. S. 324, 37 L. ed. 467, 13 Sup. Ct. Rep. 622.

It is beyond the authority of Congress to deprive anyone of rights or property without providing compensation; and a telegraph company has no right to establish a line upon the right of way of a railroad without making compensation therefor in accordance with law.

Atlantic & P. Teleg. Co. v. Chicago, R. I. & P. R. Co. 6 Biss. 158, Fed. Cas. No. 632.

A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 593, 50 L. ed. 609, 26 Sup. Ct. Rep. 341,

4 A. & E. Ann. Cas. 1175; Louisville & N. R. Co. v. Central Stock Yards Co. *supra*.

Railroads are the private property of their owners; while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service, and equality between shippers and communities, yet in no proper sense is the public a general manager.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 118, 52 L. ed. 712, 28 Sup. Ct. Rep. 493.

The right of ownership of railroad property, like other property rights, finds protection in constitutional guaranties.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 20, 51 L. ed. 942, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398.

The power to regulate is not the power to destroy, and limitation is not the equivalent of confiscation.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 399, 38 L. ed. 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Railroad Commission Cases, 116 U. S. 331, 29 L. ed. 644, 6 Sup. Ct. Rep. 334, 388, 1191.

A railroad corporation is not obliged, and cannot even be compelled by statute, against its will, to permit private persons or partnerships to erect and maintain elevators, warehouses, or similar structures, for their own benefit, upon the land of the railroad company.

Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

A legislative act which takes, or undertakes to authorize the taking of, private property for a private object, either by taxation, or by the exercise of the power of eminent domain, or by any other means, is not a law, but an arbitrary decree, whereby the property of one citizen may be transferred to another.

Dodge v. Mission Twp. 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 827.

Every statute which takes property from one person and confers it upon another, without compensation, is unconstitutional and void.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455.

The effect of the guaranty of due process of law and of the equal protection of the laws is to prevent the state from exercising, by any of its departments, arbitrary and capricious power over persons or property.

McKinster v. Sager, 163 Ind. 671, 68 L.R.A. 273, 106 Am. St. Rep. 268, 72 N. E. 854.

54 L. ed.

The assertion of a right on the part of the legislature to take the property of one citizen and transfer it to another; even for a full compensation, where the public interest is not promoted thereby, is claiming a despotic power, and one inconsistent with every just principle and fundamental maxim of a free government.

Re Eureka Basin Warehouse & Mfg. Co. 96 N. Y. 48; Wiedenfeld v. Sugar Run R. Co. 48 Fed. 618; Gaylord v. Sanitary Dist. 204 Ill. 576, 63 L.R.A. 582, 98 Am. St. Rep. 235, 68 N. E. 522; Jordan v. Woodward, 40 Me. 317.

Not only must the purpose for which the land is taken be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use.

Board of Health v. Van Hoesen, 87 Mich. 533, 14 L.R.A. 114, 49 N. W. 894; Re Burns, 155 N. Y. 23, 49 N. E. 246; Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153, 36 L.R.A. 55, 60 Am. St. Rep. 105, 70 N. W. 68; Davidson v. New Orleans, 96 U. S. 97-102, 24 L. ed. 616-618; Citizens' Sav. & L. Asso. v. Topeka, *supra*.

Mr. William T. Thompson argued the cause, and, with Mr. Grant G. Martin, filed a brief for defendant in error in No. 127:

Railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their state business, to state regulation.

Olcott v. Fond du Lac County, 16 Wall. 678, 21 L. ed. 382; Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 295, 45 L. ed. 198, 21 Sup. Ct. Rep. 115; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts), 94 U. S. 155, 24 L. ed. 94; Piek v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97; Atlantic Coast Line R. Co. v. Florida, 203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. Rep. 108.

The police powers of the state include questions of public welfare and convenience as well as questions of public health and morals.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176.

A railroad company, as an interstate carrier, may be compelled by state authorities to furnish necessary facilities and conven-

iences to accommodate the public within the state, even though it suffer loss thereby.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 26, 51 L. ed. 945, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398.

Messrs. **R. C. James and Norris Brown** argued the cause, and, with Mr. C. Gillespie, filed a brief for defendant in error in No. 128:

The Nebraska statute is valid by whatever test applied.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 296, 45 L. ed. 199, 21 Sup. Ct. Rep. 115; *Olcott v. Fond du Lac County*, 16 Wall. 678, 684, 21 L. ed. 382; *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *United States v. Joint Traffic Asso.* 171 U. S. 505-570, 43 L. ed. 259-287, 19 Sup. Ct. Rep. 25; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 301, 43 L. ed. 702, 708, 19 Sup. Ct. Rep. 465; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Pound v. Turck*, 95 U. S. 459, 464, 24 L. ed. 525, 527; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 683, 27 L. ed. 442, 445, 2 Sup. Ct. Rep. 185; *Cardwell v. American River Bridge Co.* 113 U. S. 205, 208, 28 L. ed. 959, 960, 5 Sup. Ct. Rep. 423; *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313; *Western U. Teleg. Co. v. James*, 162 U. S. 650, 662, 40 L. ed. 1105, 1109, 16 Sup. Ct. Rep. 934; *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* 169 U. S. 311, 315, 42 L. ed. 759, 761, 18 Sup. Ct. Rep. 335.

The constitutional provision against taking property without compensation was not intended to deny the state the proper exercise of its police powers.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 562, 50 L. ed. 601, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175.

Mr. Justice **Holmes** delivered the opinion of the court:

These are two suits arising under a Nebraska statute. The first is brought by the state to recover a fine of \$500 imposed by the law for failure to obey its command; the second is brought at the relation of the party concerned, to compel obedience to the same command by mandamus. The statute in question provides that "every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating, grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construc-

tion of an elevator or elevators on the railroad right of way, and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made shall erect, equip, and maintain a side track or switch of suitable length to approach as near as 4 feet of the outer edge of their right of way when necessary, and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants, adjacent to their right of way, for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever. Provided, however, that any elevator hereafter constructed, in order to receive the benefits of this act, must have a capacity *of not [205 less than 15,000 bushels." Then follows a section making railroads liable for damages in case of wilful violation of the act (which contains other provisions beside the above), and imposes the above-mentioned fine for each offense. Session Laws of 1905, chap. 105, §§ 1, 6; 2 Cobbey's Supp. § 10,007, p. 410.

Under this act the Manley Co-operative Grain Association, a corporation, applied in writing for a site for an elevator on the right of way of the plaintiff in error, in Manley, Nebraska, but the application was refused. Then notice was sent that the corporation intended to build near the end of a side track at the railroad station at Manley, and would expect an extension of the side track. The railroad company replied that it would give no trackage privilege. The elevator was built and a demand was made for a side track, repeating a previous offer to bear a fair share of the expense of the extension. This also was refused, and thereupon the first-mentioned suit was brought for the penalty imposed by the act. The other suit is a petition for mandamus at the relation of the Farmers' Elevator Company of Strausville, Nebraska, another elevator corporation, and the facts are so like the foregoing that they do not need special statement. In both cases the railroad company set up that the statute was an attempt to regulate commerce among the states, and also was void under the 14th Amendment. After trials, the fine was imposed and the peremptory writ of mandamus was ordered, and both judgments were affirmed by the supreme court of the state. 81 Neb. 15, 174, 115 N. W. 614, 757.

It will have been noticed that there is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracks required. In

the present cases, the initial cost is said to be \$450 in one and \$1,732 in the other, and to require the company to incur this expense unquestionably does take its property, whatever may be the speculations as to the ultimate return for the outlay. *Woodward v. Central Vermont Ry. Co.* 180 Mass. 599, 206] 602, 603, 62 N. E. 1051. *Moreover, a part of the company's roadbed is appropriated mainly to a special use, even if it be supposed that the side track would be available incidentally for other things than to run cars to and from the elevator. Now it is true that railroad can be required to fulfil the purposes for which they are chartered and to do what is reasonably necessary to serve the public in the way in which they undertake to serve it, without compensation for the performance of some part of their duties that does not pay. *Missouri P. R. Co. v. Kansas*, Feb. 21, 1910. [216 U. S. 262, ante 472, 30 Sup. Ct. Rep. 330.] It also is true that the states have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government,—the power commonly called the police power. But railroads, after all, are property protected by the Constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away.

Thus, it is at least open to question whether a railroad company could be required to deliver cattle at another than its own stock yard at the end of the transit, or cars elsewhere than at its own terminus, without extra charge, if it furnished reasonable accommodations. *Louisville & N. R. Co. v. Central Stock Yards Co.* 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246; *Central Stock Yards Co. v. Louisville & N. R. Co.* 192 U. S. 568, 570, 48 L. ed. 565, 569, 24 Sup. Ct. Rep. 339; *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461. So far as we see, a grain elevator stands in no stronger position than a stock yard. If, as intimated, the elevators with which the Missouri Pacific connects charge too much and wrong the farmers, there may be other remedies; but manifestly the apprehension expressed by the supreme court of Nebraska, that the company, unless checked, will have power to establish a monopoly, is not to be met merely by building another elevator,—the physical limits of that kind of competition are too easily reached. But if we assume that circumstances might make it reasonable to compel 207] a railroad to deliver and receive *grain elsewhere than at its own elevators, or those that it had made its own by contract, the circumstances must be exceptional when it 54 L. ed.

would be constitutional to throw the extra charge of reduplicating already physically adequate accommodations upon the road.

This statute has no reference to special circumstances. It is universal in terms. If we were to take it literally, it makes the demand of the elevator company conclusive, without regard to special needs, and, possibly, without regard to place. It is true that in the first of the present cases the supreme court of Nebraska discussed the circumstances, and expressed the opinion that the demand was reasonable, and that building the side track would not cast an undue burden upon the road; and, in the second, it somewhat less definitely indicated a similar opinion. So it may be, although it hardly seems possible, that the sweeping words of the statute would be construed as, by implication, confining their requirements to reasonable demands. On the face of it, the statute seems to require the railroad to pay for side tracks, whether reasonable or not,—or, if another form of expression be preferred, to declare that a demand for a side track to an elevator anywhere is reasonable, and that the railroads must pay. Clearly, no such obligation is incident to their public duty, and to impose it goes beyond the limit of the police power.

But if the statute is to be stretched, or rather shrunk, to such demands as ultimately may be held reasonable by the state court, still it requires too much. Why should the railroads pay for what, after all, are private connections? We see no reason. And, moreover, even on this strained construction, they refrain from paying at the peril of a fine, if they turn out wrong in their guess that, in the particular case, the court will hold the demand not authorized by the act. If the statute makes the mere demand conclusive, it plainly cannot be upheld. If it requires a side track only when the demand is reasonable, then the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the *act. Some- [208 times when summary action is necessary, the property owner's rights are preserved by leaving all questions open in a subsequent suit. *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 53 L. ed. 195, 29 Sup. Ct. Rep. 101. But in such cases the risk is thrown on the destroyer of property. In this case, there is no emergency, yet, at the best, the owner of the property, if it has any remedy at all, acts at its risk, not merely of being compelled to pay both the expense of building and the costs of suit, but also of incurring a fine of at least \$500 for its offense in awaiting the result of a hearing. See *Chicago, M. & St. P. R. Co. v. Minnesota*, 134

U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702. An earlier statute authorizing the state board of transportation, after hearing, to require the railroad to permit the erection of an elevator upon its roadbed, already has been held bad. *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130. See also *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 175 U. S. 91, 99, 44 L. ed. 84, 88, 20 Sup. Ct. Rep. 33. We are of opinion that this statute is unconstitutional in its application to the present cases, because it does not provide indemnity for what it requires. We leave other questions on one side, and do not intend by anything that we have said to prejudice a later amendment providing for a preliminary hearing and compensation, which is said to have been passed in 1907. See Laws of 1907, chap. 89, p. 309.

Judgments reversed.

Mr. Justice Harlan and Mr. Justice McKenna dissent.

209] *SOUTHERN RAILWAY COMPANY,
Ed. S. Hurst, Benj. Voils, and Tom Cox,
Plffs. in Err.,

v.

W. M. MILLER.

(See S. C. Reporter's ed. 209-217.)

Removal of causes—separable controversy.

1. A suit in which plaintiff, in good faith, has joined as for a joint liability in tort a foreign railway corporation and certain of its resident employees whose negligence caused the injury complained of, is not re-

NOTE.—As to removal of causes in cases of separable controversy—see notes to *Miller v. Clifford*, 5 L.R.A. (N.S.) 50; *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Meeke v. Valleytown Mineral Co.* 35 C. C. A. 153; *Sloane v. Anderson*, 29 L. ed. U. S. 899; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.* 38 L. ed. U. S. 195; *Butler v. National Home*, 36 L. ed. U. S. 346; and *Torrence v. Shedd*, 36 L. ed. U. S. 528.

New action in state court after removal to Federal court and voluntary dismissal there.

The cases are in accord with *SOUTHERN R. Co. v. MILLER*, almost without exception holding that the removal to the Federal court of an action commenced in a state court does not, in the event the action is dismissed in the Federal court, without a decision on the merits, upon the plaintiff's motion or upon his voluntary submission to a nonsuit, prevent him from commencing

movable to a Federal circuit court as presenting a separable controversy between the plaintiff and the corporate defendant.

[For other cases, see *Removal of Causes*, 138-158, in *Digest Sup. Ct.* 1908.]

Removal of causes—dismissal by Federal court—new action in state court.

2. The voluntary dismissal of an action which has been removed from a state court to a Federal circuit court does not preclude a subsequent suit on the same cause of action in the state court.

[For other cases, see *Removal of Causes*, X., in *Digest Sup. Ct.* 1908.]

[No. 122.]

Argued March 3, 1910. Decided April 4, 1910.

IN ERROR to the Court of Appeals of the State of Georgia to review a judgment which affirmed a judgment of the City Court of Hall County, in that state, in favor of plaintiff in a suit in which plaintiff has joined, as for a joint liability in tort, a foreign railway corporation and certain of its resident employees whose negligence caused the injury complained of. Affirmed.

See same case below, 3 Ga. App. 410, 59 S. E. 1115.

The facts are stated in the opinion.

Mr. John J. Strickland argued the cause, and, with Messrs. Alfred P. Thom, Hamilton McWhorter, and McDaniel, Alston, & Black, filed a brief for plaintiffs in error:

Whether or not a case is made in the state court for removal is a Federal question.

Gordon v. Longest, 16 Pet. 97, 10 L. ed. 900; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *Goldey v. Morning News*, 150 U. S. 523, 39 L. ed. 519, 15 Sup.

and maintaining a new action upon the same cause of action in the state court. *Gassman v. Jarvis*, 100 Fed. 146; *Texas Cotton Products Co. v. Starnes*, 128 Fed. 183, affirmed in 66 C. C. A. 673, 133 Fed. 1022; *McIver v. Florida C. & P. R. Co.* 110 Ga. 223, 65 L.R.A. 437, 36 S. E. 775; *Cleveland, C. C. & St. L. R. Co. v. Reese*, 93 Ill. App. 657; *Cleveland, C. C. & St. L. R. Co. v. Lawler*, 94 Ill. App. 36; *Foley v. Cudahy Packing Co.* 119 Iowa, 246, 93 N. W. 284; *Rodman v. Missouri P. R. Co.* 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642; *Swift & Co. v. Hoblawetz*, 10 Kan. App. 48, 61 Pac. 969; *Adams Exp. Co. v. Schofield*, 111 Ky. 832, 64 S. W. 903; *Stephenson v. Illinois C. R. Co.* 25 Ky. L. Rep. 442, 75 S. W. 260; *Stevenson v. Illinois C. R. Co.* 117 Ky. 855, 79 S. W. 767, 4 A. & E. Ann. Cas. 890; *DeWitt v. Chesapeake & O. R. Co.* 25 Ky. L. Rep. 2019, 79 S. W. 275; *Nipp v. Chesapeake & O. R. Co.* 25 Ky. L. Rep. 2335, 80 S. W. 796; *S. F. Dana & Co. v. Blackburn*, 121 Ky. 706, 90 S. W. 237; *Krueger v. Chicago & A. R. Co.* 84 Mo. App. 358; *Fox* 217 U. S.

Ct. Rep. 559; Burlington, C. R. & N. R. Co. v. Dunn, 122 U. S. 517, 30 L. ed. 1160, 7 Sup. Ct. Rep. 1262; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 245, 49 L. ed. 465, 25 Sup. Ct. Rep. 251; Kansas City, Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 298, 34 L. ed. 963, 11 Sup. Ct. Rep. 306; Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799.

Though a case go to the state court of review a second time, the question will be passed on when carried to the United States Supreme Court, if properly preserved.

Stanley v. Schwalby, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754; Re Blake, 175 U. S. 118, 44 L. ed. 95, 20 Sup. Ct. Rep. 42.

Whether or not the state court has jurisdiction to try a case once removed into the United States circuit court, and again sued in the state court, is a Federal question.

Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354; National S. S. Co. v. Tugman, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58.

The fact that the party, after removal, has contested the case in the state court, does not, after judgment against him, constitute a waiver as to jurisdiction.

Ibid.; Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

A joint action cannot be sustained against the master and the servant, where the master is sought to be held liable solely for the acts of the servant without the concurrence of the master.

Warax v. Cincinnati, N. O. & T. P. R. Co. 72 Fed. 637; Hukill v. Maysville & B. S. R. Co. 72 Fed. 745; Beuttel v. Chicago, M. & St. P. R. Co. 26 Fed. 50; Ferguson v. Chicago, M. & St. P. R. Co. 63 Fed. 177; Hartsborn v. Atchison, T. & S. F. R. Co. 77 Fed. 9; Helms v. Northern P. R. Co. 120 Fed.

389; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; Charman v. Lake Erie & W. R. Co. 105 Fed. 449; Riser v. Southern R. Co. 116 Fed. 215.

The acts of negligence charged in Miller's petition against Hurst, Cox, and Voils, the servants of the Southern Railway Company, and the coemployees of Miller, were acts of nonfeasance only; and for such acts the master only is liable to the injured party, the servants being in turn liable to the master.

1 Bl. Com. p. 430; 1 Am. & Eng. Enc. Law, 2d ed. p. 1131; 20 Am. & Eng. Enc. Law, 2d ed. p. 52; Bryce v. Southern R. Co. 125 Fed. 959; Kimbrough v. Boswell, 119 Ga. 203, 45 S. E. 977; Reid v. Humber, 49 Ga. 208; McCalla v. Shaw, 72 Ga. 458; Hay v. Collins, 118 Ga. 248, 44 S. E. 1002; Cox v. Strickland, 120 Ga. 104, 47 S. E. 912, 1 A. & E. Ann. Cas. 870; Burch v. Caden Stone Co. 93 Fed. 181; Shaffer v. Union Brick Co. 128 Fed. 97; Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 512; Central R. Co. v. Brown, 113 Ga. 414, 84 Am. St. Rep. 250, 38 S. E. 989; Pom. Code Remedies, § 307; Cromwell v. Sac County, 94 U. S. 352, 24 L. ed. 197; Southern R. Co. v. Grizzle, 124 Ga. 735, 110 Am. St. Rep. 191, 53 S. E. 244.

The suit of Miller against the Southern Railway Company was based upon a statutory cause of action, and the suit against the defendants Hurst, Voils, and Cox was based upon a common-law right, if any right. The two separate causes of action were blended in one count, and thus made a separable controversy.

Helms v. Northern P. R. Co. supra; Lavalley v. St. Paul, M. & M. R. Co. 40 Minn.

v. Jacob Dold Packing Co. 96 Mo. App. 173, 70 S. W. 164; Fleming v. Southern R. Co. 128 N. C. 80, 38 S. E. 253; Young v. Southern Bell Teleph. & Teleg. Co. 75 S. C. 326, 7 L.R.A. (N.S.) 501, 55 S. E. 765, 9 A. & E. Ann. Cas. 940; Hooper v. Atlanta, K. & N. R. Co. 106 Tenn. 28, 53 L.R.A. 931, 60 S. W. 607; Illinois C. R. Co. v. Bentz, 108 Tenn. 670, 58 L.R.A. 690, 91 Am. St. Rep. 763, 69 S. W. 317; Texas & P. R. Co. v. Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134; Pacific Exp. Co. v. Needham, 37 Tex. Civ. App. 129, 83 S. W. 22.

To the contrary are the decisions in Baltimore & O. R. Co. v. Fulton, 59 Ohio St. 575, 44 L.R.A. 520, 53 N. E. 265, and some subsequently discredited *dicta* in Cox v. East Tennessee, V. & G. R. Co. 68 Ga. 446, and Chesapeake & O. R. Co. v. Riddle, 24 Ky. L. Rep. 1687, 72 S. W. 22.

The general rule above stated applies even where the damages in the second action are laid so low as to prevent a second removal. Texas Cotton Products Co. v. Starnes; McIver v. Florida C. & P. R. Co.; 54 L. ed.

Cleveland, C. C. & St. L. R. Co. v. Lawler; Adams Exp. Co. v. Schofield; Krueger v. Chicago & A. R. Co.; Young v. Southern Bell Teleph. & Teleg. Co.; Hooper v. Atlanta, K. & N. R. Co.; and Pacific Exp. Co. v. Needham,—supra.

And the dismissal without prejudice of an action removed from a state court to a Federal circuit court for diversity of citizenship does not preclude a subsequent suit in the state court on the same cause of action, in which a resident of the state has been made a party defendant, thereby defeating a second removal. Southern R. Co. v. Rowe, 2 Ga. App. 557, 59 S. E. 462.

But in such case the plaintiff must not discontinue the action as against the new defendant, or he may find himself out of court (Yawkey v. Richardson, 9 Mich. 529, 81 Am. Dec. 769), or will discover that the right to remove has revived, and that, too, even where the time for defendant to answer had expired before such discontinuance (Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264).

249, 41 N. W. 974; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; *Beuttel v. Chicago, M. & St. P. R. Co. and Alabama G. S. R. Co. v. Thompson*, supra; *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 85; *Atlantic Coast Line R. Co. v. Bailey*, 151 Fed. 891; *Chicago, R. I. & P. R. Co. v. Stepp*, 151 Fed. 909; *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85; *James v. Kelley*, 107 Ga. 452, 73 Am. St. Rep. 135, 33 S. E. 425; *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; *Exposition Cotton Mills v. Western & A. R. Co.* 83 Ga. 441, 10 S. E. 113; *Charleston & W. C. R. Co. v. Miller*, 113 Ga. 15, 38 S. E. 338; *Kavanaugh v. Southern R. Co.* 120 Ga. 67, 47 S. E. 526, 1 A. & E. Ann. Cas. 705; *McDermott v. Hannibal & St. J. R. Co.* 87 Mo. 286; *Addicken v. Schrubbe*, 45 Iowa, 315.

When the case was sued in Hall superior court and removed into the United States circuit court, the cause of action as well as the case was removed, and Miller could not, by any act of his, again bestow jurisdiction upon the state court.

Kern v. Huidekoper and National S. S. Co. v. Tugman, supra; *Gordon v. Longest*, 16 Pct. 97, 10 L. ed. 900; *Goldey v. Morning News*, 156 U. S. 523, 39 L. ed. 519, 15 Sup. Ct. Rep. 559; *McIver v. Florida C. & P. R. Co.* 110 Ga. 223, 65 L.R.A. 437, 36 S. E. 775; *Webb v. Southern Cotton Oil Co.* 131 Ga. 682, 63 S. E. 135.

Mr. Reuben R. Arnold argued the cause, and, with Mr. Renben Arnold, filed a brief for defendant in error:

Miller's action having been brought jointly against the railway company and three of its employees who were guilty of the negligent acts causing the plaintiff's injury, the suit was a joint one and could not be removed.

Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203.

If the plaintiff elects to bring a joint action, the defendant has no right to say that the action shall be severable.

The new action in the state court may be maintained, although the action in the Federal court was not dismissed until after the new action was begun. *S. F. Dana & Co. v. Blackburn*, supra.

And the dismissal in the Federal court, even after plea in abatement in the new action in the state court, is sufficient to prevent the abatement of that action, unless it appears that it was brought for the purposes of vexation. *Wilson v. Milliken*,

Louisville & N. R. Co. v. Ide, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735.

Even though the plaintiff has misconceived his cause of action, and has no right to prosecute the same jointly, still, if the action is joint in form upon the face of the complaint, the Federal courts will not undertake to pass upon the question as to whether the defendants are properly joined, and will treat the action as being that which the plaintiff intended to make it; namely, a joint suit.

Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; *Cincinnati, N. O. & T. P. R. Co. v. Bohon*, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166, 4 A. & E. Ann. Cas. 1152.

But this action is well brought jointly against the defendants. Georgia having a statute which makes a railroad responsible to one employee for the negligence of a fellow servant, the negligent servant is liable to his fellow servants for injuries inflicted by such negligent servant.

Morrison v. Northern P. R. Co. 34 Wash. 70, 74 Pac. 1064; *Howe v. Northern P. R. Co.* 30 Wash. 569, 60 L.R.A. 949, 70 Pac. 1100; *Able v. Southern R. Co.* 73 S. C. 172, 52 S. E. 962.

The earlier Federal cases in the circuit and district courts, of which *Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. 637, is a specimen, have been overruled in effect by the decisions of the Supreme Court of the United States, notably in the case of *Chesapeake & O. R. Co. v. Dixon*, supra.

If an employee is intrusted by his master with a particular piece of work, whatever he does or omits to do in the prosecution of that work, if the same amounts to negligence, is misfeasance.

Southern R. Co. v. Grizzle, 124 Ga. 735, 110 Am. St. Rep. 191, 53 S. E. 244; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Bell v. Josselyn*, 3 Gray, 309, 63 Am. Dec. 741.

Upon the voluntary dismissal of a suit in the United States court, the jurisdiction of the United States court is ended; it no longer has control over the cause of action; its control over the cause of action lasted only while the case was actually pending,

103 Ky. 165, 42 L.R.A. 449, 82 Am. St. Rep. 578, 44 S. W. 660; *Harby v. Patterson* (Tex. Civ. App.) 59 S. W. 63.

Nor when the action in the Federal court has been dismissed may the action in the state court be properly abated until the costs incurred in the Federal court are paid. *Southern R. Co. v. Rowe and Harby v. Patterson*, supra. See also note to *Young v. Southern Bell Teleph. & Teleg. Co.* 7 L.R.A. (N.S.) 501.

and when the case is dismissed, the jurisdiction of the United States court is wholly devested, and the plaintiff is just as free to bring his suit over again as he was when it was originally filed in the state court.

Young v. Southern Bell Teleph. & Teleg. Co. 7 L.R.A.(N.S.) 501, note; *Gassman v. Jarvis*, 100 Fed. 146; *Texas Cotton Products Co. v. Starnes*, 128 Fed. 183, affirmed in 66 C. C. A. 673, 133 Fed. 1022; *McIver v. Florida & P. R. Co.* 110 Ga. 223, 65 L.R.A. 437, 36 S. E. 775; *Cleveland, C. C. & St. L. R. Co. v. Reese*, 93 Ill. App. 657; *Cleveland, C. C. & St. L. R. Co. v. Lawler*, 94 Ill. App. 36; *Foley v. Cudaliy Packing Co.* 119 Iowa, 246, 93 N. W. 284; *Rodman v. Missouri P. R. Co.* 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642; *Swift & Co. v. Hoblawetz*, 10 Kan. App. 48, 61 Pac. 969; *Adams Exp. Co. v. Schofield*, 111 Ky. 832, 64 S. W. 903; *Stephenson v. Illinois C. R. Co.* 25 Ky. L. Rep. 442, 75 S. W. 260; *Stevenson v. Illinois C. R. Co.* 117 Ky. 855, 79 S. W. 767, 4 A. & E. Ann. Cas. 890; *DeWitt v. Chesapeake & O. R. Co.* 25 Ky. L. Rep. 2919, 79 S. W. 275; *Nipp v. Chesapeake & O. R. Co.* 25 Ky. L. Rep. 2335, 80 S. W. 796; *S. F. Dana & Co. v. Blackburn*, 121 Ky. 706, 90 S. W. 237; *Krueger v. Chicago & A. R. Co.* 84 Mo. App. 358; *Fox v. Jacob Dold Packing Co.* 96 Mo. App. 173, 70 S. W. 164; *Fleming v. Southern R. Co.* 128 N. C. 80, 38 S. E. 253; *Hooper v. Atlanta, K. & N. R. Co.* 106 Tenn. 28, 53 L.R.A. 931, 60 S. W. 607; *Illinois C. R. Co. v. Bentz*, 108 Tenn. 670, 58 L.R.A. 690, 91 Am. St. Rep. 763, 69 S. W. 317; *Texas & P. R. Co. v. Maddox*, 26 Tex. Civ. App. 297, 63 S. W. 134; *Bush v. Kentucky*, 107 U. S. 110, 27 L. ed. 354, 1 Sup. Ct. Rep. 625.

Mr. Justice Day delivered the opinion of the court:

The defendant in error, plaintiff below, brought suit in the city court of Hall county, Georgia, against the Southern Railway Company, a corporation of Virginia, and certain individual citizens of Georgia, to recover damages for personal injuries received by him while in the employ of the railroad company as an engineer. A recovery in the court of original jurisdiction was affirmed in the court of appeals of Georgia (3 Ga. App. 410, 59 S. E. 1115), and the case is brought here to review certain Federal questions presented by the record. These are, first, that the state court erred in refusing to remove the case to the United States circuit court upon the petition of the plaintiff in error; second, as it appeared that the case had once been removed to the Federal court and was dismissed by the plaintiff, the state court should have held that the right to further prosecute in that court was lost, 54 L. ed.

and the jurisdiction completely and finally transferred to the Federal court.

In order to determine these questions, it is necessary to state how the case arose. Originally this suit was brought against the Southern Railway Company alone, to recover damages for injuries charged to have been inflicted, because the train upon which the plaintiff was engineer was permitted to run from the main track through an open switch, onto a siding, where another train was standing, when, by reason of the rules and regulations of the company in the circumstances set forth, plaintiff's train had the right of way upon the track, and, because the switch was turned the wrong way, plaintiff's train was thrown into the siding upon which the other train was standing, and in order to avoid more serious injury, plaintiff jumped from his engine, and was greatly injured.

The first suit, being against the Southern Railway Company alone, was removed to the United States circuit court, the transcript of record was duly filed, and the company answered. Thereafter the plaintiff voluntarily dismissed the case, and later began the present case against the Southern Railway Company for the same injury, and enjoined Cox, Voils, and Hurst as parties defendant. These parties were, respectively, the conductor of the train with which plaintiff's train collided, the engineer and front brakeman of said train. The negligence charged was that the brakeman negligently failed to turn the switch back to the main line after his train went into the siding; that Cox, the conductor, was in [215] control and management of the train, and under the duty of seeing that the switch was turned to the main line; and that Voil, the engineer, after he got his engine into the siding, with the exercise of ordinary care should have known that the switch was turned wrong, and yet failed to take any steps to report the situation or to have it remedied. It was further alleged that the individual defendants, in causing the switch to be unlocked and turned from the main line, were guilty of negligence, which was the negligence of the railroad company, inasmuch as they represented the company in the operation of the train which collided with the plaintiff's train. It is also alleged that the individual defendants should have flagged the plaintiff's train if, for any reason, the switch remained turned to the side track.

The petition for removal contained no charge that the attempt to join the defendants was for the purpose of fraudulently avoiding the jurisdiction of the United States court, or with a view to defeat a removal thereto. The case here presented is

one in which the record discloses there was an attempt to join, in good faith, the railway company and the individual defendants as for a joint liability in tort.

Under the practice in Georgia, the case went to the court of appeals of that state on the question of the right to remove the case to the Federal court. The decision of the court of appeals upon that question is reported in 1 Ga. App. 616, 57 S. E. 1090. In that case, the court dealt with the right, under the law of Georgia, to join the individual defendants with the railroad company, and held that the objections to joiner were untenable, and that there was no separable controversy, either at common law or under the statutes of Georgia. In an opinion by the chief judge it was held that the acts of negligence charged against the individual defendants involved both acts of omission and commission, and were not merely matters of nonfeasance, for which the agents would not be jointly liable with the principal. The court further held that the objection that the liability of the railroad company ^{*}was statutory, and that of the other defendants at common law, made no difference in the right to join the defendants, and that, under the statute law of Georgia, the acts of negligence set out in the declaration against the individual defendants may have amounted to criminal negligence, in which event both the railroad company and the individual defendants were jointly liable to the plaintiff under the law of the state. In view of the conclusions which the learned court reached, it further held that the case was ruled by *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147. We agree with that conclusion. In that case it was held that, for the purposes of determining the removability of a cause, the case must be deemed to be such as the plaintiff has made it in good faith in his pleadings. See also *Cincinnati, N. O. & T. P. R. Co. v. Bohon*, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166, 4 A. & E. Ann. Cas. 1152. There was no error in the refusal to remove the case.

A further objection is made that, inasmuch as the suit was once removed from the state court to the Federal court, and there dismissed, there was no right to begin the case again in the state court. This argument is predicated upon the statement in a number of cases in this court, to the effect that where the petition for removal and bond have been filed, the state court loses jurisdiction of the case, and subsequent proceedings therein are void and of no effect. But this is far from holding that a Federal court obtains jurisdiction of a suit thus removed

in such wise that it can never again be brought in a state court, although there has been no judgment upon the merits in the Federal court, and the case has been dismissed therein without any other disposition than is involved in a voluntary dismissal with the consent of the court.

While it is true that a compliance with the act of Congress entitling the party to remove the case may operate to end the jurisdiction of the state court, notwithstanding it refuses to allow such removal, it by no means follows that the state court may not acquire jurisdiction in some proper way of the same cause of action after the case has been dismissed without final judgment in a Federal court. By complying with the removal ^{*}act, the state court lost its [217] jurisdiction; and upon the filing of the record in the Federal court, that court acquired jurisdiction. It thereby had the authority to hear, determine, and render a judgment in that case to the exclusion of every other court. But where the court permitted a dismissal of the action by the plaintiff, it thereby lost the jurisdiction which it had thus acquired.

We know of no principle which would permit the Federal court under such circumstances, and after the dismissal of the suit, to continue its jurisdiction over the case in such wise that no other court could ever entertain it. After the voluntary dismissal in the Federal court, the case was again at large, and the plaintiff was at liberty to begin it again in any court of competent jurisdiction.

We find no error in the judgment of the Court of Appeals of Georgia, and the same is affirmed.

Affirmed.

LOS ANGELES FARMING & MILLING
COMPANY, Plff. in Err.,
v.
CITY OF LOS ANGELES.

(See S. C. Reporter's ed. 217-234.)

Error to state court—frivolousness of Federal question.

1. Federal questions of serious import, essential to support a writ of error from the Federal Supreme Court, are not involved in contentions that riparian owners were denied due process of law or the equal

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

protection of the laws by the decision of a state court awarding a municipality paramount rights in the waters of the stream under Spanish and Mexican laws, confirmed by the United States to the municipality as the successor of a Spanish pueblo.

[For other cases, see Appeal and Error, 1110-1132, in Digest Sup. Ct. 1908.]

Error to state court—Federal question—statutory construction—admissibility of evidence.

2. The construction by a state court of the statutes of that state, and its rulings as to the admissibility of evidence, furnish no basis for a writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 1584-1594, 1610-1616, in Digest Sup. Ct. 1908.]

Error to state court—decision of Federal question.

3. The assertion that state statutes have undertaken to confer water rights upon a municipality, and were given such effect in violation of Federal rights of riparian owners, cannot serve as the basis of a writ of error from the Federal Supreme Court to a state court, where the latter court holds that the municipal rights were not determined by the effect of those statutes, but upon the right and title secured by Spanish and Mexican laws, and the subsequent confirmation thereof under a Federal statute.

[For other cases, see Appeal and Error, 1319-1528, in Digest Sup. Ct. 1908.]

Error to state court—Federal question—disposition of public lands.

4. The contention that the disposition of the public lands by the United States is interfered with by a judgment awarding a municipality rights in the waters of a stream paramount to those of riparian owners, which rests upon the effect of the Spanish and Mexican laws governing the rights of a pueblo of which the municipality is the successor, and the subsequent confirmation thereof under the Federal laws, is too clearly unfounded to serve as the basis of a writ of error from the Federal Supreme Court to the state court rendering such judgment.

[For other cases, see Appeal and Error, 1110-1137, 1866-1871, in Digest Sup. Ct. 1908.]

Error to state court—Federal question—riparian rights under Spanish or Mexican grant.

5. Riparian rights asserted to have been secured by the treaty of Guadalupe Hidalgo between the United States and Mexico, and the act of Congress of March 3, 1851 (9 Stat. at L. 631, chap. 41), for the confirmation of titles derived from Spanish or Mexi-

can grants, are not rights of Federal origin, which, when denied, lay the basis for a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 1821-1824, in Digest Sup. Ct. 1908.]

Error to state court—Federal question—water rights under Spanish grant.

6. The contention that the confirmation of a pueblo claim under the act of March 3, 1851, bars the municipal successor to the pueblo from setting up water rights not claimed in the petition for confirmation, is too clearly unfounded to support a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 1110-1137, 1821-1824, in Digest Sup. Ct. 1908.]

[No. 137.]

Argued March 10, 11, 1910. Decided April 4, 1910.

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Superior Court of the County of Los Angeles, in that state, quieting the title of a municipality to the use of the waters of a stream. Dismissed for want of jurisdiction.

See same case below, 152 Cal. 645, 93 Pac. 869, 1135.

The facts are stated in the opinion.

Mr. R. M. Widney argued the cause and filed a brief for plaintiff in error:

The legal title of the premises in controversy passed by the treaty to the United States, and never passed to the defendant in error.

Leese v. Clark, 20 Cal. 388; Knight v. United Land Asso. 142 U. S. 199, 35 L. ed. 988, 12 Sup. Ct. Rep. 258; Grisar v. McDowell, 6 Wall. 373, 18 L. ed. 866; United States v. Santa Fe, 165 U. S. 713, 41 L. ed. 888, 17 Sup. Ct. Rep. 472; United States v. Sandoval, 167 U. S. 295, 42 L. ed. 174, 17 Sup. Ct. Rep. 868; Trenouth v. San Francisco, 100 U. S. 253, 25 L. ed. 627; Woodward v. Fulton, 1 Cal. 308; Ward v. Mulford, 32 Cal. 372; People ex rel. Harbor Comrs. v. Kerber, 152 Cal. 731, 125 Am. St. Rep. 93, 93 Pac. 881.

Every property right, title, or claim of the city, whether under the treaty, law of

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see 54 L. ed.

note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On the necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

On writs of error to state courts in cases involving land titles—see note to O'Connor v. Texas, 50 L. ed. U. S. 1120.

nations, or laws, usages, or customs of Spain or Mexico, or under the principles of equity, or decisions of the Federal Supreme Court, was included in this general wording of the act of March 3, 1851.

United States v. Circuit Judges, 3 Wall. 674, 18 L. ed. 113; *United States v. Fossatt*, 21 How. 445, 16 L. ed. 186; *Frémont v. United States*, 15 How. 552, 15 L. ed. 244; *Castro v. Hendricks*, 23 How. 438, 16 L. ed. 576; *Beard v. Federy*, 3 Wall. 489, 18 L. ed. 92; *Knight v. United Land Asso.* 142 U. S. 202, 35 L. ed. 989, 12 Sup. Ct. Rep. 258; *Thompson v. Los Angeles Farming & Mill. Co.* 180 U. S. 74, 45 L. ed. 434, 21 Sup. Ct. Rep. 289; *Mitchell v. Furman*, 180 U. S. 433, 436, 45 L. ed. 611, 612, 21 Sup. Ct. Rep. 430; *Barker v. Harvey*, 181 U. S. 489, 45 L. ed. 968, 21 Sup. Ct. Rep. 690; *McGarrahan v. Maxwell*, 28 Cal. 97.

The word "land" in said act of Congress of 1851 included the waters that are in, on, and riparian to, the lands, from surface to bed rock, in California.

Illinois C. R. Co. v. Chicago, 176 U. S. 658, 44 L. ed. 627, 20 Sup. Ct. Rep. 509; *Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350; *Gould v. Stafford*, 91 Cal. 155, 27 Pac. 543; *Hargrave v. Cook*, 108 Cal. 77, 30 L.R.A. 390, 41 Pac. 18; *Rose v. Mesmer*, 142 Cal. 329, 75 Pac. 905; *Southern California Invest. Co. v. Wilshire*, 144 Cal. 73, 77 Pac. 767; *Verdugo Cañon Water Co. v. Verdugo*, 152 Cal. 655, 93 Pac. 1025.

When the California court held that the act of Congress of March 3, 1851, did not include (but excluded) the jurisdiction of this claim of the city, stipulated to be derived under a grant from the laws of the Spanish and Mexican government, it thereby established that it has no jurisdiction of this case, and should have reversed the trial court in its decision and dismissed the case.

Chouteau v. Eckhart, 2 How. 344, 11 L. ed. 293; *United States v. Santa Fé*, supra; *United States v. Sandoval*, 167 U. S. 292, 42 L. ed. 173, 17 Sup. Ct. Rep. 868.

The common law of riparian rights being the only law in existence, both in the state of California and in the United States, during the entire period of the proceedings, decrees, and patents, involving the entire subject-matter of the present action, it can only be held that this common law, and it alone, entered into and determined the respective riparian rights and uses of both plaintiff in error and defendant in error, and that no legislative power exists in the California courts to change this law or the legal rights thereunder of the parties hereto.

Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Grand Rapids & I. R. Co. v. Butler*, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; *United*

States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579.

The United States patent is the only document that passes the legal title to any Mexican grant claims. Until its issuance the legal title remains in the United States. On its issuance the legal title vests in the patentee and his successors in title, and can only be attacked by a party having an adverse claim first confirmed and patented by the United States.

Meador v. Norton, 11 Wall. 455, 20 L. ed. 187; *Wilcox v. Jackson*, 13 Pet. 515, 10 L. ed. 273; *Bagnell v. Broderick*, 13 Pet. 449, 10 L. ed. 242; *Gazzam v. Phillips*, 20 How. 374, 15 L. ed. 960; *United States v. Pacheco*, 22 How. 226, 16 L. ed. 337; *United States v. Halleck*, 1 Wall. 454, 17 L. ed. 668; *United States v. Billings*, 2 Wall. 444, 17 L. ed. 848; *Beard v. Federy*, 3 Wall. 478, 18 L. ed. 88; *Gibson v. Chouteau*, 13 Wall. 100, 20 L. ed. 537; *Carpentier v. Montgomery*, 13 Wall. 493, 20 L. ed. 701; *More v. Steinbach*, 127 U. S. 70, 32 L. ed. 51, 8 Sup. Ct. Rep. 1067; *Thompson v. Los Angeles Farming & Mill. Co.* 180 U. S. 72, 45 L. ed. 432, 21 Sup. Ct. Rep. 289; *Knight v. United Land Asso.* 142 U. S. 199, 35 L. ed. 988, 12 Sup. Ct. Rep. 258.

The state courts have no jurisdiction to reverse, revise, or modify titles issued by the United States. Their sole jurisdiction in such cases is limited to declaring what title the United States has passed and to whom, as described and declared in the obvious words of the patent.

Irvine v. Marshall, 20 How. 560, 15 L. ed. 996; *Gibson v. Chouteau*, 13 Wall. 99, 20 L. ed. 536; *Lux v. Haggin*, 69 Cal. 373, 10 Pac. 674.

A patent from the United States transfers all interest it could possess in the soil, and everything imbedded in or connected therewith.

Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123; *Los Angeles Farming & Mill. Co. v. Thompson*, 117 Cal. 594, 49 Pac. 714.

The state of California did not convey any riparian water rights to the city of Los Angeles, by its statutes.

Devine v. Los Angeles, 202 U. S. 334, 50 L. ed. 1054, 26 Sup. Ct. Rep. 652; *Los Angeles v. Pomeroy*, 124 Cal. 639, 57 Pac. 585; *Vernon Irrig. Co. v. Los Angeles*, 106 Cal. 253, 39 Pac. 762.

The United States patent to the city of Los Angeles, and the proceedings of the tribunals under the act of Congress of March 3, 1851, resulting in the issuance of said patent, were conclusive against any and all claims of the city of Los Angeles by virtue of any right, title, interest, or claim derived from the Spanish or Mexican government, in

or to lands or any part or parcel thereof in California, lying outside of the premises described in said patent.

United States v. Fossatt; Mitchell v. Furman; and Castro v. Hendricks,—supra; Castillero v. United States, 2 Black, 17, 156, 17 L. ed. 360, 376; Beard v. Federy, 3 Wall. 489, 18 L. ed. 92; Grisar v. McDowell, 6 Wall. 376, 18 L. ed. 867; Lynch v. Bernal, 9 Wall. 320, 19 L. ed. 715; More v. Steinbach, 127 U. S. 80, 32 L. ed. 55, 8 Sup. Ct. Rep. 1067; Botiller v. Dominguez, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525; Barker v. Harvey, 181 U. S. 481, 45 L. ed. 963, 21 Sup. Ct. Rep. 690.

The city, having presented its claim, is bound by the decree of the commissioners.

More v. Steinbach and United States v. Halleck, supra; United States v. Billings, 2 Wall. 444, 17 L. ed. 848; Beard v. Federy, 3 Wall. 487, 18 L. ed. 88.

The legal title of all Spanish and Mexican grants not segregated from the public domain, private as well as public, remains in the Federal government until the patent is issued, and it conclusively vests the legal title in the patentee and his assigns.

Biddle Boggs v. Merced Min. Co. 14 Cal. 279; Young v. Howell, 14 Cal. 465; Stark v. Barrett, 15 Cal. 362; Mott v. Smith, 16 Cal. 534; Moore v. Smaw, 17 Cal. 220, 79 Am. Dec. 123; Teschemacher v. Thompson, 18 Cal. 30; Leese v. Clark, 18 Cal. 535; Soto v. Kroder, 19 Cal. 87.

All nonpresented claims are abandoned and become part of the public domain.

Estrada v. Murphy, 19 Cal. 248; Leese v. Clark, supra; Clark v. Lockwood, 21 Cal. 220.

A patent is conclusive against a nonpresented grant, either in law or equity, and reverts to the public domain.

Mahoney v. Van Winkle, 21 Cal. 553; Doran v. Central P. R. Co. 24 Cal. 246; Semple v. Hagar, 27 Cal. 163; McGarrahan v. Maxwell, 28 Cal. 75; Hagar v. Lucas, 29 Cal. 310; Steinbach v. Moore, 30 Cal. 499; Merle v. Dixey, 31 Cal. 131; Ward v. Mulford, 32 Cal. 365; Rico v. Spence, 21 Cal. 504.

Nonpresented pueblo claims are nonexistent.

Stevenson v. Bennett, 35 Cal. 424; Bernal v. Lynch, 36 Cal. 135; Page v. Fowler, 37 Cal. 100; Yates v. Smith, 38 Cal. 60; San Francisco v. Canavan, 42 Cal. 541; Miller v. Dale, 44 Cal. 562; Brown v. Brackett, 45 Cal. 167; Chipley v. Farris, 45 Cal. 527; Gardiner v. Miller, 47 Cal. 570; Cassidy v. Carr, 48 Cal. 339; Galindo v. Wittenmeyer, 49 Cal. 12; Cruz v. Martinez, 53 Cal. 239; Anzar v. Miller, 90 Cal. 342, 27 Pac. 299; De Guyer v. Banning, 91 Cal. 400, 27 Pac. 761; Los Angeles Farming & Mill. Co. v. Thompson, 117 Cal. 594, 49 Pac. 714; Holla-
54 L. ed.

day v. San Francisco, 124 Cal. 352, 57 Pac. 146; Harvey v. Barker, 126 Cal. 262, 58 Pac. 692.

When the highest court of a state decides against any right claimed under a treaty and the Constitution of the United States, the Supreme Court has jurisdiction to review the case. A case arising from or growing out of a treaty is one involving rights given or protected by a treaty.

Owings v. Norwood, 5 Cranch, 120, 3 L. ed. 120; Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97.

Where the claim is made to land under a treaty or authority of some officer of the United States, and the claim is denied, the Supreme Court has jurisdiction to review the case.

Crowell v. Randell, 10 Pet. 368, 9 L. ed. 458; Cunningham v. Ashley, 14 How. 386, 14 L. ed. 467; Burgess v. Gray, 16 How. 58; 14 L. ed. 844; Walton v. Cotton, 19 How. 355, 15 L. ed. 658; Murray v. Charleston, 96 U. S. 442, 24 L. ed. 762; McNulta v. Lochridge, 141 U. S. 331, 35 L. ed. 800, 12 Sup. Ct. Rep. 11; Bushnell v. Crooke Min. & Smelting Co. 148 U. S. 689, 37 L. ed. 613, 13 Sup. Ct. Rep. 771; Neilson v. Lagow, 7 How. 772, 12 L. ed. 908; Cousin v. Labatut, 19 How. 601, 15 L. ed. 601; Irvine v. Marshall, 20 How. 560-564, 15 L. ed. 996-998; Berthold v. McDonald, 22 How. 334, 16 L. ed. 318; United States v. Fossatt, 21 How. 445, 451, 16 L. ed. 186, 187; Carondelet v. St. Louis, 1 Black, 187, 17 L. ed. 105; Magwire v. Tyler, 1 Black, 195, 17 L. ed. 137; Minnesota v. Bachelder, 1 Wall. 109, 17 L. ed. 551; Silver v. Ladd, 6 Wall. 440, 18 L. ed. 828; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 182, 20 L. ed. 562; Glasgow v. Baker, 128 U. S. 560, 32 L. ed. 513, 9 Sup. Ct. Rep. 154; Pickering v. Lomax, 145 U. S. 310, 36 L. ed. 716, 12 Sup. Ct. Rep. 860; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

Generally a decision of a state court against the validity of an authority set up under the United States by defendants in an action of trespass to try title, so far as it involves the decision of a question of law, presents a question for review, whether the question depends upon the Constitution, laws, or treaties of the United States, or upon the local law, or upon principles of general jurisprudence.

Stanley v. Schwalby, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; West Chicago Street R. Co. v. Illinois, 201 U. S. 518, 50 L. ed. 850, 26 Sup. Ct. Rep. 518.

It is not material whether the invalidity

of a title was decided upon a question of fact or law, if the title was rejected.

Lytle v. Arkansas, 22 How. 193, 16 L. ed. 306.

That a proper construction of the survey and patents gives riparian rights covering the land in dispute, and that it is not competent to overcome such rights by evidence affecting the legal import of the plats and patents, raises a Federal question.

French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838.

A refusal to consider a Federal question which is controlling in a case is equivalent to a decision against the Federal right involved therein, and gives the Supreme Court jurisdiction to review.

Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217.

A Federal question for this court is raised where a title or right or privilege or immunity on which recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction.

Carondelet v. St. Louis, 1 Black, 179, 17 L. ed. 102; Starin v. New York, 115 U. S. 248, 29 L. ed. 388; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 567, 50 L. ed. 604, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175.

In the case at bar, the state court refused to give due force and effect or any force or effect whatever to the decree of the Federal board of land commissioners, pleaded as a defense and as *res judicata*, and denied by the state courts, and duly assigned as the third error. This also raises a Federal question for this court to decide.

Dupasseur v. Roehereau, 21 Wall. 130, 22 L. ed. 588; Central Nat. Bank v. Stevens, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; Deposit Bank v. Frankfort, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154; National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111.

Mr. William B. Mathews argued the cause, and, with Mr. Leslie R. Hewitt, filed a brief for defendant in error:

No Federal question exists in the record by virtue of any provision of the treaty of Guadalupe Hidalgo or of the act of March 3, 1851.

New Orleans v. De Armas, 9 Pet. 224, 9 L. ed. 109; Phillips v. Mound City Land & Water Asso. 124 U. S. 605, 31 L. ed. 588, 740

8 Sup. Ct. Rep. 657; California Powder Works v. Davis, 151 U. S. 389, 395, 38 L. ed. 206, 208, 14 Sup. Ct. Rep. 350; Crystal Springs Land & Water Co. v. Los Angeles, 82 Fed. 114, 177 U. S. 169, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 487, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395.

The question of the existence of the paramount water right claimed by the city was one of state or general public law, on which the decision of the state court was final and conclusive.

Ohm v. San Francisco, 92 Cal. 450, 28 Pac. 580; Chicago, R. I. & P. R. Co. v. McGlinn, 114 U. S. 542, 546, 29 L. ed. 270, 271, 5 Sup. Ct. Rep. 1005; St. Louis v. Myers, 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640; Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Middleton v. Pritchard, 4 Ill. 510, 38 Am. Dec. 112; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; Eldridge v. Trezevant, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345; Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224; Hooker v. Los Angeles, supra; Devine v. Los Angeles, 202 U. S. 313, 50 L. ed. 1046, 26 Sup. Ct. Rep. 652.

The decision of a Federal question was not necessary to the determination of this cause in the state court.

Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; California Powder Works v. Davis, supra; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; Wade v. Lawder, 165 U. S. 624, 41 L. ed. 851, 17 Sup. Ct. Rep. 425.

Federal jurisdiction cannot be founded upon questions which are frivolous and unsubstantial, or have been foreclosed by previous decisions of this court.

Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123; Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; New Orleans v. New Orleans Waterworks Co. supra; McCain v. Des Moines, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22.

The claim in the fifth assignment of error, that the decision of the state court denied to the plaintiff in error the equal protection of the law, in violation of the 14th Amendment, is without merit and cannot confer Federal jurisdiction.

Central Land Co. v. Laidley, 159 U. S. 217 U. S.

103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; Hooker v. Los Angeles, supra; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 579; Eldridge v. Trezevant, supra; Tinsley v. Anderson, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; Clarke v. McDade, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 690.

The claim of plaintiff in error that the judgment of the state court interferes with the primary disposal of the public lands in California is also without merit, and presents no real and substantial Federal question.

Langdeau v. Hanes, 21 Wall. 521, 529, 22 L. ed. 606, 608; Adam v. Norris, 103 U. S. 591, 593, 26 L. ed. 583, 584; Hooker v. Los Angeles, supra.

The decisions of this court leave no ground for question as to the meaning of the words "public lands," employed in the act of September 9, 1850, admitting California into the Union.

Newhall v. Sanger, 92 U. S. 761, 763, 23 L. ed. 769, 770; Bardon v. Northern P. R. Co. 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856; Cameron v. United States, 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. Rep. 595; Barker v. Harvey, 181 U. S. 490, 45 L. ed. 968, 21 Sup. Ct. Rep. 690.

The decision of the state court sustaining the city's claim of title was based on grounds, not Federal, which were sufficient to sustain its judgment, and is therefore not subject to review by this court on writ of error.

Klinger v. Missouri, 13 Wall. 257, 263, 20 L. ed. 635, 637; Eustis v. Bolles, supra; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 38, 31 L. ed. 607, 614, 8 Sup. Ct. Rep. 741.

The fact that the claim of plaintiff in error was denied by the state court does not mean that the decision of that court, even though erroneous, had the effect of depriving it of property without due process of law.

Leeper v. Texas, 139 U. S. 462, 468, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. 579; Central Land Co. v. Laidley and Sayward v. Denny, supra; Davidson v. New Orleans, 96 U. S. 97, 105, 24 L. ed. 616, 620.

Mr. John F. Dillon also argued the cause, and, with Messrs. William B. Mathews, John C. Thompson, and Leslie R. Hewitt, filed a brief for defendant in error:

The letters patent issued by the United States to the city of Los Angeles for pueblo
54 L. ed.

lands under the act of Congress of March 3, 1851, were not a new grant to the city, but only recognized and confirmed pre-existing rights under Spanish and Mexican law, which were vested in the city as successor of the pueblo.

Beard v. Fedcry, 3 Wall. 478, 491, 18 L. ed. 88, 92; Hooker v. Los Angeles, 188 U. S. 314, 317, 47 L. ed. 487, 490, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; Devine v. Los Angeles, 202 U. S. 313, 315, 50 L. ed. 1046, 1047, 26 Sup. Ct. Rep. 652; Townsend v. Greeley, 5 Wall. 326, 334, 18 L. ed. 547, 548; Newhall v. Sanger, 92 U. S. 761, 23 L. ed. 769; Palmer v. Low, 98 U. S. 1, 25 L. ed. 60; Brownsville v. Cavazos, 100 U. S. 138, 143, 25 L. ed. 574, 576; More v. Steinbach, 127 U. S. 70, 32 L. ed. 51, 8 Sup. Ct. Rep. 1067; San Francisco v. Le Roy, 138 U. S. 656, 34 L. ed. 1096, 11 Sup. Ct. Rep. 364; Knight v. United States Land Asso. 142 U. S. 162, 183, 35 L. ed. 975, 981, 12 Sup. Ct. Rep. 258.

The riparian rights of patentees from the United States are to be determined according to the law of the state in which the lands lie.

Shively v. Bowlby, 152 U. S. 1, 45, 38 L. ed. 331, 347, 14 Sup. Ct. Rep. 548; Lowndes v. Huntington, 153 U. S. 1, 19, 38 L. ed. 615, 618, 14 Sup. Ct. Rep. 758; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 92, 40 L. ed. 85, 87, 15 Sup. Ct. Rep. 991; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651; Hardin v. Shedd, 190 U. S. 508, 47 L. ed. 1156, 23 Sup. Ct. Rep. 685; St. Louis v. Myers, 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640; Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; Eldridge v. Trezevant, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345; St. Louis v. Rutz, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 435-437, 465-474, 36 L. ed. 1018, 1036, 1037, 1047-1050, 13 Sup. Ct. Rep. 110.

Mr. Justice Day delivered the opinion of the court:

The city of Los Angeles brought suit in the superior court of the county of Los Angeles against the Los Angeles Farming & Milling Company, hereinafter called the Milling Company, to quiet the title of the city to the use of the waters of the Los Angeles river. The city of Los Angeles is situated on the Los Angeles river, a non-navigable stream, rising in the San Fernando valley and mountains adjacent, and flowing *from the north down to and through [219 said city. The Milling Company is the owner of a large tract of land, about

10,000 acres, situated some 10 miles up stream, above said city, on the same river. In its complaint, the city of Los Angeles sets forth that it is the owner of the paramount right to take and use all of the water of said river, from its sources to the southern boundary of the city, so far as it is necessary to furnish a supply for the use of the city and its inhabitants; that the plaintiff in error owns its lands subject to such paramount right of the city to the use of the water, and claims adversely to the city and its estate and interest in said water right.

The defendant answered, and, among other things, set up a denial of the alleged paramount rights of the city in the waters of the Los Angeles river, and alleges that it and its predecessors had been in the exclusive possession of said lands for more than fifty years, under claim of title, using the waters of the river riparian or appurtenant to its estate; that the value of the premises was over \$500,000; that its lands were some 10 miles above the city, on the river; that the title to the lands and waters in controversy was first owned by the Crown of Spain, thence passing to the Republic of Mexico, which Republic, on June 17, 1846, granted to the predecessors of the Milling Company certain lands, which included the lands in controversy; that, by the treaty between the Republic of Mexico and the United States, the sovereign rights and titles of said Republic of Mexico in said property passed to and vested in the United States; that California, upon its admission to the Union, was prohibited from passing any laws disposing of the public lands of the United States, or from doing any acts whereby the title of the United States in the public lands within its limits should be impaired or questioned; that the laws of the United States were extended over California, September 29, 1850; that the Congress of the United States passed an act, approved March 3, 1851 [9 Stat. at L. 631, chap. 41], providing for the ascertainment and settlement of the land

220] *claims derived from Spain or Mexico in the state of California, and created a board of land commissioners for that purpose; that all lands, the claim to which was rejected, or had not been presented, to said board, should be held and considered as part of the public domain of the United States; that claims of towns or cities should be presented under said act; that a grant to cities or towns existing July 7, 1846, should be presumed; that the decrees and patents issued by the tribunals under said act should be conclusive between the United States and the claimant; that the claims of the predecessors in interest of the Milling Company

to its lands were duly presented to the board of land commissioners, and confirmed on January 8, 1873, and the patent of the United States was issued to them; and it is alleged that said patentee thereby became vested with the rights in fee simple to said lands and all the waters therein or riparian thereto. It is alleged that this patent is *res judicata* of the rights of the Milling Company; that under the act of March 3, 1851, the mayor and council of the city of Los Angeles presented to the said board of land commissioners a claim for 16 square leagues of land, known as the pueblo of Los Angeles, and for the water rights of the said Los Angeles river, for the use of the pueblo; that said claim was adjudged and affirmed to be valid to the extent of 4 square leagues, and held invalid as to the remainder thereof, and that a patent was issued by the United States to the city of Los Angeles on August 9, 1866, for 4 square leagues of land. The Milling Company sets up that this confirmation and patent in favor of the city is *res judicata* for 4 square leagues, and claims that the city is barred from setting up or claiming any title, ownership, or interest in or to the premises in controversy herein; that the sources and tributaries of the Los Angeles river are located on the public lands of the United States; that the legislature of California has passed certain acts, attempting to confer and grant to the city of Los Angeles paramount right to take and use all the waters of the Los Angeles river, which acts, it is contended, *are null [221 and void under the act of Congress admitting the state of California into the Union [9 Stat. at L. 452, chap. 50], and, under article 14 of the Constitution, preventing private property being taken for public use without just compensation therefor. The answer also sets up the statute of limitations.

The case was submitted to the court of original jurisdiction upon a stipulation of facts, which shows that the pueblo of Los Angeles was established in 1781 under the government of Spain, containing 4 square leagues of land, embracing the lands afterwards patented to the city under the act of Congress of March 3, 1851; that the settlers and inhabitants of the pueblo used the water from the river by means of ditches for domestic and irrigation purposes until the time of the acquisition of the state of California by the United States, the amount of irrigable land being then about 1,500 acres, and it is stipulated:

"Under the laws of the Kingdom of Spain, said pueblo, upon its foundation, by virtue of a grant under such laws, had the paramount right, claimed by the plaintiff in the complaint herein, to use all the water of the

river, and such paramount right continued to exist under that government and under the Mexican government, until the acquisition of California by the United States."

It appears in the stipulation of facts that the pueblo of Los Angeles, in presenting its petition to the board of land commissioners, wherein it claimed the 16 square leagues, presented as a part thereof a copy of an ordinance of the King of Spain, wherein he provides for the establishment of the town of Pitic, in Sonora, and orders that the provisions relative thereto should be followed in the foundation of any new pueblos in the jurisdiction of the commanding general of the internal provinces of the West, of which California constituted a part, and attached to that petition was a copy of the plan of the town of Pitic, which contained, among other things, this provision:

"7th. The neighbors and natives shall like-
222] wise enjoy the *use of the woods, water, and other benefits from the royal and vacant lands lying outside of the tract assigned to the new town, jointly with the residents and natives of the immediate and adjoining towns; which favor and right shall continue until by his Majesty the same shall be granted or alienated; in which case, regulations will be made according to the provisions for concessions in favor of new possessors or proprietors."

But there is nothing in the statement of facts affecting the force of the stipulation that the pueblo of Los Angeles had the paramount water right, as above stated, and as claimed in the complaint, until the acquisition of the state of California by the United States. It is further stipulated that no grant nor claim of the real property described in the complaint was presented for confirmation under the act of March 3, 1851, except in so far as the same may have been embraced in the claim of the mayor and common council of the city of Los Angeles, presented and confirmed in the manner described, which resulted in the confirmation and patent for 4 square leagues of land, and the rejection of the claim for the remaining portion of the premises described and claimed by the petitioners; that pursuant to that decree, the United States issued a patent for the 4 square leagues of land; that the city of Los Angeles was incorporated on April 4, 1850, by act of the legislature of California, with boundaries including the 4 square leagues, and the act provided that the city should succeed to all the rights, claims, and powers of the pueblo of Los Angeles in regard to property, and shall be subject to all the liabilities incurred and obligations created by the ayuntamiento of said pueblo. The decision of the commissioners was affirmed by the dis-
54 L. ed.

trict court of the United States, and a patent was issued on August 9, 1866, in accordance therewith, for 4 square leagues. Afterwards, on August 4, 1875, another patent was issued by the United States for the 4 square leagues of land, in which latter patent no mention was made of the fact that the land *for which confirmation was [223 asked contained 16 square leagues, or that the claim of the city was founded on the Mexican grant to the petitioners made on August 25, 1844, as was stated in the earlier patent. The patent of August 4, 1875, contained a certificate of the United States surveyor general for California, that notice of the plat and survey had been advertised in two newspapers, and that the plat was a correct copy of the original, and had been approved August 4, 1875, by the Commissioner of the General Land Office.

As to the land claimed and owned by the Milling Company, it is stipulated that it was contained in the Rancho Ex-Mission de San Fernando, which embraced the lands of the Milling Company, and was an imperfect or inchoate grant made by the Mexican government on June 14, 1846, and the claim thereto of the predecessors in interest to the Milling Company was presented to and confirmed by the board of land commissioners, under the act of March 3, 1851, and the patent of the United States was issued therefor on January 8, 1873; that said patent includes 121,619 acres of land, through a part of which the Los Angeles river and its tributaries flow; that said rancho is riparian to said river, and that the patent states that the United States of America granted the land therein embraced, with the appurtenances, without making any reservation or exception of any rights to said river, its tributaries or waters therein; that the value of the premises in controversy is over \$400,000; that neither the city nor any of its predecessors have contested the grant, survey, or proceedings in connection with the confirmation of the claim of the predecessors in interest to the Milling Company to said rancho; that said rancho is situated on said river, some 10 miles above the city of Los Angeles, and above any of the points of diversion of water by said city; that after the acquisition of California by the United States, the pueblo of Los Angeles continued to exist and be managed by the pueblo authorities, and the water of said river continued to be used for domestic and irrigation purposes by its inhabitants until *the incorporation of the city un- [224 der the legislative act of April 4, 1850, and thereafter the use of water from said river for municipal, domestic, and irrigation purposes continued until about 1901, since which time all of said water has been needed and

used for domestic purposes in said city, as enlarged from the patented area of 17,172 acres to 27,695 acres in 1898; that the surface stream of the river continues for a distance of several miles above the city, to points where it rises from beneath the surface of the ground, and, in seasons of heavy rainfall, it extends up to the mouths of the various canyons, from which surface streams, coming from public lands of the United States, and which are the sources and tributaries of the Los Angeles river, emerge and flow, until the approach of summer, when they sink into the sand at or near the mouths of such canyons; that all of the territory in which the surface stream of the Los Angeles river constantly flows, and all of the valleys through which the torrential surface stream of the river flows, in winter and spring, up to the mouths of said canyons, are embraced within Spanish and Mexican grants, confirmed and patented to parties other than the city, under the act of March 3, 1851; that the city has sold to private parties all the lands embraced in its patent from the United States, including the lands riparian to the river, excepting certain lots, on which are erected public city buildings, also certain parks and the river bed, 200 feet, more or less, in width, inside the patent boundary; that the allegations of the complaint, describing the Los Angeles river, and showing that the underground stream thereof extends throughout the whole of the lands of the Milling Company, described in the complaint, are true.

Upon submission to the trial court, a judgment was rendered in favor of the city, ordering and adjudging that the city was the owner in fee simple of the paramount right to take and use the water of the Los Angeles river from its source to the southern boundary of the city of Los Angeles, so far as may be reasonably necessary, from time 225] to time, to *give an ample supply of water for the use of its inhabitants, and for all the municipal purposes and uses of the city, and the city was quieted in its title and right to the use of the water, as aforesaid.

Upon appeal to the supreme court of California, the judgment of the lower court was affirmed (152 Cal. 645, 93 Pac. 869, 1135), and the case is brought here by writ of error to that court.

A case can only be brought to this court from a supreme court of a state by writ of error under § 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575), in order to determine Federal rights asserted under that section of the statutes which it is claimed have been denied by the decision and judgment of the supreme court of the state. It is therefore

necessary to know just what is comprehended in the decision and judgment of that court. The supreme court of California, after reciting the proceedings and facts found in the court below, dealt with the contention of the plaintiff in error as to the proceedings under the act of March 3, 1851, which confirmed the title to the lands described, and held that, in confirming the title to the lands and awarding patents therefor, the riparian rights of the proprietors and patentees were left to be determined by the law of the country or state where the land is situated, and denied the contention of the Milling Company, that the city had only title to the 4 square leagues of land awarded to it by the proceedings and patents under the act of March 3, 1851, with no ownership in the use of the water above the limits of the land granted, and denied the further contention that, by the proceedings and patent to the Milling Company's predecessors, they were adjudged the riparian owners, with the use of the waters of the river running through the land as part and parcel of their estate. The court having reached this conclusion as to the effect of the act of March 3, 1851, held that the only question in the case was as to whether, under the Spanish and Mexican law, the old pueblo of Los Angeles and the city, as its successor, had, *as [226 against the Milling Company, the prior and paramount ownership of so much of the water of the Los Angeles river as is necessary for its inhabitants, and for general municipal purposes, and held that this question was answered in the affirmative in the prior decisions of the California supreme court. *Lux v. Haggin*, 69 Cal. 265, 10 Pac. 674; *Vernon Irrig. Co. v. Los Angeles*, 106 Cal. 237, 39 Pac. 762; *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585 (same case in this court, 188 U. S. 314, 47 L. ed. 487, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395).

These decisions the court held to be determinative of the prior and paramount right of the pueblo and its successor, under rights existing under the Spanish and Mexican laws, confirmed by the United States to the successors of the pueblo. The court declined to consider for what municipal purpose the water could be used as against a riparian owner, and held that the extent of the city's prior and paramount right was not involved in the case.

It is thus apparent that the supreme court of California put the decision of the case upon the effect of the old Spanish or Mexican law as to the rights of the pueblo, succeeded to by the city, and confirmed by proceedings under the acts of Congress for the purpose of confirming such titles.

We come, then, to consider what Federal questions are really presented in this record, and whether, in reaching the decision which we have stated, the supreme court of California directly, or necessarily, by reason of its decision, denied such rights asserted under § 709 of the Revised Statutes. We may at once put aside, as not presenting Federal questions of serious import, the assignments of error to the effect that the decision of the supreme court of California denied to the plaintiff in error due process of law or the equal protection of the laws, secured by the 14th Amendment of the Constitution of the United States. We may treat in like manner the assignments involving the construction by the supreme court of the state statutes, and rulings as to the admissibility of evidence. Nor do we find any denial of Federal right worthy [227] *of consideration in the assertion that the statutes of California have undertaken to confer the water rights in controversy on the city of Los Angeles, and were given such effect, in violation of the Federal rights of the plaintiff in error. As we have seen, the rights of the city were not determined by the effect of those statutes, but upon the right and title secured by the Spanish or Mexican law, and the subsequent confirmation thereof under the statute of the United States.

As to the assignment of error that the effect of the judgment is to interfere with the disposition of the public lands by the United States.

The act of 1851 (9 Stat. at L. 631, chap. 41), § 14, made provision for the presentation to the commission of the former right of pueblos, and the issue of patents to them upon confirmation. And further, the same section provided that the existence of a city, town, or village on July 7, 1846, being duly proved, should be prima facie evidence of a grant to such corporation.

This court, speaking by Mr. Justice Miller, tersely disposes of the nature of such old Mexican titles in *Adam v. Norris*, 103 U. S. 591, 593, 26 L. ed. 583, 584:

"But the United States, in dealing with parties claiming under Mexican grants, lands within the territory ceded by the treaty of Mexico, never made pretense that it was the owner of them. When, therefore, guided by the action of the tribunals established to pass upon the validity of these alleged grants, the government issued a patent, it was in the nature of a quitclaim,—an admission that the rightful ownership had never been in the United States, but had passed at the time of the cession to the claimant, or to those under whom he claimed. This principle has been more than once clearly announced in this court. The lead-

ing cases are *Beard v. Federy*, 3 Wall. 478, 18 L. ed. 88; *Henshaw v. Bissell*, 18 Wall. 255, 21 L. ed. 835; *Miller v. Dale*, 92 U. S. 473, 23 L. ed. 735."

It is perhaps more accurate to say that the action of the United States in such cases is a confirmation rather than a *quit-[228] claim. *Boquillas Land & Cattle Co. v. Curtis*, 213 U. S. 339, 344, 53 L. ed. 822, 825, 29 Sup. Ct. Rep. 493.

The assignments covering other Federal questions which should be noticed embrace the contention that the rights of the Milling Company were secured under the treaty of Guadalupe Hidalgo between the United States and Mexico [9 Stat. at L. 922], and under the act of Congress of March 3, 1851, for the confirmation of titles derived from the Spanish or Mexican governments. The contentions as to the supposed rights derived under that treaty and act have been before this court in a number of cases, in which it has been uniformly held that rights alleged to have arisen thereunder, in the manner claimed by the present plaintiff in error, are not rights of Federal origin which, when denied, lay the basis for the review and reversal of the judgment of the state court.

In *Townsend v. Greeley*, 5 Wall. 326, 18 L. ed. 547, Mr. Justice Field, delivering the opinion of the court, held that the treaty of Guadalupe Hidalgo does not purport to divest the pueblo existing at the site of the city of San Francisco, of any rights of property, or to alter the character of interests it may have held in any lands under the former government; that the treaty provided for the protection of the inhabitants in their property, and that the same rights exist as to towns under the Mexican government; and dealing with both the treaty and the act of Congress of March 3, 1851, Mr. Justice Field, again speaking for the court [in *Beard v. Federy*, 3 Wall. 478, 491, 18 L. ed. 88, 92], said:

"In the first place, the patent is a deed of the United States. As a deed its operation is that of a quitclaim, or rather, a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners.

"In the second place, the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did *not affect the rights of [229] the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former government. The treaty of cession also stipulated

for such protection. The obligation to which the United States thus succeeded was, of course, political in its character, and to be discharged in such manner, and on such terms, as they might judge expedient. By the act of March 3d, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first to the district and then to the supreme court; and designated officers to survey and measure off the land when the validity of the claims is finally determined. When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described."

In the later case of *Hooker v. Los Angeles*, 188 U. S. 314, 47 L. ed. 487, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395, practically the same contentions were made as in the case at bar concerning the effect of the act of 1851 and the treaty of Guadalupe Hidalgo. In that case the lands of the plaintiffs in error were situated above the city of Los Angeles, and it was sought to appropriate them to the use of the city for the purpose of maintaining thereon the headworks of a system of water supply. In that case, as here, [230] the city contended *that the rights of the plaintiffs in error were subject to the paramount rights of the city of Los Angeles to take water for the use of its inhabitants, for all the public and municipal purposes of the city. Plaintiffs in error denied this contention, and set up their own rights as riparian owners of the lands, the confirmation of their rights by the board of land commissioners under the act of Congress of 1851, confirmed by the district court for the southern district of California, and patents duly issued in accordance therewith. The contention of the plaintiffs in error was that the state decided against their rights as riparian owners, and as to the ownership of the percolating waters, derived from patents of the United States as well as from Mexican grants, and under the treaty of

Guadalupe Hidalgo. Delivering the opinion of the court, Mr. Chief Justice Fuller said:

"Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law, on which the decision of the state court was final. *San Francisco v. Scott*, 111 U. S. 768, 28 L. ed. 593, 4 Sup. Ct. Rep. 688; *California Powder Works v. Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350. And the question of the existence of percolating water was merely a question of fact.

"The patents were in the nature of a quit-claim, and, under the act of March 3, 1851, were 'conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.' The validity of that act was not drawn in question in the state court, and as the right or title asserted by plaintiffs in error was derived under Mexican and Spanish grants, the decision of the state court on the claims asserted by plaintiffs in error to the waters of the river was not against any title or right claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised, under the Constitution. If the title of plaintiffs in error were protected by the treaty, still the suit did not arise thereunder, because the controversy in the state court did not involve the construction of the treaty, but the validity of the *title of Mexican and Spanish [231] grants prior to the treaty. *New Orleans v. De Armas*, 9 Pet. 224, 9 L. ed. 109; *Iowa v. Rood*, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49; *Phillips v. Mound City Land & Water Asso.* 124 U. S. 605, 31 L. ed. 588, 8 Sup. Ct. Rep. 657."

In *California Powder Works v. Davis*, supra, referred to by the chief justice in the *Hooker Case*, it was held, referring to the previous case of *Phillips v. Mound City Land & Water Asso.* supra, that the treaty of Guadalupe Hidalgo protected all existing property rights, but neither created nor defined the rights, and that a confirmation of such rights by a decree of the court did not determine rights which depended upon the Constitution, laws, or treaties of the United States.

Similar questions came before this court in *Devine v. Los Angeles*, 202 U. S. 313, 50 L. ed. 1046, 26 Sup. Ct. Rep. 652. In that case, 244 complainants, owners of lands situated in the county of Los Angeles and in the *Ranchos San Rafael, Los Felis*, and *Providencia*, and whose title was alleged to have been confirmed pursuant to the treaty of Guadalupe Hidalgo, by the board of land commissioners created under the act of Congress of 1851, and to whom patents had been issued by the United States,

brought suit against the city of Los Angeles to quiet their title as against the claims of the city of Los Angeles to the paramount use of the water of Los Angeles river. The bill is abstracted at length in the report of that case, and it was alleged there, as here, that the rights asserted by the city, and acts of the legislature and charters of the city, were in violation of the 14th Amendment of the Constitution, and that the city of Los Angeles should have presented its claims to the waters of the river to the board of land commissioners, under the act of Congress of March 3, 1851, and that a decree should be granted declaring the acts of the legislature of California and the charters of the city of Los Angeles invalid in respect to conferring upon the city any rights in the waters of the Los Angeles river other than those which were ascertained and confirmed under the act of March 3, 1851.

An answer was filed by the city, fully setting up its rights and contentions, as the successor of the pueblo, to the ownership of the waters in the river and its tributaries, and admitting that it rested its claim to the Los Angeles river and the waters thereof, including the waters in the lands of the complainants, upon the treaty of Guadalupe Hidalgo, which protected the rights or pueblos as well as the rights of individuals, and in part upon the act of Congress of March 3, 1851, confirming the claims of pueblos and municipal corporations to lands granted by Spain and Mexico, and that the confirmation thereof had the effect of confirming the water rights contended for by the city; that said act did not require claims for property otherwise than for land to be presented for confirmation. The answer sets out a detailed history of the pueblo and city of Los Angeles, and certain prior adjudications which were claimed to conclude the plaintiffs in the suit.

After the pleadings were filed, the city of Los Angeles moved the court to dismiss the case on the ground that there was no Federal jurisdiction thereof; the motion was sustained, and the case brought to this court upon a certificate. This court held that there was no jurisdiction of the case in the Federal court, quoting in the opinion from the previous cases to the effect that the rights of the complainant depended upon the Spanish and Mexican grants confirmed by the board of land commissioners (Hooker v. Los Angeles, supra), and again held that the extent of the riparian rights of the plaintiffs alleged to be derived from the patents of the United States and confirmed Mexican grants, did not present a right, title, privilege, or immunity arising under statutes or treaties of the United States. The 54 L. ed.

court also cited *Crystal Springs Land & Water Co. v. Los Angeles*, 177 U. S. 169, 44 L. ed. 720, 20 Sup. Ct. Rep. 573, in which this court affirmed the ruling of the circuit court of the United States for the southern district of California, holding that a controversy between parties claiming under Mexican grants, alleged to be confirmed and patented by the United States in accordance with the treaty of Guadalupe Hidalgo, was only a controversy as to what rights were thus granted and confirmed, and could not lay the basis for a suit as one arising under the laws and treaties of the United States, and the decree of the circuit court, dismissing the bill for want of jurisdiction, was affirmed.

It is insisted that the supreme court of California, in holding that the term "land," as embraced in the act of March 3, 1851, did not include the riparian rights of the patentee of the land, nor conclude the city from making claim of ownership of the water rights in controversy, and leaving to local law the determination of what riparian rights are embraced in the word "land," denied to the plaintiff in error the rights which had accrued to it because of the proceedings under the act of 1851, and the benefits of the limitations upon the rights conferred upon the city of Los Angeles by reason of the proceedings and determination of the commissioners. But as these alleged rights and limitations arise under the act of March 3, 1851, which this court has repeatedly held did not originate Federal rights or titles, but merely confirmed the old ones, we cannot review the judgment of the state court in this respect. In its opinion in the case at bar, the supreme court of California said that, in this respect, it was following *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838, and this court has frequently held that the extent of the right and title of a riparian owner under a patent is one of local law. See recent decision of *Whitaker v. McBride*, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530, and cases therein cited.

And whatever the rule may be as to patents conveying title to the lands of the United States, it has been distinctly held in this court that neither the treaty of Guadalupe Hidalgo nor patents under the act of March 3, 1851, are original sources of private titles, but are merely confirmatory of rights already accrued under a former sovereignty.

Both parties claim under Spanish or Mexican titles, confirmed by proceedings under the act of March 3, 1851. The Federal rights alleged by the plaintiff in error to have been violated by the decision and judgment of the supreme court of California, 80

far as concerns this act, relate to the extent of the right and ownership in the use 234] of the waters of the Los Angeles river by the one or the other of the parties to this suit. The plaintiff in error, as we have seen, contends that, by its grant, it became the owner of riparian rights in such waters without limitation by any supposed right in the city of Los Angeles to use the water of the river, and that the city of Los Angeles, by failing to present the claim it now makes for the use of the waters of the river to the commissioners under the act of 1851, and by the effect of the judgment of the commissioners upon the petition presented by the city, is forever adjudicated to have no such water rights in the river as the city now contends for, and as were awarded to it by the decision and judgment of the supreme court of California.

The defect of these contentions, from the standpoint of Federal jurisdiction, is that this court has already determined, in the cases above cited, that the act of 1851 was a confirmatory act; that by its terms it did not undertake to originate titles or make the patents to be issued in pursuance of the decisions of the commission conclusive, except upon the United States; and that the extent of the riparian rights belonging to pueblos or persons receiving such patents is a matter of local or general law.

In this view, the writ of error must be dismissed for want of jurisdiction.

JOHN WYNNE, Plff. in Err.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 234-247.)

Admiralty jurisdiction—crime in Honolulu harbor.

1. A murder committed on board a ship lying in the harbor of Honolulu is cognizable in the district court of the United States for the territory of Hawaii, under U. S. Rev. Stat. § 5339, U. S. Comp. Stat. 1901, p. 3627, as committed in a haven or arm of the sea within the admiralty and maritime jurisdiction of the United States, and "out of the jurisdiction of any particular state."

[For other cases, see Admiralty, 132-146, in Digest Sup. Ct. 1908.]

Admiralty jurisdiction—crime in Honolulu harbor.

2. There is nothing in the Hawaiian organic act of April 30, 1900 (31 Stat. at L. 141, chap. 339), which expressly or impliedly

NOTE.—As to the places to which the jurisdiction of admiralty is confined—see note to *Allen v. Newberry*, 16 L. ed. U. S. 110.

deprives the Federal courts of their jurisdiction under U. S. Rev. Stat. § 5339, U. S. Comp. Stat. 1901, p. 3627, to punish a murder committed on board a ship lying in the harbor of Honolulu.

[For other cases, see Admiralty, 132-146, in Digest Sup. Ct. 1908.]

Evidence—authentication of document—presumption of genuineness.

3. The genuineness of the authentication of a copy of a certificate of enrolment offered in evidence to establish the national character of a vessel on a prosecution for a crime committed on shipboard will be assumed, as will also the official character of the purported signer and the signing by him, or one authorized to sign for him, where there is no evidence casting suspicion upon the genuineness of the copy or of the seal, or the signature, and none which challenges in any way the American character of the ship.

[For other cases, see Evidence, 996-1004, in Digest Sup. Ct. 1908.]

[No. 449.]

Argued February 28 and March 1, 1910.
Decided April 4, 1910.

IN ERROR to the District Court of the United States for the Territory of Hawaii to review a conviction for a murder committed on board a ship lying in the harbor of Honolulu. Affirmed.

The facts are stated in the opinion.

Mr. Henry E. Davis argued the cause and filed a brief for plaintiff in error.

Messrs. Frank E. Thompson, Charles F. Clemons, and Britton & Gray also filed a brief for plaintiff in error:

There can be no doubt of the jurisdiction of the courts of the territory over the crime of murder, as defined by Hawaiian statutes.

Equitable Life Assur. Soc. v. Brown, 187 U. S. 309, 47 L. ed. 191, 23 Sup. Ct. Rep. 123; *Ex parte Wilder's S. S. Co.* 183 U. S. 545, 46 L. ed. 321, 22 Sup. Ct. Rep. 225; *Territory v. Carter*, 19 Haw. 200; *Territory v. Martin*, 19 Haw. 201; *Territory v. Morita Kaizo*, 17 Haw. 297; *Bierce v. Hutchins*, 18 Haw. 518.

The word "state" should be construed in its broader meaning of "any separate political community."

Talbott v. Silver Bow County, 139 U. S. 438, 444, 35 L. ed. 210, 212, 11 Sup. Ct. Rep. 594; *The Ullock*, 19 Fed. 212; *Neil v. Wilson*, 14 Or. 410, 12 Pac. 810; *Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295.

By the use of the words "out of the jurisdiction of any particular state," it was intended to provide a means of punishment where no such means were afforded; it was thereby intended to give jurisdiction to the Federal court in cases where the judicial bodies of the particular state (*i. e.*, political

community, including territory) were not invested with jurisdiction in the premises.

United States v. Bevans, 3 Wheat. 337, 4 L. ed. 404; *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559.

The act here charged in the indictment was committed within the body of the county, then the county of Oahu, now the city and county of Honolulu.

United States v. New Bedford Bridge Co. 1 Woodb. & M. 401, Fed. Cas. No. 15,867.

Assistant Attorney General **Fowler** argued the cause and filed a brief for defendant in error:

The phrase "particular state," as used in this statute, is limited to the several states of the Union.

United States v. Ross, 1 Gall. 626, Fed. Cas. No. 16,196; *St. Clair v. United States*, 154 U. S. 144, 38 L. ed. 939, 14 Sup. Ct. Rep. 1002; *Andersen v. United States*, 170 U. S. 489, 42 L. ed. 1118, 18 Sup. Ct. Rep. 689.

Courts will notice without proof the signatures and official seals of public officers.

17 Am. & Eng. Enc. Law, 2d ed. p. 918; *Himmelmahn v. Hoadley*, 44 Cal. 214.

Mr. Justice **Lurton** delivered the opinion of the court:

The plaintiff in error, John Wynne, has sued out this writ of error from a judgment and sentence of death for a murder committed on board the steamer *Rosecrans*, an American vessel, while lying in the harbor of Honolulu, in the territory of Hawaii. The indictment upon which he was tried included four counts. In each it was charged that the murder had been done on board the said American vessel, lying in the harbor of Honolulu, in the district and territory of Hawaii, and within the admiralty and maritime jurisdiction of the United States, "and out of the jurisdiction of any particular state of the said United States of America." In two of the counts the locality is described as a certain "haven" of the Pacific ocean, and in the others as a certain "arm" of the Pacific ocean.

The question to which the counsel for the plaintiff in error has chiefly invited the attention of the court is whether the indictment charges an offense within the jurisdiction of the district court of the United States for the territory of Hawaii. It was founded upon § 5339, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3627), and particularly the second paragraph. The section is set out below:

"Sec. 5339. Every person who commits murder—

"First. Within any fort, arsenal, dock-
54 L. ed.

yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States.

"Second. Or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state.

"Third. Or who, upon any such waters, maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death."

*Shortly stated, the contention is [241 that the haven or arm of the Pacific ocean which constitutes the harbor of Honolulu, although "within the admiralty and maritime jurisdiction of the United States," is a locality not "out of the jurisdiction of any particular state," because within the jurisdiction of the territory of Hawaii. The basis for the contention is that the words, "out of the jurisdiction of any particular state," do not refer to the jurisdiction of a state of the United States, but are to be given the wider meaning of out of the jurisdiction of any separate political community; and that the territory of Hawaii constitutes such a political organism. The postulate cannot be considered. The crimes act of April 30, 1790, chap. 9, 1 Stat. at L. 112, contained the same limiting words. Thus, in the 8th section of that act jurisdiction was asserted over the crime of murder, as well as certain other crimes, when committed "upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state." The act was remodeled by the act of March 3, 1825, chap. 65, § 4, page 115, 4 Stat. at L. (U. S. Comp. Stat. 1901, p. 3627). The further limitation of "within the admiralty and maritime jurisdiction of the United States" was added, but otherwise the jurisdiction remained the same. Without substantial change the provision of the last act was carried into the Revised Statutes as part of § 5339.

To support the contention urged, counsel have cited *United States v. Bevans*, 3 Wheat. 337, 388, 4 L. ed. 404, and *Talbott v. Silver Bow County*, 139 U. S. 438, 444, 35 L. ed. 210, 212, 11 Sup. Ct. Rep. 594. The indictment in the *Bevans* Case was for a murder done on board a war vessel of the United States while she lay at anchor a mile or more from the shores of the bay constituting the harbor of Boston, in the state of Massachusetts. The bay was wholly within the territorial jurisdiction of the state of Massachusetts, and the court said that it was not

material whether the courts of that state had cognizance of the offense or not. "To bring the offense," said the court, "within the jurisdiction of the courts of the Union, it must have been committed in a river, etc., out of the jurisdiction of any state. It is 242] not the offense committed, but the *bay in which it is committed, which must be out of the jurisdiction of the state. If, then, it should be true that Massachusetts can take no cognizance of the offense, yet, unless the place itself be out of her jurisdiction, Congress has not given cognizance of that offense to its courts. If there be a common jurisdiction, the crime cannot be punished in the courts of the Union." The case has no bearing upon the question here involved, except so far as that the jurisdiction of the courts of the United States was there held to be excluded, because the place where the offense was committed was within the territorial jurisdiction of one of the states of the Union. The question in the Talbott Case was whether a territory was within the meaning of § 5219, Revised Statutes (U. S. Comp. Stat. 1901, p. 3502), which permitted a "state within which" a national bank is located to tax its shares. The court held that the permission extended to states in that regard including territories. The decision was based upon the obvious intent of Congress, looking to the scope and purpose of the act; the court saying, among other things: "While the word 'state' is often used in contradistinction to 'territory,' yet, in its general public sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the territories, as well as those political communities known as states of the Union." But the word "state," as used in the 8th section of the act of 1790, and the subsequent act of 1825, as well as used in § 5339, Rev. Stat., must be determined from its own context. The word "state," as there used, has been uniformly held as referring only to the territorial jurisdiction of one of the United States, and not to any other government or political community. Thus, in *United States v. Ross*, 1 Gall. 626, Fed. Cas. No. 16,196, Mr. Justice Story said, in reference to the words in § 4 of the act of 1825, above referred to, that "the additional words of the act, 'in any river, haven, basin, or bay out of the jurisdiction of any particular state,' refer to such places without any of the United States, and not without foreign states, as will be very clear on 243] examining the provision *as to the place of trial, in the close of the same section." In *United States v. Griffen*, 5 Wheat. 184, 189, 200, 5 L. ed. 64, 65, 68, 750

one of the questions certified was "whether the words, 'out of the jurisdiction of any particular state,' in the 8th section of the act of Congress of the 30th of April, 1790, chap. 9 [1 Stat. at L. 113, U. S. Comp. Stat. 1901, p. 3643], . . . must be construed to mean out of the jurisdiction of any particular state of the United States." To this the court said: "We think it obvious that 'out of any particular state' must be construed to mean 'out of any one of the United States.' By examining the context it will be seen that 'particular state' is uniformly used in contradistinction to United States." In *United States v. Rodgers*, 150 U. S. 249, 265, 37 L. ed. 1071, 1077, 14 Sup. Ct. Rep. 109, the same meaning was attached to the words in question, and an offense committed on the Detroit river, on a vessel belonging to a citizen of the United States, was held cognizable by the district court of the United States for the eastern district of Michigan, although it appeared that the offense had been committed *within the territorial limits of the Dominion of Canada*, and therefore not within the jurisdiction of any particular state of the United States. See also *St. Clair v. United States*, 154 U. S. 134, 144, 38 L. ed. 936, 939, 14 Sup. Ct. Rep. 1002, and *Andersen v. United States*, 170 U. S. 489, 42 L. ed. 1118, 18 Sup. Ct. Rep. 689.

That there existed an organized political community in the Hawaiian Islands, exercising political, civil, and penal jurisdiction throughout what now constitutes the territory of Hawaii, including jurisdiction over the bay or haven in question, when that territory was acquired under the joint resolution of Congress of July 7, 1898 [30 Stat. at L. 750], did not prevent the operation of § 5339, Rev. Stat. That "political community" did not constitute one of the states of the United States; and if the other jurisdictional facts existed, § 5339 came at once into operation.

Unless, therefore, there was something in the legislation of Congress found in the act of April 30, 1900, chap. 339, 31 Stat. at L. p. 141, providing a government for the territory of Hawaii, which excluded the operation of the statute, the jurisdiction of the courts of the United States over the bay here in question, *in respect of the [244 murder there charged to have been committed, was beyond question.

Counsel have cited and relied upon the 5th, 6th, and 7th sections of the organic act referred to, in connection with §§ 83, 84, 89, and 91, as operating to leave intact the jurisdiction of the territorial courts of the territory under existing penal laws over this "haven" or "arm" of the sea, in respect to homicides there committed. The 5th section of the organic act referred to provided,

"that the Constitution, and except as herein otherwise provided, all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States." The 6th section continued in force the laws of Hawaii "not inconsistent with the Constitution or laws of the United States, or the provisions of this act; . . . subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States." The 7th section expressly repeals a long list of local laws, civil and criminal, and does not expressly include the chapter of the penal laws of Hawaii of 1897, relating to homicides. The 81st section vests the judicial power of the territory in one supreme court and such inferior courts as the legislature may establish, and continues in force the laws of Hawaii concerning the jurisdiction and procedure of such courts, "except as herein provided." Section 83 continues in force the laws of Hawaii relating to the judicial department, including civil and criminal procedure, subject to modification by Congress or the legislature. Section 89 provides that the control of wharves and landings constructed by the Republic of Hawaii, on any seacoast, bay, or harbor, shall remain under the control of the government of the territory of Hawaii. Section 91 leaves public property which had been ceded to the United States under the control of the government of the territory.

We cannot see that any of the things referred to have the effect claimed for them. The plain purpose of the 5th section was to extend the Constitution and laws of the 245] United States, "not locally inapplicable, to the territory, and of the 6th section, to leave in force the laws of Hawaii, except as repealed by the act, or inconsistent with the Constitution or laws of the United States.

If, when that act was passed, one who committed murder in the harbor of Honolulu was subject to trial in the courts of the United States, though within the territorial waters of Hawaii, the organic act neither expressly nor impliedly deprives the courts of the Union of the jurisdiction which they had before. It was within the power of Congress to confer upon its courts exclusive jurisdiction over all offenses committed within the territory, whether on land or water. This it did not elect to exercise. It provided for the establishment of a district court of the United States, with all of the powers and jurisdiction of a district court and of a circuit court of the United States. It provided also for the organization of local courts with the jurisdiction conferred by the existing laws of Hawaii upon its local courts except as such laws were in conflict with the act itself or the Constitution 54 L. ed.

and laws of the United States. If it be true, as claimed, that the territorial courts exercise jurisdiction over homicides in the harbor of Honolulu, under and by virtue of the laws of Hawaii thus continued in force, it only establishes that there may be concurrent jurisdiction in respect of certain crimes when committed in certain places, and is far from establishing that the courts of the Union have been deprived of a jurisdiction which they have at all times claimed and exercised over certain offenses when committed upon the high seas, or in any arm of the sea, or in any river, basin, haven, creek, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state.

We find nothing in the special legislation applicable to that territory which prevented the operation of § 5339.

There are assignments touching the competency of certain evidence relied upon to establish the national character of the Rosecrans, and others which challenge the sufficiency of the *evidence to carry the [246 case to the jury against a motion to direct a verdict for insufficiency of evidence upon that point. A certificate of enrolment, purporting to have been issued at San Francisco by one Coey, "acting deputy collector of customs," initialed "W.," and signed by E. W. Marlin, deputy naval officer, as required by § 4332, Rev. Stat. (U. S. Comp. Stat. 1901, p. 2967), which recited that the vessel was solely owned by the National Oil & Transportation Company, a corporation organized under the laws of California, was introduced for the purpose of establishing that the vessel was of American nationality. There was also evidence that she carried the flag of the United States,—evidence admissible upon a mere question of nationality. *St. Clair v. United States*, 154 U. S. 134, 151, 38 L. ed. 936, 942, 14 Sup. Ct. Rep. 1002. The principal objection is that this certificate was not the original, but a copy, not sufficiently authenticated. The authentication was in these words:

District and Port of San Francisco.

I hereby certify the within to be a true copy of the original issued by this office.

Given under my hand and seal this 5 day of October 1907.

(Sgd.) N. S. Farley, [Seal.]

Deputy Collector of Customs.

W.

The requirements for registration are set out in § 4142 (U. S. Comp. Stat. 1901, p. 2809). The certificate in question was in form as required by § 4155.

There was evidence of a witness that he had himself received custom papers from the

customhouse at San Francisco, signed by Farley, and was familiar with the signature from its appearance upon ship licenses on board ships. He had never seen Farley write, and only identified the signature from familiarity with it obtained from this and other like official papers. He also said he was familiar with the seal of the customs officials at San Francisco.

The appointment of deputy collectors is provided for by §§ 2630, 2633, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 1812, 1813). By § 882, Rev. Stat. (U. S. Comp. Stat. 247] 1901, p. 669), copies of any *papers or documents, in any of the executive departments, under the seal of the proper department, are made admissible in evidence equally with the original.

There was no evidence whatever casting suspicion upon the genuineness of the copy or of the seal or the signature of Farley, and none which challenged in any way the American character of the ship. Under such circumstances and for the purposes of this case it was not error to assume that the document was genuinely executed by Farley, that he was what he claimed to be, a deputy collector of customs, and that his signature had been signed by himself or one authorized to sign for him. 3 Wigmore, Ev. § 2161.

There was no error, and the judgment is affirmed.

ST. LOUIS, KANSAS CITY, & COLORADO
RAILROAD COMPANY, Appt.,

v.

WABASH RAILROAD COMPANY and City
of St. Louis. (No. 57.)

ST. LOUIS, KANSAS CITY, & COLORADO
RAILROAD COMPANY, Petitioner,

v.

WABASH RAILROAD COMPANY and the
City of St. Louis. (No. 301.)

(See S. C. Reporter's ed. 247-257.)

Appeal — jurisdiction — intervention.

1. The decree of a Federal circuit court, entered pursuant to the mandate of a circuit court of appeals, upon a petition to enforce rights granted by a decree in intervention proceedings in a foreclosure suit, is not appealable to the Federal Supreme Court where the jurisdiction of the original foreclosure suit was based solely upon diverse citizenship, although, when the case went

NOTE. — On direct review in Federal Supreme Court of judgments of district and circuit courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

On certiorari from Federal Supreme Court to circuit courts of appeals—see note to *United States v. Dickinson*, 53 L. ed. U. S. 711.

back from the circuit court of appeals to the circuit court, the latter court authorized an amendment to the petition, alleging that the decree ordered by the circuit court of appeals failed to give full faith and credit to the original decree in the intervention proceedings.

[For other cases, see *Appeal and Error*, 785, 786, 970, in *Digest Sup. Ct. 1908.*]

Certiorari — to circuit court of appeals.

2. The power of the Federal Supreme Court to require a circuit court of appeals by certiorari to send up for review cases pending before the latter court extends to a case pending in that court on an appeal from a decree of a circuit court, entered pursuant to the mandate of the circuit court of appeals on a prior appeal.

[For other cases, see *Certiorari*, II., in *Digest Sup. Ct. 1908.*]

Certiorari — to circuit court of appeals.

3. Certiorari to a Federal circuit court of appeals should be granted by the Supreme Court in a case in which is involved the construction of a prior decree of a circuit court, affirmed by the Supreme Court, upon which depends the extent of the use by one railway company of the track, right of way, and terminal facilities of another, as well as the rights of access by the one company to industries established along the line of the other.

[For other cases, see *Certiorari*, II., in *Digest Sup. Ct. 1908.*]

Railroads — joint use — construction of decree.

4. The equal use and benefit of the entire ground owned by the Wabash, St. Louis, & Pacific Railway Company, and used by it for its terminal facilities in St. Louis, and not merely a right of way over its tracks running to the Union station, were granted to the St. Louis, Kansas City, & Colorado Railroad Company by a decree awarding to the latter road the equal use, on certain prescribed terms, of the right of way and tracks, side tracks, switches, turn-outs, turntables, and other terminal facilities of the former road at and between the north line of Forest park and Eighteenth street in the city of St. Louis.

[For other cases, see *Railroads*, VI., in *Digest Sup. Ct. 1908.*]

Railroads — joint use — construction of decree.

5. The right of the St. Louis, Kansas City, & Colorado Railroad Company to use terminal facilities in connection with industrial establishments now existing near the right of way of the Wabash, St. Louis, & Pacific Railway Company is included in a decree by which the former road was given the right, upon certain prescribed terms, which contemplated modification upon change in conditions, to use the right of way and tracks, side tracks, switches, turn-outs, turntables, and other terminal facilities of the latter road at and between the north line of Forest park and Eighteenth street in the city of St. Louis.

[For other cases, see *Railroads*, VI., in *Digest Sup. Ct. 1908.*]

Argued December 9, 1909. Decided April 11, 1910.

APPPEAL from the Circuit Court of the United States for the Eastern District of Missouri to review a decree entered pursuant to the mandate of the Circuit Court of Appeals for the Eighth Circuit upon a petition to enforce rights granted by a decree in intervention proceedings in a foreclosure suit. Dismissed for want of jurisdiction. Also a

PETITION for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to bring up for review a case pending in that court on an appeal from a decree of the Circuit Court for the Eastern District of Missouri, entered pursuant to the mandate of the Circuit Court of Appeals on a prior appeal upon a petition to enforce rights granted by a decree in intervention proceedings in a suit to foreclose a railway mortgage. Certiorari granted and decree of the Circuit Court modified so as to give the right to the intervening railway company to the use of the terminal facilities of the defendant railway company in connection with industrial establishments existing near the right of way of the latter company.

See same case below, No. 301, 81 C. C. A. 643, 152 Fed. 849.

The facts are stated in the opinion.

Mr. Frank Hagerman argued the cause, and, with Messrs. W. F. Evans and M. A. Low, filed a brief for appellant and petitioner:

The right of way included all terminal facilities.

New Mexico v. United States Trust Co. 172 U. S. 171, 43 L. ed. 407, 19 Sup. Ct. Rep. 128; New Mexico v. United States Trust Co. 174 U. S. 545, 43 L. ed. 1079, 19 Sup. Ct. Rep. 784; Chicago & A. R. Co. v. People, 98 Ill. 356; Lake Erie & W. R. Co. v. Middlecoff, 150 Ill. 27, 37 N. E. 669; Pfaff v. Terre Haute & I. R. Co. 108 Ind. 144, 9 N. E. 93.

The right to use is as broad as the necessities of a railroad. The word "use" is not new to the law books. In the civil law a use is defined as "the right which" a person has to use or enjoy the property of another according to his necessities.

Mulford v. Le Franc, 26 Cal. 88.

The use of the right of way was not limited to the use of a specific strip of land acquired for railroad purposes, but included the right to the terminal facilities adjacent thereto and connected therewith, especially as they were either built by or under contract with the railroad company, for its use with and as part of its railroad, and

parts of them were actually upon that specific strip.

Brunson v. Martin, 152 Ind. 118, 52 N. E. 601; Snow v. Columbian Ins. Co. 48 N. Y. 624, 8 Am. Rep. 578.

If the provisions of the original tripartite agreement were now being enforced, the construction of the parties as to their rights would be conclusive.

Chicago v. Sheldon, 9 Wall. 50, 54, 19 L. ed. 594, 596; Topliff v. Topliff, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057; Central Trust Co. v. Wabash, St. L. & P. R. Co. 34 Fed. 254; Long-Bell Lumber Co. v. Stump, 30 C. C. A. 260, 57 U. S. App. 546, 86 Fed. 574; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Thomas v. Cincinnati, N. O. & T. P. R. Co. 81 Fed. 919; New Orleans & N. E. R. Co. v. Meridian Waterworks Co. 18 C. C. A. 519, 30 U. S. App. 749, 72 Fed. 232; Metropolitan Nat. Bank v. Benedict Co. 20 C. C. A. 377, 36 U. S. App. 604, 74 Fed. 185; Fox Solid Pressed Steel Co. v. Schoen, 77 Fed. 30; Sanders v. Munson, 20 C. C. A. 581, 45 U. S. App. 32, 74 Fed. 619; Leete v. Pacific Mill & Min. Co. 88 Fed. 957; St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co. 32 C. C. A. 284, 60 U. S. App. 675, 89 Fed. 657; Lyman v. Kansas City & A. R. Co. 101 Fed. 636; Fitzgerald v. First Nat. Bank, 52 C. C. A. 276, 114 Fed. 478.

The decree in the main case should not be limited by construction.

Wechawken Ferry Co. v. Sisson, 17 N. J. Eq. 481.

Mr. James L. Minnis argued the cause, and, with Mr. Wells H. Blodgett, filed a brief for appellee and respondent:

For the purposes of an appeal or writ of error, the ground of jurisdiction in an intervention suit will be ascribed to that of the main case.

Rouse v. Letcher, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266; Gregory v. Van Fe, 160 U. S. 643, 40 L. ed. 566, 16 Sup. Ct. Rep. 431; Carey v. Houston & T. C. R. Co. 161 U. S. 115, 40 L. ed. 638, 16 Sup. Ct. Rep. 537; Rouse v. Hornsby, 161 U. S. 588, 40 L. ed. 817, 16 Sup. Ct. Rep. 610; Pope v. Louisville, N. A. & C. R. Co. 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500.

The defeated party may, at his election, appeal either to this court or the circuit court of appeals from a decree entered in the circuit court in a cause between citizens of different states, wherein constitutional questions are involved, but if he prosecutes his appeal to the circuit court of appeals, the decree of that court will be final, and he cannot thereafter prosecute an appeal to this court.

Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

If it were conceded that a constitutional question did not arise until the decision of the circuit court of appeals, the Colorado Company then might have applied to this court for a writ of certiorari, which this court might have, in its discretion, allowed at that stage of the proceedings.

Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665; Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493.

An appeal cannot be prosecuted from a decree entered in exact conformity with a mandate of an appellate court.

Stewart v. Salamon, 97 U. S. 361, 24 L. ed. 1044; United States v. New York Indians, 173 U. S. 464, 43 L. ed. 769, 19 Sup. Ct. Rep. 464; Illinois v. Illinois C. R. Co. 184 U. S. 77, 91, 46 L. ed. 440, 446, 22 Sup. Ct. Rep. 300; Roberts v. Cooper, 20 How. 467, 15 L. ed. 969; Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

The appeal allowed from the decree of the circuit court cannot be considered as an appeal from a decree of the circuit court of appeals.

Webster v. Daly, 163 U. S. 155, 41 L. ed. 111, 16 Sup. Ct. Rep. 961.

Mr. Chief Justice **Fuller** delivered the opinion of the court, after reading the following memorandum:

This opinion was prepared by our Brother **Brewer**, and had been approved before his lamented death. It was then recirculated, and is adopted as the opinion of the court.

On January 6, 1886, there was entered in **249**] the circuit court *of the United States for the eastern district of Missouri a decree of foreclosure and sale of the Wabash, St. Louis, & Pacific Railway Company, hereinafter called the Wabash Company. In that suit, before the execution of the deeds to the purchasing committee, a railway corporation known as the St. Louis, Kansas City, & Colorado Railroad Company (hereinafter called the Colorado Company) and the city of St. Louis intervened to compel the Wabash Company to give to the Colorado Company the use of its tracks and a right of entrance over them to the Union depot of that city. On that intervention a decree was entered finding the equities in favor of the interveners, and granting the Colorado Company the use of the tracks and right of way. 29 Fed. 546. On appeal to this court the decree of the circuit court on the interven-

tion was, on January 19, 1891, sustained. Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243.

A dispute having arisen as to the rights granted by that decree, a petition was filed at the March term, 1902, of the circuit court in the original foreclosure case to enforce those rights as the Colorado Company claimed they existed. A large amount of testimony was taken upon this application, and a decree entered April 2, 1906. Thereupon an appeal was taken to the circuit court of appeals for the eighth circuit, which, on April 3, 1907, reversed the decree and remanded the case "with directions to enter a decree not inconsistent with the views" expressed in the opinion of the court. 81 C. C. A. 643, 152 Fed. 849. The case went back to the circuit court, and after an amendment to the petition, which was allowed by the court, a decree was entered in obedience to the mandate, from which decree an appeal was again taken to the circuit court of appeals, and also to this court. On the appeal to the circuit court of appeals the record was filed in that court, and thereupon an application for a certiorari was made to this court, so that two cases are before us with records precisely alike, one the appeal from the circuit court directly to this court (being case No. 57) and the other the petition for a certiorari to the *court of appeals (being case No. 301. [**250** [This petition was filed and presented to the court November 30, 1908, and on December 7, 1908, consideration of the petition was postponed to be heard with No. 57.]

The Wabash Company has filed a motion to dismiss No. 57, the case appealed directly to this court. The jurisdiction of the original foreclosure suit was based solely upon diverse citizenship, and it has been repeatedly decided that the jurisdiction in the case of an intervention is determined by that of the main cause. Rouse v. Letcher, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266; Gregory v. Van Ee, 160 U. S. 643, 40 L. ed. 566, 16 Sup. Ct. Rep. 431; Carey v. Houston & T. C. R. Co. 161 U. S. 115, 40 L. ed. 638, 16 Sup. Ct. Rep. 537; Rouse v. Hornsby, 161 U. S. 588, 40 L. ed. 817, 16 Sup. Ct. Rep. 610; Pope v. Louisville, N. A. & C. R. Co. 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500.

If this be true in respect to an intervention, *a fortiori* must it be true in respect to a petition to enforce rights granted by the decree in the intervention. Nor is this rule changed by the fact that when this case went back from the circuit court of appeals to the circuit court, the latter court authorized an amendment to the petition, alleging that the decree ordered by the court of appeals failed to give full faith and credit to the original decree in the inter-

vention proceedings, for, as said in *Pope v. Louisville, N. A. & C. R. Co.* supra (p. 578):

"And this is true although another ground of jurisdiction might be developed in the course of the proceedings, as it must appear at the outset that the suit is one of that character of which the circuit court could properly take cognizance at the time its jurisdiction is invoked. *Colorado Cent. Consol. Min. Co. v. Turek*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Ex parte Jones*, 164 U. S. 691, 693, 41 L. ed. 601, 602, 17 Sup. Ct. Rep. 222; *Third Street & Suburban R. Co. v. Lewis*, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 451."

Further, the power of the circuit court was limited to the entry of a decree as ordered by the court of appeals, and it could not introduce new questions into the litigation without the permission of that court. *Ex parte Dubuque & P. R. Co.* 1 Wall. 69, 17 L. ed. 514; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291. Still further, the mere construction of a decree involves "no challenge of its validity. *Smithsonian Institution v. St. John*, 214 U. S. 19, 29, 53 L. ed. 892, 897, 29 Sup. Ct. Rep. 601, and cases cited in the opinion.

The motion to dismiss No. 57 must therefore be sustained with costs.

With reference to the application for a certiorari, the power of this court cannot be doubted. As said in *Forsyth v. Hammond*, 166 U. S. 506, 514, 41 L. ed. 1095, 1098, 17 Sup. Ct. Rep. 665, 669:

"We reaffirm in this case the propositions heretofore announced; to wit, that the power of this court in certiorari extends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency, provided the case is one which, but for this provision of the statute, would be finally determined in that court."

On the appeal to the circuit court of appeals the case was there pending for consideration and decree, and as, for reasons heretofore stated, an appeal to this court would not lie, the case can be brought here by certiorari.

The question, then, is whether the writ of certiorari ought to be granted. That question involves the construction of a prior decree of a United States circuit court, affirmed by this court. It is not a question of the payment of money, but of the extent of the use belonging to one railroad company in the tracks, right of way, and terminal facilities of another, as well as the rights of access by the one company to industries established along the line of the other. This, in view of the increasing number of industries in a great and growing

city like St. Louis, is of constantly enlarging importance, and ought, so far as possible, to be settled. It seems to us that both the private interests of the railroad companies and of the separate industries and the greater interests of the public call for the granting of the writ of certiorari, and it is therefore so ordered.

This brings before us the original decree on the intervention. That decree, and the facts upon which the original controversy arose, as well as those upon which the present dispute rests, will be found fully stated in 29 Fed. 546, 138 *U. S. 1, and [252 81 C. C. A. 643, supra, and need not be repeated. It is sufficient to say that the decree was founded upon contracts to which the railroad companies, or their predecessors, were parties, by which the Wabash Company agreed to "permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park, and up to the terminus of its road in the city of St. Louis, upon such terms, and for such fair and equitable compensation, to be paid to it therefor, as may be agreed upon by such companies." It provided that the Colorado Company should pay \$2,500 a month "for the use of the right of way, and tracks, side tracks, switches, turn-outs, turntables, and other terminal facilities of the said Wabash, St. Louis, & Pacific Railway at and between the north line of Forest park and Eighteenth street in the city of St. Louis," and that of these properties it should "enjoy the equal use and benefit." It apportioned the expense of maintaining on a wheelage basis this right of way and other property during such joint use.

Two principal questions are presented, each having reference to the existence of the rights granted by the intervention decree. The eastern line of Forest park is about 3 miles west of Eighteenth street, and at the time the decree was entered the Wabash Company owned a strip of land varying in width from 28 to over 200 feet, and extending from Eighteenth street to the east line of the park, and also had an easement for the passage of its trains and engines through the park upon a strip of land 42 feet wide from the east to the north side thereof. The ground owned by the Wabash is not, as stated, of equal width, portions having been obtained by deeds from different owners, some being only 28 feet in width and others extending quite a distance, so as to furnish room for round-houses and other terminal facilities. Now, it is contended that the only effect of this decree was to give to the Colorado Company the right to use the two continuous tracks from the north line of Forest

253] *park into the Union station; while, on the other hand, it is contended that it gave to the Colorado Company the equal use and benefit of the entire ground owned by the Wabash and used for its terminal facilities. Both the circuit court and the circuit court of appeals sustained the latter construction, and with that conclusion we concur. The terminal facilities, and not simply a right of way over the tracks of the Wabash running to the Union station, were granted by the decree. As said by Circuit Judge Sanborn, delivering the opinion of the court of appeals (p. 646):

"The ordinary signification of the term 'right of way,' when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes, is the entire strip or tract it owns or is entitled to use for this purpose, and not any specific or limited part thereof upon which its main track or other specified improvements are located. *Joy v. St. Louis*, 138 U. S. 1, 44-46, 34 L. ed. 843, 857, 858, 11 Sup. Ct. Rep. 243; *New Mexico v. United States Trust Co.* 172 U. S. 171, 181, 182, 43 L. ed. 407, 410, 411, 19 Sup. Ct. Rep. 128; *id.* 174 U. S. 545, 546, 43 L. ed. 1079, 1080, 19 Sup. Ct. Rep. 784; *Chicago & A. R. Co. v. People*, 98 Ill. 350, 356, 357; *Lake Erie & W. R. Co. v. Middlecoff*, 150 Ill. 27, 37 N. E. 660, 663; *Pfaff v. Terre Haute & I. R. Co.* 108 Ind. 144, 148, 9 N. E. 93, 95.

"To one ignorant of the origin and history of the rights of the contending parties, and unaware of the persuasive arguments of counsel, the reading of this decree would suggest, no doubt, that it granted the joint use of the entire strip owned by the Wabash Company, and of all the railroad facilities thereon between the east line of the park and Eighteenth street. Upon its face there is no ambiguity in its terms. They suggest no limitation or exception, and when the terms of a decree are plain and clear, their ordinary meaning and effect may not be lawfully contracted or extended unless it appears with reasonable certainty that such was the purpose of the court; for the legal presumption is that the judge carefully and thoughtfully expressed therein his deliberate intention. The Wabash Company, therefore, assumed no light burden when it **254]** essayed to *prove that the court intended by this decree to grant to the Colorado company the joint use of a strip only 30 feet in width out of the wider strip the Wabash Company owned between the east line of the park and Eighteenth street."

The other matter involves the question of the right of access to industrial establishments which have been built up near to the line of the Wabash road. As might

be expected in a growing city like St. Louis, there are now many such establishments, access to which has been obtained by the construction of tracks connecting them with the main tracks of the railway. The use of these connecting tracks, which were constructed under different arrangements with the various establishments, is claimed by the intervener, thus making itself a close and active competitor with the Wabash Company for their transportation business.

The general conclusion of the court of appeals is stated in these words (p. 657):

"The conclusion is that the Colorado Company is entitled to enjoy the joint and equal use of the entire strip of land between the east line of the park and Eighteenth street, which the Wabash owned or had acquired the right to use when the decree of 1886 was rendered, and of the tracks, side tracks, turn-outs, turntables, and terminal facilities now thereon. But it is not entitled to the use under that decree of any of the property, industrial or railway facilities of the Wabash Company, beyond the limits of that strip. *Union P. R. Co. v. Mason City & Ft. D. R. Co.* 199 U. S. 171, 50 L. ed. 139, 26 Sup. Ct. Rep. 19."

From the latter part of this conclusion Circuit Judge Hook dissented, and that presents the question now to be considered. We are of opinion that the circuit court of appeals erred, and that the views of Judge Hook are correct. That the matter was considered by the circuit court at the time of the original decree is evident from the opinion of the circuit judge, in which it was said (29 Fed. 559):

"The final matter is that of compensation. In this I think *the master erred. He **255** fixed the value of the right of way at a million of dollars; and reported that, in his judgment, the share of the interest on this value and in the expenses of keeping up the track, which the intervener company should pay, should be fixed upon a wheelage basis. So far as respects the mere matter of keeping up the track, I see no reason to doubt the justice of the rule fixed by the master; but in regard to the interest on the value, I think the intervener should pay one half of that, and for these reasons: It is a familiar fact that in a large city like St. Louis, along the track of an important railroad, within the city limits, are built large manufacturing establishments, warehouses, and other buildings for the convenient trans-action of business between the carrier, on the one hand, and the manufacturer and the merchant on the other. Another road coming over the same track not only uses the property, of great value, which the company owner has in the first instance paid for, but also shares in the benefit of access;

to all these manufacturies, warehouses, etc. It thus places itself in competition with the original company for this valuable business. Such competition may operate to diminish the business of the original company, or compel it to lower its rates to preserve the business. In either way it operates to the serious detriment of the original company. The new company comes in as an equal competitor. It shares in all the benefits of this business, and it may share equally. Under those circumstances it seems to me no more than fair that a new company, which crowds itself into an equal access to such benefits and such privileges, should pay an equal share of the interest on the value of the property. Hence I shall sustain the objections of the respondent to the report of the master, so far as concerns the amount of compensation, and I think that the intervener company must pay one half the interest on the value, and its share of the cost of keeping up the track, determined upon a wheelage basis. In other respects the report of the master will be confirmed." 256] *That is an interpretation of the language of the intervention decree giving the use of the right of way, side tracks, switches, turn-outs, turntables, and other terminal facilities. It is doubtless true that a connection with these industrial establishments has become a matter of far greater importance than at the time of the decree. If it be said that this has cast an unexpected burden upon the Wabash, it must also be remembered that provision was made for such unexpected changes. As said in the opinion (p. 558):

"An act of the legislature might be passed, giving to one company the right to use the tracks of another, and prescribing all the terms and conditions,—the details for the use. I take it, an act of the legislature would also be valid which simply declared that one company should have the right to use the tracks of another upon such terms and conditions as the parties might agree upon, or should be prescribed by the courts; and if such a legislative act would have to be adjudged valid and complete, I see no satisfactory reason why courts may not also hold sufficient and valid a mere contract for the right, and, determining the right, also settle and prescribe the terms of the use. It is true that such a decree cannot be executed by the performance of a single act. It is continuous in its operation. It requires the constant exercise of judgment and skill by the officers of the corporation defendant; and therefore, in a qualified sense, it may be true that the case never is ended, but remains a permanent case in the court, performance of whose decree may be the subject of re-

54 L. ed.

peated inquiry by proceedings in the nature of contempt. It is also true that, in the changing conditions of business, the details of the use may require change. The time may come when the respondent's business may demand the entire use of its tracks, and the intervener's right wholly cease. But other decrees are subject to modification and change, as in decrees for alimony. The courts are not infrequently called to modify them by reason of the changed condition of the parties thereto. So, when a decree passes in a case of this kind, it *re-[257] mains as a permanent determination of the respective rights of the parties, subject only to the further right of either party to apply for a modification upon any changed condition of affairs; and, so far as any matter of supervision of the personal skill and judgment of the officers of the respondent corporation, the contract, in terms, provides that the regulation of the running of trains shall be subject to the control of the officers of the respondent."

See also the opinion of this court in 138 U. S. 1, 47.

The decree of the Circuit Court of December 20, 1907, is therefore modified in accordance with the views we have expressed as to terminal facilities in connection with the industrial establishments now existing near the right of way of the Wabash Company. If that company shall desire, it may apply for a valuation of the additional properties of which the equal use and enjoyment is given to the intervener, and upon that valuation the same per cent shall be paid by the intervener. The costs, except so far as they have been already taxed, shall be charged against the respondents.

LUTCHER & MOORE LUMBER COMPANY
and H. J. Luteher, Petitioners,

v.

WILLIAM H. KNIGHT et al.

(See S. C. Reporter's ed. 257-268.)

Appeal — questions not raised below — day in court.

1. Plaintiffs in error in a Federal circuit court of appeals are substantially denied their day in court by an affirmance of the judgment below on the ground that the defenses relied upon were of an equitable nature, not cognizable in a court of law, where the trial court, with the acquiescence of all parties, treated the defenses interposed by the answer as legal in their nature, and no such question was raised by either party or considered when the cause was submitted to the circuit court of appeals.

[Considering questions not raised below, see Appeal and Error, VIII. 1, in Digest Sup. Ct. 1908.]

Appeal — remanding cause — to what court.

2. The circuit court of appeals, and not the circuit court, is the court to which the cause will be remanded by the Federal Supreme Court for hearing and decision upon reversing, on certiorari, a judgment of the circuit court of appeals which affirmed a judgment of the circuit court on the ground that the defenses relied upon below were of an equitable nature, not cognizable in a court of law, while the trial court, with the acquiescence of all parties, treated the defenses interposed by the answer as legal in their nature, and no such question was raised by either party or considered when the cause was submitted to the circuit court of appeals.

[For other cases, see Appeal and Error, 5495-5498, in Digest Sup. Ct. 1908.]

[No. 101.]

Argued January 24, 1910. Decided April 11, 1910.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of Louisiana in favor of plaintiffs in an action to establish rights in real property. Reversed and remanded to the Circuit Court of Appeals for further proceedings.

See same case below, 84 C. C. A. 679, 156 Fed. 1022.

The facts are stated in the opinion.

Mr. A. P. Pujo argued the cause, and, with Messrs. George E. Holland, Pujo, Moss, & Sugar, and Holland & Holland, filed a brief for petitioners.

Mr. M. J. Cunningham argued the cause, and, with Mr. M. J. Cunningham, Jr., filed a brief for respondents.

Mr. Justice White delivered the opinion of the court:

On July 28, 1882, Dan R. Knight and John A. Lovett sold to William J. Knight several tracts of land situated in the state of Louisiana. The price stated in the act of sale was \$15,000, \$500 cash and the balance, \$14,500, on credit, evidenced by a note of the purchaser. On February 5, 1887, W. J. Knight sold to Viola P. Knight, wife of Dan R. Knight, a one-half interest, and on February 7, 1887, he sold to J. C. Knight a one-fourth interest in the same lands. The remaining one-fourth interest was parted with by an act of sale dated April 13, 1889, wherein W. J. Knight joined with Viola P. Knight and John C. Knight in selling the entire land to Henry J. Luteher and G. Bedell Moore. On April 3, 1901, Moore sold his undivided one-half interest to

the Luteher & Moore Lumber Company. All these acts of sale were duly recorded in the proper land conveyance records.

*In March, 1903, William H. Knight, [259 his brother and two sisters, one a married woman, whose husband joined in the suit as a merely technical party, commenced this action in the state district court of Vernon parish, Louisiana, against Henry J. Luteher and the Luteher & Moore Lumber Company, asking to be adjudged the owners of and to be entitled to the possession of an undivided half interest in the lands bought by William J. Knight in 1882 from D. R. Knight and John A. Lovett. The right of ownership was based upon the averment that the petitioners were children of William J. Knight; that the property bought by him was acquired during the marriage between their father and mother; that it formed a part of the community existing between them, and constituted an *acquêt* of the community at the time of the death of the mother in August, 1885. The right of the father to sell, in 1887 and 1889, the one-half interest belonging to their mother, as the result of her community estate, was denied, and it was charged that the defendants, who were in possession in virtue of the attempted sale made by the father, were mere trespassers. It was besides averred that William J. Knight, the father, married a second time, in June, 1886.

Because of diversity of citizenship the cause was removed into the circuit court of the United States for the western district of Louisiana. In that court the defendants answered. In addition to averring that the petition disclosed no cause of action, and denying generally all the allegations of the petition not expressly admitted, it was averred: That William J. Knight had never intermarried with the mother of the petitioners; that even if there had been such a marriage and a community resulting from it, the property sued for was not an *acquêt* of such community, because it was the separate property of W. J. Knight, as no cash price was ever paid by him for the property and no note given, as recited in the notarial act of sale, and, although the transaction was put in the form of a sale, it was only ostensibly so, having been merely intended to be a donation to him of the property. It was, however, *moreover alleged that [260 the property never formed part of a community existing between Knight and his alleged first wife, even if there was such community, because the property was conveyed to him under a secret agreement, for the benefit of his vendors, and that all the subsequent transfers were in pursuance of such agreement. It was further alleged that the sales to the defendants were executed

in good faith, for valuable considerations, without notice or knowledge of the claims of plaintiffs, Knight being then married, and there being no evidence of record of a previous marriage or of the death of the alleged previous wife. In a further paragraph of the answer it was claimed "that the pretended sale made July 28, 1882, to said William J. Knight, was a simulation and a fiction," and that the seeming grantors made said pretended sale for the sole purpose of screening said property from the pursuit of their creditors; "that the property never became community property, but always belonged to said Knight and Lovett, as William J. Knight and his alleged wife and all parties well knew, until the sale made April 13, 1889, by W. J. Knight, John C. Knight, and Viola P. Knight to Henry J. Lutchter and G. Bedell Moore." The respective interests of the defendants in the land were next averred, their vendors were called in warranty, and it was prayed that, in the event of eviction, defendants might recover of their warrantors the proportionate amount of the purchase price which they had received. An amendment to the answer was subsequently filed October 27, 1903, amplifying the claim that the sale in 1882 to William J. Knight was not bona fide, but was for the benefit of the grantors, and included both movable and immovable property belonging to said vendors, and averring that the \$500 recited cash consideration was paid, but with money of the grantors, and that a note was executed, but with no intention to pay the same or to demand payment thereof, and that it was in fact redelivered to Knight without his making payment, and it was averred that the pretended sale constituted only a paper title to the property, "and same never in fact nor in law became 261] the *property of the community between him and his so-called wife; and no interest whatever in said property vested in said community, and the said plaintiffs herein are without right or equity to any right, title, or interest in the said lands." The prescriptions of one, two, four, five, and ten years were also pleaded.

As expressly stated in the argument, both by counsel for the petitioners in error and by counsel for the respondents, and as appears from recitals contained in a petition for rehearing printed in the record, to which we shall hereafter more particularly refer, the defendants, who had removed this action to the circuit court in December, 1903, filed in that court their bill of complaint, in which they made the plaintiffs in this action defendants. The bill, after substantially reiterating the averments which we previously recited, and which were contained in the answer filed in this cause, prayed that

the further prosecution of the action at law be perpetually enjoined. The right to prevent the further prosecution of the action was based on the assertion that the law action "clouded your orators' title to the land in suit; that your orators' defenses are equitable, and that the pendency of said suit and the cloud cast on your orators' title works irreparable injury and damage to you orators, and that they have no adequate remedy at law."

The following demurrer was interposed to the bill of complaint:

"First. Plaintiffs are estopped from attacking their own title.

"Second. The deed under which the defendants claim has been adjudged a good and valid title.

"Third. The complaint comes too late, the defendants having filed a suit in law, and the plaintiffs have answered to their demands, in which they set up a defense which, if sustained, will be adequate in law.

"Fourth. That the allegations of plaintiffs' bill of complaint is simply a reiteration of their answer in suit No. 276 in the *circuit court of the United States for [262 the western district of Louisiana, at law, and that the allegations therein contained and set forth set up a plea of estoppel *in pais*, and constitute a complete and adequate remedy at law.

"Fifth. That the bill of complaint discloses no right or cause of action.

"Finally. Defendants especially demur to the right of plaintiffs to bring their bill in equity, as neither the law nor the jurisprudence of this state authorizes or provides suits in equity, and especially is this so as to real estate situated in the state. Hence, defendants move that the injunction herein asked for be denied. That this branch of the case be dismissed to plaintiffs' cost, and suit No. 276 be proceeded with according to law."

After argument, and on February 16, 1904, a decree was entered in favor of the respondents, in which it was recited that "the court sustained the demurrer and dismissed the suit at cost of complainants." This action, which had in the meanwhile been pending in the circuit court, upon the issues made up as heretofore stated, was tried, and resulted in a verdict and judgment in favor of the defendants. Error having been prosecuted from the circuit court of appeals, in that court, on April 4, 1905, the judgment was reversed and the cause remanded. The court did not pass upon the merits, because it found that the citizenship of the Lutchter & Moore Lumber Company, the corporation defendant, was not adequately averred in the petition for removal, and therefore the proper basis for jurisdiction

in the court below had not been laid (69 C. C. A. 248, 136 Fed. 404), and a petition for rehearing was refused (71 C. C. A. 684, 139 Fed. 1007).

In the circuit court, after the receipt of the mandate of the circuit court of appeals, plaintiffs objecting and excepting, the defendants, in accordance with leave granted, amended the averments of citizenship in the petition for removal so as to cause them to be in all respects adequate. Subsequently, upon grounds which it is not necessary to [263] state, plaintiffs *filed a paper styled a demurrer to portions of the answer of the defendants, and pleas of *res judicata* and estoppel. The case was tried the second time to a jury in October, 1906. During the progress of the trial the deposition of J. A. Lovett, one of the original vendors of Knight, was offered by the defendants. The testimony tended to show that the note for \$14,500, described in the act of sale by which Knight had acquired the property as having been given as part of the purchase price, had not been paid by him prior to the death of his first wife, and that it had subsequently been paid out of the purchase price realized from the various sales which were assailed, and that the amount was therefore a debt of the community, and the plaintiffs, as heirs of their mother, could not attack the sales without tendering their share of the community debt, which had been paid as the result of the sales. This testimony was excluded by the court, because, among other reasons, it was held not to be competent under the defenses made in the answers. Thereupon the defendants requested to be allowed to amend on the ground that, on the former trial, the testimony had been admitted as within the issues arising from the answers, and that the defendants "therefore took no steps to provide for the contingency of a change in the opinion of the court by amending their answers so as to clearly make such defenses admissible." To the action of the court in refusing to allow this amendment an exception was taken. Differing from the first trial, there was a verdict in favor of the plaintiffs, upon which judgment was entered. Various exceptions additional to those to which we have just referred were taken by the defendants. Without going into detail, it suffices to say that these exceptions were varied in character, embracing all the defenses made in the answers, and covered rulings of the court on the admission and rejection of evidence and the refusal to give requested instructions. On error the case again went to the circuit court of appeals for the fifth circuit, and as the result of the numerous exceptions tak- [264] en below, the assignments *of error in 760

substance presented for decisions the many questions raised in the trial court.

The circuit court of appeals affirmed the judgment of the trial court, and the opinion delivered by it is as follows: "By the court: After a thorough and attentive consideration of the questions raised on this writ, we are of opinion that the matters of defense relied upon by plaintiffs in error on the trial below, in so far as they were not given consideration, were of an equitable nature, not cognizable in a court of law. We therefore affirm the judgment of the circuit court." [84 C. C. A. 679, 156 Fed. 1022.] A lengthy petition for rehearing was filed on December 26, 1907, and a few days thereafter there was also filed what was styled "Motion by plaintiffs in error to withhold mandate, stay proceedings, and order trial of the equitable issues, with suggestions of *res judicata* and waiver." Both in the petition and in the motion, counsel contended that, contrary to the ruling of the circuit court of appeals, the trial court held all the issues properly triable on the law side of the court, and that the plaintiffs in this action never at any time suggested that any of the matters of defense were equitable, and to dispose of the cause as the court had done would deprive the defendants of their rights, and entail great hardship upon them. The defendants also incorporated in the motion the bill of complaint filed in the equity cause heretofore referred to, and which was instituted by them to enjoin the prosecution of this action, as also the demurrer and the decree of dismissal. In connection therewith the suggestion was made that the decree in said cause ought, in conscience, to be treated as *res judicata* of the question of the nature of the defenses interposed in this action. Elaborate argument was advanced to sustain the contention that the defenses introduced amounted only to a denial of the case made by the plaintiffs, and that the evidence excluded by the trial court should have been received, and upon the undisputed record a verdict should have been directed for the defendants below. The appellate court was asked to allow an oral argument of the *petition for re- [265] hearing: "In view of the fact that the case has been disposed of on questions not raised by either party, and not considered when this cause was submitted, and in view of the attitude of the trial court with reference to the defenses being at law, and not in equity, and in view of the attitude plaintiffs in error have been placed in, because of this question having been determined adversely to their rights for the first time in this court." The record does not show that any formal disposition was made of the petition for re-

hearing, and the motion to which we have referred, other than an entry, dated January 22, 1908, reading as follows: "Ordered, that the issuance of mandate in this case be, and it is hereby, stayed for thirty days from this date." The case thereupon came here in consequence of the allowance of a writ of certiorari.

The record unquestionably establishes that the circuit court, with the acquiescence of all parties, treated the defenses interposed by the answer of the defendants as legal in their nature. Aside, however, from the strict record, both the respondents and the petitioners call our attention to the transcript containing the proceedings in the equity cause. Indeed, counsel for respondents particularly press upon our attention that the defendants below, plaintiffs in the equity cause, acquiesced in the decree entered against them in the circuit court in such cause by not appealing therefrom, and that "it binds and estops them from now urging the same matters set up in that bill." There is no denial, but, on the contrary, by necessary implication, counsel for respondents admit the truth of the statement made in the petition for rehearing, filed in the circuit court of appeals, that the cause was disposed of by that court "on questions not raised by either party, and not considered when this cause was submitted," and contrary to the "attitude of the trial court with reference to the defenses being at law, and not in equity."

It is a reasonable inference that when, after the removal of the cause, the defendants filed their bill of complaint, setting 266] *up the defenses which they had urged in their answer in this action, such course must have been suggested by the fact that the distinction between law and equity did not prevail in the courts of the state of Louisiana, and that therefore it was well for them, after they had removed the cause into a court of the United States, to seek to conform to the practice there prevailing, and, in any event, to pursue a course which would render it certain that, in the new forum, they would not be deprived, because of the form of pleading, of their right to have their defenses passed upon. The plaintiffs in the action at law (this action), who were the defendants in the equity cause, having, as a defense to that cause, insisted that the defenses were not cognizable in equity, and having prevailed in such contention, were certainly in conscience placed in a position where they could not, by a change of attitude, assert that the defenses were legal in their nature, and thus deprive the defendants of all means of defense in this action. Indeed, the record does not intimate that

they sought to do so, since it affirmatively establishes that the plaintiffs in this action, after having obtained as respondents the adjudication in their favor in the equity cause,—an adjudication which was as well binding upon them as upon the complainants,—acquiesced in the decree,—an acquiescence which was manifestly concurred in by the opposing parties and sanctioned by the trial court. The case is altogether unlike that which would be presented by an objection urged by the respondents to a bill in equity, against the power of the court to exert jurisdiction over a cause of action indisputably cognizable only in a court of law whereby a deprivation of the constitutional right of trial by jury would result. In this case, on the contrary, the question considered did not concern the inherent jurisdiction of the court over the subject-matter. The decision of the question before us is controlled by the case of *Burbank v. Bigelow*, 154 U. S. 558, Appx., and 19 L. ed. 51, 14 Sup. Ct. Rep. 1163. That was an action at law in which the plaintiff recovered judgment. In this court, for the first time, the objection was made by the unsuccessful *party that the matter of the demand [267 of plaintiff was one of equitable cognizance. The court, however, said (p. 559):

"The objection that the matter of plaintiff's demand is one of equitable cognizance in the Federal courts cannot prevail. No such objection was raised in the court below at any stage of the proceedings, and it cannot be permitted to a defendant to go to trial before a jury on the facts of a case involving fraud, and let it proceed to judgment on the verdict without any attempt to assert the equitable character of the suit, and then raise that question for the first time in this court."

Applying this doctrine to the facts and circumstances which we have previously stated, we are of opinion that it inevitably results that the effect of the action of the circuit court of appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard.

It is undoubted that by the operation of the writ of certiorari, granted in accordance with the provisions of the judiciary act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488], the entire record is before us, with power to decide the case as it was presented to the circuit court of appeals, by reason of the writ of error issued out of that court. Certain is it also that the judiciary act of 1891 contemplates that, as a general rule, where, under its provisions, a case comes to this

court on certiorari to a circuit court of appeals, it will be disposed of so that the mandate of this court, to avoid circuitry, will go directly to the circuit court. The great purpose of the act of 1891, however, to which all its provisions are subservient, is to distribute the jurisdiction of the courts of the United States, and thus to relieve the docket of this court by easting upon the circuit courts of appeal the duty of finally deciding the cases over which the jurisdiction of those courts is by the act made final. The power to issue certiorari in accordance with the act, in its essence, is only a means to the end that this imperative and responsible 268] duty may be *adequately performed. As it is patent from the statement we have made that the only ground upon which the power to issue certiorari could have been exerted was the failure of the court below to consider the case before it, we think this record presents an exception to the general rule of procedure above referred to. In other words, in a case like this we think the judgment of the circuit court of appeals must be reversed, and the case be remanded to that court, to the end that the duty to hear and decide it may be performed. To hold otherwise would be repugnant to the plain intent of the act of 1891, since it would recognize a practice by which the concededly essential purpose of the act of 1891 could be disregarded or be made practically of no avail.

The judgment of the Circuit Court of Appeals is reversed and the case is remanded to that court for further proceedings in conformity with this opinion.

JOHN C. McCLELLAN, James S. McClellan, William S. McClellan, et al., Petitioners,

v.

JOHN E. CARLAND, U. S. District Judge for the District of South Dakota.

(See S. C. Reporter's ed. 268-284.)

Certiorari — from Supreme Court — when may issue.

1. The Federal Supreme Court may issue certiorari to bring up for review the denial by a circuit court of appeals of an original application for mandamus to compel the judge of a circuit court to proceed with and determine an action pending before it, since the power of the Supreme Court to issue certiorari is not limited to the cases mentioned in the circuit courts of appeals act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), but the writ may issue in the exercise of the power, under U. S. Rev. Stat. § 716, U. S. Comp. Stat. 1901, p. 580, to issue all writs not specifically provided for by the statute,

762

which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law.

[For other cases, see Certiorari, II., in Digest Sup. Ct. 1908.]

Mandamus — from circuit court of appeals — in aid of appellate jurisdiction.

2. Mandamus to require a Federal circuit court to proceed with and determine a pending suit which it has stayed to await the commencement and prosecution to final judgment of a suit in a state court may be issued by a circuit court of appeals as in aid of its appellate jurisdiction under the act of March 3, 1891, § 12, giving the circuit courts of appeals the powers specified in U. S. Rev. Stat. § 716, U. S. Comp. Stat. 1901, p. 580, to issue all writs not specifically provided for by statute, and necessary for the exercise of the court's jurisdiction, and agreeable to the usages and principles of law. [For other cases, see Mandamus, 39-47, in Digest Sup. Ct. 1908.]

Federal courts — conflict of jurisdiction — probate and administration proceedings.

3. The chancery jurisdiction of the Federal courts embraces a suit, where the requisite diversity of citizenship exists, to have the complainants adjudicated to be the heirs at law and next of kin of a decedent.

[For other cases, see Courts, 1397-1406, in Digest Sup. Ct. 1908.]

Federal courts — staying pending action to await suit in state court.

4. A suit within the original jurisdiction of a Federal circuit court, to have the complainants adjudicated to be the heirs at law and next of kin of a decedent, cannot be

NOTE. — As to certiorari in United States courts—see note to Clark v. Hackett, 17 L. ed. U. S. 69.

On certiorari from Federal Supreme Court to circuit court of appeals—see note to United States v. Dickinson, 53 L. ed. U. S. 711.

On mandamus in aid of appeals—see note to Lewis v. Baltimore & L. R. Co. 10 C. C. A. 450.

On mandamus in exercise of superintending control over inferior courts—see note to State ex rel. Fourth Nat. Bank v. Johnson, 51 L.R.A. 33.

On mandamus to control inferior tribunal—see note to Re Morgan, 29 L. ed. U. S. 135.

As to conflict of jurisdiction between Federal and state courts—see notes to Louisville Trust Co. v. Cincinnati, 22 C. C. A. 356, and J. I. Case Plow Works v. Finks, 26 C. C. A. 50.

On pendency of action in state or Federal court as ground for abatement of action in other—see notes to Willson v. Milliken, 42 L. R. A. 449; Bunker Hill & S. Min. & Concentrating Co. v. Shoshone Min. Co. 47 C. C. A. 205; and Barnsdall v. Waltemeyer, 73 C. C. A. 521.

On the probate jurisdiction of the Federal courts—see note to Bedford Quarries Co. v. Thomlinson, 36 C. C. A. 276.

stayed by that court to await the commencement and prosecution to final determination of a suit to be brought in a state court, on behalf of the state, to determine an escheat of the estate.

[Conflicting jurisdiction in probate and administration proceedings, see *Courts*, 1588-1597, in *Digest Sup. Ct.* 1908.]

Certiorari — hearing — what considered.

5. The Federal Supreme Court will determine a cause brought before it by certiorari to a circuit court of appeals upon the record made in that court, and certified to the Supreme Court.

[For other cases, see *Certiorari*, II. c, in *Digest Sup. Ct.* 1908.]

[No. 630.]

Argued January 25, 26, 1910. Decided April 11, 1910.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review the denial of an original petition for mandamus to compel the judge for the Circuit Court for the District of South Dakota to proceed with and determine an action pending in that court. Reversed.

The facts are stated in the opinion.

Mr. **Melvin Grigsby** argued the cause, and, with Messrs. Grigsby & Grigsby, filed a brief for petitioners:

Could the circuit court rightfully stay proceedings of an action there pending to await the commencement and determination of another action in a state court?

Barber Asphalt Paving Co. v. Morris, 67 L.R.A. 761, 66 C. C. A. 55, 132 Fed. 945; *Harkrader v. Wadley*, 172 U. S. 150, 43 L. ed. 399, 19 Sup. Ct. Rep. 119; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Lang v. Choctaw, O. & G. R. Co.* 87 C. C. A. 307, 160 Fed. 359; *Gordon v. Longest*, 16 Pet. 97, 10 L. ed. 900; *Re Langford*, 4 Inters. Com. Rep. 437, 57 Fed. 570.

Could the circuit court properly stay proceedings on the ground that it was necessary for the protection of the state of South Dakota, the state having appeared in that court, claiming to be an interested party?

United States v. Peters, 5 Cranch, 115, 3 L. ed. 53; *South Carolina v. Wesley*, 155 U. S. 543, 39 L. ed. 254, 15 Sup. Ct. Rep. 230; *The Exchange v. M'Faddon*, 7 Cranch, 116, 3 L. ed. 287; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Stanley v. Schwalby*, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418; *Tindal v. Wesley*, 167 U. S. 204-206, 42 L. ed. 137, 138, 17 Sup. Ct. Rep. 770; *Carr v. United States*, 98 U. S. 433, 25 L. ed. 209.

54 L. ed.

The circuit court had jurisdiction of the suit.

Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Ingersoll v. Coram*, 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 92.

Mr. **Frederic D. McKenney** argued the cause, and, with Messrs. S. W. Clark and U. S. G. Cherry, filed a brief for respondent.

The courts of the United States have no power to acquire jurisdiction of a case or question by issuing a writ of mandamus. Their authority in this regard is limited to the issuance of writs of mandamus in aid of their appellate jurisdiction and in such cases as are already pending, and wherein jurisdiction has been obtained on other grounds and by other process.

M'Clung v. Silliman, 6 Wheat. 601, 5 L. ed. 341; *M'Intire v. Wood*, 7 Cranch, 504, 3 L. ed. 420; *Kendall v. United States*, 12 Pet. 524, 9 L. ed. 1181; *Riggs v. Johnson County*, 6 Wall. 166, 197, 198, 18 L. ed. 768, 776, 777; *The Secretary v. McGarrahan (Cox v. United States)* 9 Wall. 311, 19 L. ed. 583; *Bath County v. Amy*, 13 Wall. 244, 20 L. ed. 539; *Graham v. Norton*, 15 Wall. 427, 21 L. ed. 177; *Green County v. Daniel*, 102 U. S. 187, 26 L. ed. 99; *Davenport v. Dodge County*, 105 U. S. 237, 26 L. ed. 1018; *Smith v. Bourbon County*, 127 U. S. 105, 32 L. ed. 73, 8 Sup. Ct. Rep. 1043; *United States ex rel. Fisher v. Williams*, 14 C. C. A. 440, 32 U. S. App. 126, 67 Fed. 384; *United States ex rel. Harless v. United States Ct. App. Judges*, 29 C. C. A. 78, 56 U. S. App. 33, 85 Fed. 179; *Re Forsyth*, 78 Fed. 301; *Waite v. Santa Cruz*, 89 Fed. 619; *Shepard v. Tulare Irrig. Dist.* 94 Fed. 3; *Rosenbaum v. Supervisors*, 28 Fed. 223.

If the circuit courts of appeals have the power to issue writs of mandamus at all, that power is derived from the provisions of § 716 of the Revised Statutes, as read into the circuit courts of appeals act by the terms of § 12 thereof; and it seems to have been settled beyond dispute that such courts in any event can issue such writ only in aid of their appellate jurisdiction, and in the exercise of their discretionary authority.

Barber Asphalt Paving Co. v. Morris, 67 L.R.A. 761, 66 C. C. A. 55, 132 Fed. 945; *Re Paquet*, 52 C. C. A. 239, 114 Fed. 437; *Travis County v. King Iron Bridge & Mfg. Co.* 34 C. C. A. 620, 92 Fed. 690; *United States ex rel. Iron County v. Severens*, 18 C. C. A. 314, 37 U. S. App. 622, 71 Fed. 768.

Where the order or judgment of a state court in proceedings for administration depends upon the question as to whether the party claiming the right to administer such estate is next of kin or heir at law of the

intestate, such order or judgment is conclusive upon that question until vacated or reversed in any and all subsequent suits or proceedings, whether in the state or Federal courts. Such order or judgment, until vacated or reversed, is pleadable in bar and as *res judicata* in such subsequent proceedings.

Caujolle v. Ferrié (*Canjolle v. Curtiss*) 13 Wall. 465, 20 L. ed. 507; *Howell v. Budd*, 91 Cal. 342, 27 Pac. 747; *Woerner, Am. Law of Administration*, 2d ed. p. 1234; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Farrell v. O'Brien* (*O'Callaghan v. O'Brien*) 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727.

It is a law and rule of property in the state of South Dakota that the order or decree of the probate court must name the persons and the proportions or parts to which each are entitled before any right of action accrues in favor of an heir, devisee, or legatee to recover from an administrator; and it is a like law and rule of property that the final order and decree is conclusive as to the rights of heirs, legatees, or devisees, and can only be reversed, set aside, or modified on an appeal; and that no suit *inter partes* in any court of the state is provided for other than a direct or ancillary proceeding in the probate court.

Carrau v. O'Calligan, 60 C. C. A. 347, 125 Fed. 657; *Richardson v. Green*, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 423.

Statutes and laws of the state pertaining to probate are not merely rules of practice for the courts, but are laws limiting rights of parties, and must be observed by the Federal courts in the enforcement of individual claims of right.

Byers v. McAuley, *supra*.

The Federal circuit court was without jurisdiction to entertain this action for lack of indispensable parties. To a suit in a Federal court, brought to establish a claim of heirship to a decedent, all persons claiming to be sole heirs or to be entitled to the estate adversely to the complainants, and who have asserted their claims by appropriate proceedings in the probate court, are indispensable parties.

Carrau v. O'Calligan, *supra*.

The application of the state of South Dakota for leave to intervene in the circuit court of the United States was in accordance with the usage sanctioned by prior rulings of this court.

Gumber v. Pitkin, 124 U. S. 143, 31 L. ed. 378, 8 Sup. Ct. Rep. 379; *Krippendorf v. Hyde*, 110 U. S. 276, 283, 28 L. ed. 145, 148, 4 Sup. Ct. Rep. 27; *Florida v. Georgia*, 17 How. 478, 15 L. ed. 181.

Mr. Justice Day delivered the opinion of the court:

This case comes here upon a writ of certiorari to the circuit court of appeals for the eighth circuit. In that court McClellan and others, petitioners, filed a petition for a writ of mandamus against the United States district judge for the district of South Dakota, praying a writ of mandamus to said judge, sitting as a judge of the circuit court of said district, commanding him to set aside and vacate certain orders staying proceedings in an action pending in the circuit court, and to proceed to try and determine the suit in the usual course of procedure, without regard to the pendency of certain proceedings, to be hereinafter referred to, in the courts of the state of South Dakota. The circuit court of appeals, upon the petition for a writ of mandamus being presented to it, denied the prayer thereof and dismissed it. Thereafter this court granted the writ of certiorari.

From the transcript of the record of the case in the circuit court of appeals it appears that petitioners and others, on the 8th day of September, 1908, commenced suit against George T. Blackman, special administrator of the estate of John C. McClellan, deceased, and others, in the circuit court of the United States for the district of South Dakota, in which suit complainants were citizens of states other than South Dakota, and respondent, George T. Blackman, a citizen of South Dakota, was sued as special administrator of the estate of John C. McClellan, deceased. The bill set up that complainants were the sole surviving heirs at law and next of kin of John C. McClellan, deceased, who died on or about the 31st of August, 1899, intestate, in the city of Sioux Falls, county of Minnehaha, South Dakota, leaving an estate of real and personal property of the value of about \$33,000. The bill sets out the issuing of letters of administration to one William Van Eps, who held possession of the estate until July 12, 1906, when he died; that subsequently thereto special letters of administration were issued to George T. Blackman, the respondent. The bill further avers that there were in possession of said Blackman, as said special administrator, belonging to said estate, assets in excess of the sum of \$35,000, consisting of real estate, cash on hand, etc. The bill avers that there were no claims against the estate, and that all the creditors of John C. McClellan had been paid, and that the estate was ready for distribution according to the laws of South Dakota. The bill further prayed that the complainants might be adjudicated the sole heirs at law and next of kin of said decedent, and entitled to inherit the [276

estate, real and personal, and that the said Blackman render a just and true account of the property in his hands belonging to said estate, and, after deducting his lawful fees and expenses, be required to distribute the same in certain proportions to the complainants, as heirs at law of the decedent. The defendant Blackman appeared and answered the bill, admitting certain allegations thereof, and denying others, and demanding proof thereof, and stating that he held the property described in the bill of complaint subject to the order of the court. A general replication was filed to the answer, and thereupon it appears that the state of South Dakota came, by its attorney general and its attorney for the county of Minnehaha, and special counsel, and asked leave to intervene in the case, and, upon hearing, the circuit court of the United States overruled the motion, and ordered that the further prosecution of the action then pending before it be stayed for the period of ninety days, for the purpose of allowing the state of South Dakota to commence a proper action or proceeding to establish its title and interest in and to the property in the estate of the decedent, and that, in the event that such action be commenced within that time, then the pending action to be stayed until the determination of such action brought by the state of South Dakota. Afterwards the complainants filed an application for the vacation of the orders staying the prosecution of their suit until the determination of the suit in the state court, but the same was denied, and thereafter the petition for mandamus in the circuit court of appeals was filed, with the result already stated.

The matters we have stated constitute the entire record before the circuit court of appeals. Upon that record it appears that the circuit court of the United States, having an action before it to determine the interest of the complainants in the estate of John C. McClellan, upon which issue had been joined, upon application of the state of South Dakota refused to permit it to intervene in the case to set up its right and title to the property in the estate of the decedent, upon the claim that he died without legal heirs, and stayed the proceedings in the case before it until the state of South Dakota could bring an action in the state court for the purpose of determining such rights; and afterwards, it appearing that the state had commenced such action against all persons having or claiming a right, title, or interest therein, stayed the pending action until the determination of the action in the state court.

It is first objected on behalf of the respondent herein that this is not a case in
54 L. ed.

which this court has the authority to issue the writ of certiorari. It is contended that the application for the writ in this case was under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), and that the right to grant writs of certiorari to the circuit court of appeals is limited by the act to certain cases made final in the circuit court of appeals, and that by § 10 of the court of appeals act it is declared that whenever on appeal, writ of error, or otherwise, a case coming from the circuit court of appeals shall be reviewed and determined in the Supreme Court, it shall be remanded to the proper district or circuit court for further proceedings in pursuance of such determination.

These provisions, it is contended, show that a writ of certiorari is not warranted in this case, it being an original application in mandamus in the court of appeals, and the jurisdiction in the circuit court not depending upon the opposite parties to the suit being citizens of different states, and, therefore, the judgment not final in the circuit court of appeals, nor could the case be remanded to the proper district or circuit court, as it was an original proceeding in mandamus in the circuit court of appeals. But the power of this court to issue writs of certiorari is not limited to the court of appeals act. Section 716 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 580) provides:

"The Supreme Court and the circuit and district courts shall have power to issue writs of seire facias. They shall also [278 have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Of this section it was said in *Re Chetwood*, 165 U. S. 443, 461, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385, 392:

"By § 14 of the judiciary act of September 24, 1789 (1 Stat. at L. 81, chap. 20, U. S. Comp. Stat. 1901, p. 580), carried forward as § 716 of the Revised Statutes, this court and the circuit and district courts of the United States were empowered by Congress to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law; and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 380, 37 L. ed. 486, 489, 13 Sup. Ct. Rep. 758. And although, as observed in that case, this writ has not been issued as freely by this court as by the court of Queen's bench, in England, and, prior to the act of March 3,

1891 (chap. 517, 26 Stat. at L. 826, U. S. Comp. Stat. 1901, p. 488), had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition, the writ may be allowed, as at common law, to correct excesses of jurisdiction, and in furtherance of justice. Tidd, Pr. 398; Bacon, Abr. 'Certiorari.'"

In *Whitney v. Dick*, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584, a writ of certiorari was granted to the circuit court of appeals for the ninth circuit to review the judgment of that court where an original application had been made for the writ of habeas corpus and a writ of certiorari in that court. This court held, upon the question of jurisdiction, that there could be no appeal from the circuit court of appeals in such a case, but that a writ of certiorari might issue to bring the case here from the circuit court of appeals, upon the authority of *Re Chetwood*, supra. The case at bar being a petition for mandamus, there is no amount in controversy, and consequently there could be no appeal to this court; and, as in *Whitney v. Dick*, supra, the judgment of the circuit court of appeals was not final 279] because *of the diversity of citizenship in the court below, and, consequently, certiorari would not issue under the act of 1891. In *Whitney v. Dick* the case was remanded to the circuit court of appeals, with instructions to quash the writ of certiorari issued by that court, and to dismiss the petition for habeas corpus.

In the present case we have no doubt of the authority of this court to issue the writ of certiorari, under § 716 of the Revised Statutes of the United States, as construed and applied in the cases just cited,—*Re Chetwood* and *Whitney v. Dick*, supra. The suggestion, therefore, that this case should be dismissed for want of power in this court to grant the writ of certiorari, cannot be entertained. While the power to grant this writ will be sparingly used, as has been frequently declared by this court, we should be slow to reach a conclusion which would deprive the court of the power to issue the writ in proper cases to review the action of the Federal courts inferior in jurisdiction to this court.

It is further objected that the circuit court of appeals had no jurisdiction to issue the writ of mandamus, as that writ can only be issued in aid of the appellate jurisdiction of the circuit court of appeals; and, it is contended, as that court had no jurisdiction of the suit when the application for mandamus was filed, it ought to have been dismissed. Section 12 of the court of appeals act declares that the circuit court of appeals shall have the powers specified in

§ 716 of the Revised Statutes of the United States. That section we have already had occasion to quote, and when read in connection with § 12 of the court of appeals act, it gives to the circuit court of appeals the authority, as this court has, to issue writs of scire facias, and all writs not specially provided for by statute, and necessary for the exercise of the court's jurisdiction, and agreeable to the usages and principles of law.

In this case it appears that the original action commenced in the circuit court of the United States might have been taken on appeal to the circuit court of appeals. The suit involved over \$2,000 in amount, and was between citizens of *different states. [280 There are not wanting decisions in the Federal courts, holding different views as to the right to issue such writs as are involved in this case, before the appellate court has actually obtained jurisdiction of the case. There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction actually acquired. But we think it the true rule that where a case is within the appellate jurisdiction of the higher court, a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below. This rule was distinctly stated and the previous cases referred to in *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 270, 21 L. ed. 493, 498. In that case the rule was recognized that this court had the power to issue the writ of mandamus to compel the circuit courts to proceed to final judgment in order that this court may exercise the jurisdiction of review given by law. In that case the court said:

"Repeated decisions of this court have established the rule that this court has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause."

In *Ex parte Bradstreet*, 7 Pet. 647, 8 L. ed. 815, the same rule was laid down by Chief Justice Marshall, speaking for the court, requiring a Federal court of inferior jurisdiction to reinstate a case, and to proceed to try and adjudicate the same. And see *Re Pennsylvania Co.* 137 U. S. 451, 452, 34 L. ed. 738, 739, 11 Sup. Ct. Rep. 141; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667; *Re United States*, 194 U. S. 194, 48 L. ed. 931, 24 Sup. Ct. Rep. 629; *Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 761, 66 C. C. A. 55, 132 Fed. 945.

Inasmuch as the order of the circuit court, staying the proceeding until after final judgment in the state court, might prevent the

adjudication of the questions involved, and thereby prevent a review thereof in the circuit court of appeals, which had jurisdiction for that purpose, we think that court had power to issue the writ of mandamus to require the circuit court to proceed with and determine the action pending before it. 281] *The question then arises, Was the circuit court justified in staying the proceedings in the case, and withholding further action until the case involving the same question might be brought and determined in the state court? We think that there can be but one answer to this question. The case made upon the bill was within the original jurisdiction of the circuit court of the United States. The right of the circuit court to maintain such actions, notwithstanding the legislation of the state creating probate courts, has been so recently before this court as to require no further consideration now. *Waterman v. Canal-Louisiana Bank & T. Co.* 215 U. S. 33, ante, 80, 30 Sup. Ct. Rep. 10. In that case, following previous decisions of this court, it was held that the chancery jurisdiction of the Federal courts to entertain suits between citizens of different states to determine interests in estates, and to have the same fixed and declared, having existed from the beginning of the Federal government, and created by the grant of equity jurisdiction to such courts as it existed in the chancery courts of England, could not be impaired by subsequent state legislation creating courts of probate. The action was therefore within the jurisdiction of the circuit court of the United States.

So far as the record presented to the circuit court of appeals shows, the only ground upon which the circuit court acted in postponing the suit was because the state of South Dakota, which had applied to be made a party, and which application was denied, was about to begin a suit in the state court to determine an escheat of the estate of John C. McClellan; therefore the action was stayed, first, until the beginning of such suit, and then until it was determined. It therefore appeared upon the record presented to the circuit court of appeals that the circuit court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a Federal court may not do. *Chicot County v. Sherwood*, 148 U. S. 529, 534, 37 L. ed. 546, 548, 13 Sup. Ct. Rep. 695.

It cannot be denied that a circuit court 282] of the United States, like other courts, had power to postpone the trial of cases for good reasons, but, by the orders made in 54 L. ed.

this case, the Federal court withheld the further exercise of its authority until the state court, by its action in a case involving all the parties, might render a judgment which would be *res judicata*, and thus prevent further proceedings in the Federal court.

The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, for both the state and Federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case. In the present case, so far as the record before the circuit court of appeals discloses, the circuit court of the United States had acquired jurisdiction, the issues were made up, and when the state intervened, the Federal court practically turned the case over for determination to the state court. We think it had no authority to do this, and that the circuit court of appeals, upon the record before it, should have issued the writ of mandamus to require the judge of the circuit court of the United States to show cause why he did not proceed to hear and determine the case.

Whether the state ought to have been allowed to intervene in the Federal court is not a question now before us; but, if not made a party to the suit, its rights would not have been concluded by any adjudication made therein. *Tindal v. Wesley*, 167 U. S. 204, 223, 42 L. ed. 137, 143, 17 Sup. Ct. Rep. 770.

We have thus far considered the case upon the record made in the circuit court of appeals, and certified here upon the writ of certiorari. In this court the honorable judge of the district court enters special appearance, and filed an affidavit as to the proceedings before him, in which much appears which is not in the record presented to the circuit court of appeals. In that appearance and affidavit the petition in intervention, *filed in the circuit court of [283 the United States, is set forth in full, as well as certain affidavits which were filed. We shall not enter upon a consideration of these papers, because they are not in the record, as the same has been certified to us from the circuit court of appeals as the one upon which it acted, and declined to issue the writ of mandamus. They set forth at length certain proceedings in the state courts of South Dakota, in which it is alleged that the issue of the right of the complainants in the equity suit to take the estate of John C. McClellan, as his heirs at law, was de-

terminated adversely to them, and that such proceedings were had as showed that further proceedings in reference to the escheat of the estate of McClellan for want of legal heirs ought to be determined by proceedings in the state court. In making his appearance in this court, and in presenting these papers, it is evident that the district judge was much influenced in ordering the stay of proceedings, and withholding judgment until the state court had rendered its judgment, by the proceedings already had in the state courts of South Dakota.

As we have said, we do not pass upon the sufficiency of those proceedings to authorize the orders in question. We must take the case as it is presented here upon the stipulated return to the writ of certiorari on the record as presented to the circuit court of appeals. Upon that record, we think, the circuit court of appeals should not have dismissed the writ of mandamus, but should have ordered the alternative writ, or an order to show cause, to issue, in order that the district judge might have been fully heard before the question was determined as to whether mandamus should issue or not.

We shall therefore reverse the judgment of the circuit court of appeals, and remand the case to that court, with directions to issue the alternative writ, or an order to show cause. All we decide is, that upon the petition and record made in the circuit court of appeals, and as now presented by the transcript filed in this court, such alternative writ or order to show cause ought to have issued. The judgment dismissing [284] *the petition is reversed and the case is remanded to the Circuit Court of Appeals for further proceedings, as herein indicated.

Reversed.

SOLOMON BRANTLEY, Plff. in Err.,
v.

STATE OF GEORGIA.

(See S. C. Reporter's ed. 284, 285.)

Criminal law — former jeopardy.

A person convicted of a lesser grade of homicide than that charged in the indictment, who obtains a reversal of the judgment upon appeal, is not placed twice in jeopardy by a second trial for murder under the same indictment.

[For other cases, see Criminal Law, II., in Digest Sup. Ct. 1908.]

[No. 692.]

Argued and submitted April 6, 1910. Decided April 11, 1910.

IN ERROR to the Supreme Court of the State of Georgia to review a judgment which affirmed a conviction for murder in the Superior Court of Washington County, in that state, after a reversal in the Court of Appeals of that state upon an appeal from a conviction of voluntary manslaughter. Affirmed.

See same case below 133 Ga. 264, 85 S. E. 426.

The facts are stated in the opinion.

Mr. John Randolph Cooper argued the cause and filed a brief for plaintiff in error.

Mr. John C. Hart submitted the cause for defendant in error.

Per Curiam:

Brantley was indicted in the superior court of Washington county, Georgia, charged with the offense of murder; was tried and found guilty of voluntary manslaughter; filed a motion for new trial, and, upon appeal to the state court of appeals, obtained a reversal of the judgment, and a new trial was ordered.

At the second trial he filed a plea of former jeopardy, claiming that he had been tried for murder, and having been found guilty of a lesser grade of homicide, that operated to acquit him of the charge of murder, and to try him again for murder under the same indictment would be to try him again for an *offense of which he [285] had been previously acquitted, and that he could only be arraigned for voluntary manslaughter. This plea was demurred to and the demurrer sustained by the court. The case then proceeded to trial, and the jury found him guilty of murder, whereupon he was sentenced to life imprisonment. He moved for a new trial, which motion was overruled, and thereupon he appealed to the supreme court of the state of Georgia, which affirmed the judgment of the lower court. 132 Ga. 573, 22 L.R.A. (N.S.) 959, 64 S. E. 676.

The Constitution of the state of Georgia provides that "no person shall be put in jeopardy of life or liberty more than once for the same offense, save on his or her own motion for a new trial, after conviction, or in case of mistrial." [Art. 1, § 1, ¶ 8.] This writ of error was sued out, and plain-

NOTE. — On former jeopardy—see notes to Com. v. Fitzpatrick, 1 L.R.A. 451; Altenhurg v. Com. 4 L.R.A. 543; Re Lange, 21 L. ed. U. S. 872; United States v. Perez, 6 L. ed. U. S. 165; and Silsby v. Foote, 14 L. ed. U. S. 394.

On former jeopardy in retrial on higher charge after setting aside verdict for lower charge—see notes to Flemister v. United States, 52 L. ed. U. S. 252, and Brantley v. Georgia, 22 L.R.A. (N.S.) 959.

tiff in error contended that the judgment of the supreme court of Georgia was in violation of the 5th Amendment of the Constitution of the United States, and that the provision of the Constitution of the state of Georgia was null and void as construed by the state supreme court.

The contention is absolutely without merit. It was not a case of twice in jeopardy under any view of the Constitution of the United States.

Judgment affirmed.

286] *UNITED STATES OF AMERICA,
Appt.,
v.

OBERLIN M. CARTER et al. (No. 551.)

OBERLIN M. CARTER et al., Appts.,
v.

UNITED STATES OF AMERICA. (No.
552.)

EX PARTE: IN THE MATTER OF THE
UNITED STATES, Petitioner.

(No. 10, Original.)

(See S. C. Reporter's ed. 286-323.)

Principal and agent — fiduciary relation — conflict of interest — accounting.

1. An Army engineer in charge of a harbor improvement, who secretly receives from the contractors a proportion of the abnormal profits realized by them in the execution of their contracts, may be required to account in equity to the United States for the share so received, without any showing of any specific abuse of discretion on his part, or of any actual loss to the government by fraud or otherwise.

[For other cases, see Principal and Agent, V. a, in Digest Sup. Ct. 1908.]

Judgment — following trust property — deficiency personal judgment.

2. Recovery on behalf of the government against the engineer in charge of a public improvement, who secretly receives from the contractors a proportion of the abnormal profits realized by them in the execution of their contracts, is not confined to the property or securities into which such illicit gains may be traced, but for any deficiency the government may have a personal judgment.

[For other cases, see Judgment, II. b, in Digest Sup. Ct. 1908.]

Constructive trusts — following trust property — liability of transferee.

3. Persons who, with full knowledge of the facts, have received the securities into which have gone the illicit gains of the engineer in charge of a public improvement, must account to the United States for the securities traced to their possession.

[For other cases, see Trusts, V., in Digest Sup. Ct. 1908.]

54 L. ed.

Pleading — relief under general prayer — deficiency personal judgment.

4. The United States, seeking to follow the illicit gains of its agent into the property or securities into which they have gone, is entitled, under a prayer for "other, further, and general relief," to a judgment, as for money had and received for its use, for any difference between the cost of the specific property recovered and the gains which it is unable to trace.

[For other cases, see Pleading, 93, 104, in Digest Sup. Ct. 1908.]

Appeal — concurrent findings below — allowance of counsel fees.

5. An allowance for counsel fees out of funds in court will not be disturbed as excessive, where the two lower courts have concurred in the amount allowed as reasonable.

[For other cases, see Appeal and Error, 4931-4945, in Digest Sup. Ct. 1908.]

Costs and fees — allowance out of fund — stipulation.

6. The condition upon which the United States agreed to allowances for counsel fees and other expenses out of funds in court into which the illicit gains of its agent had been traced, viz., the turning over by the defendants to the receiver of all assets which had not been theretofore "bona fide disposed of by them, and therefore beyond their control," was not so violated as to defeat the right to such allowances by the insistence by the defendants upon a credit for all disbursements made by them in defense of the suit and in the care of the property in their hands, and for sums retained by them as compensation for their services.

[For other cases, see Costs and Fees, I. d, in Digest Sup. Ct. 1908.]

[Nos. 551, 552, and 10, Original.]

Argued January 13, 14, 1910. Decided
April 18, 1910.

CROSS APPEALS from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed, with some modifications, a decree of the Circuit Court for the Eastern Division of the Northern District of Illinois in favor of the United States in a suit to compel the engineer in charge of a harbor improvement to account for the share of the profits secretly received by him from the contractors, and to follow his illicit gains into the property or securities into which they have gone. Affirmed. Also

PETITION for a writ of prohibition to the judge of the Circuit Court for the Eastern Division of the Northern District of Illinois to prohibit him from entertaining jurisdiction in the suit pending the appeal, and to prohibit him from making allowances for expenses or counsel fees out of

funds in court, prior to the disposition of the appeal. Dismissed.

The facts are stated in the opinion.

See same case below, 96 C. C. A. 587, 172 Fed. 1.

Mr. Marion Erwin argued the cause and filed a brief for the United States:

As the circuit court and circuit court of appeals agreed as to what were the ultimate facts established by the evidence, this court should accept their view as to the facts, unless it clearly appeared that they erred as to the effect of the evidence.

Stuart v. Hayden, 169 U. S. 1, 14, 42 L. ed. 639, 643, 18 Sup. Ct. Rep. 274.

And when the evidence is conflicting, there being evidence to sustain the decree, this court will not ordinarily interfere.

Smith v. Burnett, 173 U. S. 430, 436, 43 L. ed. 756, 759, 19 Sup. Ct. Rep. 442.

It is the settled doctrine of this court that the concurrent decisions of two courts upon the question of fact will be followed unless shown to be clearly erroneous.

Brainard v. Buck, 184 U. S. 105, 46 L. ed. 453, 22 Sup. Ct. Rep. 458; Baker v. Cummings, 169 U. S. 189, 42 L. ed. 711, 18 Sup. Ct. Rep. 367; Towson v. Moore, 173 U. S. 17, 43 L. ed. 597, 19 Sup. Ct. Rep. 332; The Richmond, 103 U. S. 540, 26 L. ed. 313; Dravo v. Fabel, 132 U. S. 487, 33 L. ed. 421, 10 Sup. Ct. Rep. 170.

If a party attempt to impose upon the court, by knowingly or fraudulently claiming as his own, property belonging in part to others, he shall not be entitled to restitution of that portion which he may ultimately establish as his own.

The Dos Hermanos, 2 Wheat. 76-96, 4 L. ed. 189-193.

Where the conduct of the defendant has not been such as to commend him to the favor of a court of equity, under the circumstances, every doubt and difficulty should be resolved against him.

Providence Rubber Co. v. Goodyear, 9 Wall. 788, 803, 19 L. ed. 566, 571.

As long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust.

2 Pom. Eq. Jur. 2d ed. §§ 1051, 1053, 1076; May v. LeClaire, 11 Wall. 217, 236, 20 L. ed. 50, 54; Smith v. Vodges, 92 U. S. 186, 23 L. ed. 482; Moore v. Crawford, 130 U. S. 122, 32 L. ed. 878, 9 Sup. Ct. Rep. 447; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Eaton Eq. Jur. § 210, p. 439; 17 Am. & Eng. Enc. Law, 2d ed. p. 475; Oliver v. Piatt, 3 How. 333, 11 L. ed. 622.

Where a trustee or bailee exchanges with himself the trust fund for other property or money of his own, or where the exchange is

made with another person, the trust will attach to the property taken.

Van Alen v. American Nat. Bank, 52 N. Y. 5; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 68, 70, 26 L. ed. 699, 700; Knatchbull v. Hallett, L. R. 13 Ch. Div. 696.

When the object is to show system, subsequent as well as prior offenses, when tending to establish identity or intent, can be put in evidence. The question is one of induction, and the larger the number of consistent facts, the more complete the induction is.

Wharton, Crim. Ev. § 38.

The reason for the rule in this and in similar cases is that when once system is proved, each particular part of the system may be explained by the other parts which go to make up the whole.

Wharton, Crim. Ev. § 32.

Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.

The Slavers (Coggeshall v. United States) 2 Wall. 401, 17 L. ed. 914; Castle v. Bullard, 23 How. 187, 16 L. ed. 428.

To establish fraud it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but, in most cases, it is the only proof that can be adduced.

Rea v. Missouri, 71 Wall. 543, 21 L. ed. 709.

Where a trustee has abused his trust, the *cestui que trust* has the option to take the original or the substituted property; and if either has passed into the hands of a bona fide purchaser without notice, then its value in money.

May v. Le Claire, 11 Wall. 236, 20 L. ed. 54.

Messrs. Marion Erwin and Edwin W. Sims also filed a brief for the United States.

Mr. Joseph B. Foraker argued the cause, and, with Mr. John B. Daish, filed a brief for Oberlin M. Carter et al.:

Epithets do not make out fraud.

Kent v. Lake Superior Ship Canal, R. & Iron Co. 144 U. S. 91, 36 L. ed. 358, 12 Sup. Ct. Rep. 650.

It must be proved, and not only must fraud be proved, but it must be the particular fraud set forth in the bill. To prove some other fraud or some other ground for equitable relief would not be sufficient.

Dashiell v. Grosvenor, 27 L.R.A. 67, 13 C. C. A. 593, 25 U. S. App. 227, 66 Fed. 339; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Boone v. Chiles, 10 Pet. 177, 178, 9 L. ed. 388; Hoyt v. Sheldon (Hoyt v. Thompson) 1 Black, 518, 17 L. ed. 65; Harrison v. Nixon, 9 Pet. 483, 9 L. ed. 201;

Providence Rubber Co. v. Goodyear, 9 Wall. 793, 19 L. ed. 567; Fleming v. Slocum, 18 Johns. 403, 9 Am. Dec. 224; Davidson v. Crosby, 49 Neb. 60, 68 N. W. 338.

The case is simply and solely one of suspicion, assertion, inference, and assumption.

Turner v. Hand, 3 Wall. Jr. 88, Fed. Cas. No. 14,257.

A money decree is not authorized by the nature of the bill, nor is it within the prayer of the bill.

Hayward v. Eliot Nat. Bank, 96 U. S. 611, 614, 615, 24 L. ed. 855-857; Clark v. Beecher, 154 U. S. 631, Appx. and 24 L. ed. 705, 14 Sup. Ct. Rep. 1184; Kent v. Lake Superior Ship Canal, R. & Iron Co. 144 U. S. 75-92, 36 L. ed. 352-358, 12 Sup. Ct. Rep. 650.

The specific prayer must be in consonance with the case made in the bill; and the relief grantable under the general prayer must be in harmony with the facts in the bill, and such as the proof will justify.

Story, Eq. Pl. § 40; Mitford, Eq. Pl. by Jeremy, 38, 45; Cooper, Ch. Pl. 13, 14; Barton, Suit in Equity, 40, 41, notes; Wilkinson v. Beal, 4 Madd. Ch. 408; Beaumont v. Boulton, 5 Ves. Jr. 495; Hiern v. Mill, 13 Ves. Jr. 119; English v. Foxall, 2 Pet. 595, 7 L. ed. 531; Hobson v. M'Arthur, 16 Pet. 182, 195, 10 L. ed. 930, 934; Danforth v. Smith, 23 Vt. 247; Hilleary v. Hurdle, 6 Gill, 105; Scudder v. Young, 25 Me. 153; Street, Fed. Eq. Pr. § 247; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

In cases alleging fraud, if proof of fraud be wanting, the complainant is not entitled to substituted relief.

Street, Fed. Eq. Pr. § 252; Eyre v. Potter, 15 How. 42, 14 L. ed. 592.

Even in cases where the general prayer is sufficient, the special relief prayed at the bar must essentially depend upon the proper frame and structure of the bill; for the court will grant such relief only as the case stated will justify, and will not ordinarily be so indulgent as to permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced thereby.

Story, Eq. Pl. § 38; Cooper, Ch. Pl. 14; Jones v. Montgomery, 3 Swanst. 208; Legal v. Miller, 2 Ves. Sr. 299; Walpole v. Orford, 3 Ves. Jr. 416; Hiern v. Mill, supra; 3 Wooddeson Lectures, § 55, p. 372; Walker v. Devereaux, 4 Paige, 229; Scudder v. Young, supra.

The theory of this case is the same as one for the recovery of an ancient silver altar claimed as treasure trove, for a cabinet of family jewels; for a picture or statue of a particular artist; and for other objects of like kind.

Adams, Eq. p. 91; Mitford, Eq. Pl. 117; 54 L. ed.

Somerset v. Cookson, 3 P. Wms. 389; Macclesfield v. Davis, 3 Ves. & B. 16; Wood v. Rowcliffe, 3 Hare, 304.

The decree must conform to the prayers of the bill.

Phipps v. Sedgwick, 95 U. S. 3, 24 L. ed. 591; Clark v. Beecher, supra; Hayward v. Eliot Nat. Bank, 96 U. S. 611, 24 L. ed. 855.

The bill herein sought to have decreed to the complainant certain property and securities *in specie*, and the prayers asked for such relief. It is true that the prayers asked for the aforesaid investments, but nothing more. There is no alternative relief sought, as there might well have been.

Story, Eq. Pl. §§ 8, 42a, 42b; Hardin v. Boyd, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771; Hubbard v. Urton, 67 Fed. 419.

The decree must conform to the pleadings; the relief granted must always be in conformity with the case made in the pleadings.

Simms v. Guthrie, 9 Cranch, 19, 3 L. ed. 642; Crocket v. Lee, 7 Wheat. 523, 5 L. ed. 513; Carneal v. Banks, 10 Wheat. 181, 6 L. ed. 297; Harding v. Handy, 11 Wheat. 103, 6 L. ed. 429; Britton v. Brewster, 2 Fed. 160; Kent v. Lake Superior Ship Canal, R. & Iron Co. 144 U. S. 75, 36 L. ed. 352, 12 Sup. Ct. Rep. 650; Hendryx v. Perkins, 52 C. C. A. 435, 114 Fed. 801.

Mr. Horace G. Stone also argued the cause for Oberlin M. Carter et al.

Mr. William W. Gurley filed a brief for appellees Stone et al:

Findings of fact in a suit in equity by both the circuit court and the circuit court of appeals will not be reversed by this court unless shown to be clearly erroneous.

Dun v. Lumberman's Credit Asso. 209 U. S. 20, 52 L. ed. 663, 28 Sup. Ct. Rep. 335, 14 A. & E. Ann. Cas. 501; Page v. Rogers, 211 U. S. 575, 53 L. ed. 332, 29 Sup. Ct. Rep. 159.

The orders paying Stone et al., as interveners, various sums in 1904, were final orders.

Central Trust Co. v. Grant Locomotive Works, 135 U. S. 224, 34 L. ed. 103, 10 Sup. Ct. Rep. 736; Internal Improv. Fund v. Greenough, 105 U. S. 531, 26 L. ed. 1159; Davis v. Schwartz, 155 U. S. 637, 39 L. ed. 293, 15 Sup. Ct. Rep. 237.

New objections are not permissible on appeal.

Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735.

Objections not made before the master cannot be raised on appeal.

Burns v. Rosenstein, 135 U. S. 455, 34 L. ed. 195, 10 Sup. Ct. Rep. 817.

The master's report will not be set aside in a case like the present.

Furrer v. Ferris, 145 U. S. 133, 36 L. ed. 649, 12 Sup. Ct. Rep. 821; *Tilghman v. Proctor*, 125 U. S. 149, 150, 31 L. ed. 668, 669, 8 Sup. Ct. Rep. 894; *Callaghan v. Myers*, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177; *Crawford v. Neal*, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; *Warren v. Keep*, 155 U. S. 265, 39 L. ed. 144, 15 Sup. Ct. Rep. 83.

Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that, upon the evidence, the findings should have been different.

Stanley v. Albany County, 121 U. S. 547, 30 L. ed. 1002, 7 Sup. Ct. Rep. 1234.

Where a case is tried by the circuit court without a jury, and it makes a special finding of facts, with conclusions of law, alleged errors of fact are not, on a writ of error, subject to revision by this court, if there was any evidence on which such findings could be made.

Hathaway v. First Nat. Bank, 134 U. S. 494, 33 L. ed. 1004, 10 Sup. Ct. Rep. 608.

A lien on property is not a personal interest in it.

Ward v. Chamberlain, 2 Black, 437, 17 L. ed. 323.

A final decree as to the first instalment of a contract is conclusive as to the validity or invalidity of the contract.

Wilson v. Deen (*Milne v. Deen*) 121 U. S. 525, 534, 30 L. ed. 980, 982, 7 Sup. Ct. Rep. 1004.

Mr. Justice **Lurton** delivered the opinion of the court:

This is a bill which seeks to compel the defendant *Oberlin M. Carter*, late a captain in the Army of the United States, to account for illicit gains, gratuities, and profits received by him through collusion with contractors for river and harbor improvements in the Savannah, Georgia, improvement district, and to follow such illicit profits into securities and other property held for him by other defendants to the suit.

In substance, the bill charges that under an appropriation made by Congress for the improvement of the harbor of Savannah, certain contracts were entered into with *John F. Gaynor* and *Benjamin D. Greene*, doing business either in their joint names, or the name of one of them, or as the *Atlantic Contracting Company*. That these contracts were made in pursuance of plans and specifications prepared and let out under biddings conducted by the defendant *Oberlin M. Carter*, then an engineer officer assigned as local engineer of the improvements projected in the Savannah district.

These contracts were executed, the appropriations disbursed, and the work supervised and accepted by said officer, or, under his advice and recommendations, by the War Department.

It is charged that *Carter* entered into a corrupt arrangement with the said contractors, by which he undertook to use his power and discretion in the preparation of specifications and contracts, and in advertising and letting the same out in such a way as to enable *Gaynor* and *Greene* to become contractors under conditions which would insure them a large profit, and to use his influence, power, and discretion in the supervision and acceptance of the work to their greatest advantage. It is then, in substance, averred that, in consideration of such service to them and the betrayal of his trust, he should share in the profits and receive one third of every distribution made. It is *charged in substance [298 that under such agreement or understanding there was paid over to the defendant *Carter* about \$500,000 as his share of the profits, and that the same was converted into real estate, bonds, stocks, and negotiable notes, and that much of these gains were later placed in the custody of certain other defendants named in the bill, two of them being brothers of defendant *Carter*, to wit, *Lorenzo D. Carter* and *I. Stanton Carter*, who are charged as holding same as agents for *Oberlin M. Carter*. Securities aggregating in value some \$400,000, into which the larger part of the share of the defendant *Oberlin M. Carter* is said to have gone, were attached under this and other bills, ancillary in character, and placed in the hands of a receiver to abide the result of a decree in this case, the same decree to go down in the ancillary suits in other jurisdictions in which any part of the property or securities has been impounded.

There was a decree in favor of the United States in the circuit court, substantially as prayed for. Upon an appeal by the defendants and cross appeal by the United States, to the circuit court of appeals, the decree was affirmed as far as it went, and was enlarged in certain matters upon the appeal of the United States. The original defendants have appealed from this last decree so far as it was favorable to the complainant, and the United States has perfected a cross appeal with reference to certain parts of the decree with which it is discontent. Thus the whole case is here as upon a broad appeal, and the several appeals have been heard upon the entire record, consisting of some thirty printed volumes.

The facts essential to be stated, as sifted out of this great record of pleadings and

evidence, are these: From some time in 1889 until July 20, 1897, Oberlin M. Carter, then a brilliant and rising officer of engineers in the Army of the United States, was assigned to duty and placed in charge of certain improvements, for which an appropriation had been made, in the harbor of Savannah. It is enough to say, without going into particulars, that this duty involved large powers and considerable 299] *discretion in the matter of plans, preparation of contracts, advertising for and acceptance of bids, superintendence and acceptance of the work as it progressed, and some latitude in the construction and modification of contracts. It is undoubtedly true that the plans, the form of contracts, the character and time of advertising, and acceptance of bids, as well as most matters involving the exercise of judgment and discretion during the execution of contracts, were reported to the War Department for its approval or rejection. Nevertheless it is most thoroughly made out that the action and recommendation of a local engineer officer in charge of such work practically determined the situation so long as he had the confidence of his superiors and kept within the general limits of the appropriation by Congress for the work in hand. Passing by a number of comparatively small contracts made prior to 1892, as well as a very large one made in 1896, but not completed when Captain Carter was succeeded in July, 1897, the bill charges:

"That commencing with the contract No. 4820 of September 16, 1892, let in the name of Edward H. Gaynor, contractor, that after the payment of the cost of the work, and after the payment to the other persons, parties to the said fraudulent scheme aforesaid, the profits, amounting to over \$2,000,000, of all the aforesaid contracts so fraudulently let, as aforesaid, were divided from time to time between Oberlin M. Carter, Benjamin D. Greene, and John F. Gaynor, in three equal shares, one of which shares was apportioned to the said Oberlin M. Carter as his share of the profits arising from the consummation of said scheme to defraud the United States."

Aside from certain contracts prior to September, 1892, and subsequent to May, 1896, the circuit court found, and the circuit court of appeals confirmed the finding, that between September 16, 1892, and May 12, 1896, the United States, through the defendant Oberlin M. Carter, as its disbursing officer, paid to Gaynor and Greene, or the Atlantic Contracting Company, a corporation of which they owned all of the shares 300] *except a few assigned to certain kinsmen for organization purposes, on account of

what we shall hereafter describe as Gaynor and Greene contracts, the sum of \$2,567,493.48. They also found that of this sum \$1,815,941.62 was distributed as net profits between John F. Gaynor, Benjamin D. Greene, and some third person not publicly known to be interested. The remainder, \$751,551.86, was the sum disbursed by Greene and Gaynor for labor, supplies, and salaries, being the actual cost of the work for which the government had in some way been induced to pay, under contracts drawn and supervised by Captain Carter, the sum of \$2,567,493.48. These figures are not derived from any set of books kept by either the contractors or by Carter. Though the execution of these contracts extended over a period of four years and involved the receipt and expenditure of millions, yet the contractors say they kept no books other than one which related to supplies bought and ordinary labor or salary accounts, and that that book could not be produced. The plan under which Greene and Gaynor carried on these great affairs, as shown by the evidence, was to apply monthly payments received from Carter, as the government's disbursing officer, to the payment of the monthly expenses and advances which might have been made by one or the other of the contractors, and then divide the balance into three parts, one part being at once handed over to Greene, another to Gaynor, and the third to some third person, who both courts found upon the evidence to have been one Robert F. Westcott, the father-in-law of the defendant Oberlin M. Carter, or to accounts kept in his name, and that this third was ultimately turned over to Carter himself.

Without any distinct finding as to the *method* by which the government had been defrauded, or as to the *extent of actual loss sustained*, both courts concurred in the conclusion that the government had been defrauded, and had suffered great loss. Without any distinct finding as to whether one third of the profits realized had been paid over to Robert F. Westcott, as a secret partner with Greene and Gaynor, or to him as the *representative of Captain Carter, yet [301 both courts concurred in holding that, if Westcott was interested as a partner in the contracts, Carter, under all of the facts, was chargeable with knowledge of such partnership relation, and that if, with such knowledge, he accepted from Westcott the share of profit so received, he was accountable to the government for all such illicit gratuities or gains. In view of this concurrence of opinion upon these material facts the burden rests heavily upon the appellant Oberlin M. Carter to satisfy this court that their conclusions are plainly erroneous, or

that, conceding the facts to be as found, the decree holding him accountable is erroneous as matter of law. *The Carib Prince* (Wuppermann v. *The Carib Prince*) 170 U. S. 655, 658, 42 L. ed. 1181, 1185, 18 Sup. Ct. Rep. 753; *Brainard v. Buck*, 184 U. S. 99, 46 L. ed. 449, 22 Sup. Ct. Rep. 458.

But counsel have urged with great force and much confidence that the conclusion of both of the courts below rests upon no secure foundation, and that there has been a great miscarriage of justice in finding that Captain Carter was ever in any way interested in these contracts, or that he ever, directly or indirectly, consciously shared in any profits arising therefrom. This protest does not, as we understand it, involve any serious denial of the fact that nearly two millions of dollars were realized as profit upon contracts drawn by, let out, and supervised by Captain Carter, at a net cost to the contractors of less than one million dollars; nor does it involve any serious denial that approximately one third of this abnormal profit was paid over to some third person not publicly known to have had any connection with the contracts or the contractors. If, however, we are in error in assuming such a limitation upon the contention of counsel, there is no reasonable ground, upon this record, for doubting the correctness of the conclusion reached by the courts below as to either of these matters. It may be conceded that no witness proves an express agreement between the contractors and Carter that he should serve them in the letting or execution of these contracts. So far as the principals have spoken, they have denied any such agreement.

But it is said that none of the specific 302] averments of the bill *as to the methods by which the government had been defrauded were sustained by either the circuit court or the circuit court of appeals. Thus it was averred that Carter had shortened the time required by regulations for advertising for bids, that he had made it difficult for some intending bidders to secure the plans and specifications, that he had deterred others by unduly magnifying the risks of the work, that the specifications were so drawn as to leave to the government the option of two or more materials of different value, or two or more methods of doing parts of the work, or the right to substitute one material for another. It was also averred that Greene and Gaynor were in advance advised as to how such options would be exercised, but that other proposing bidders were not, and that by this and other artifices Greene and Gaynor were enabled to secure contracts at unreasonable prices. It is then averred that Carter had collusively

and fraudulently increased unduly the quantity of some materials required and diminished that of other kinds; that he had exercised options reserved in such a way as to greatly increase the cost of the work and the profit of the contractors; that he had permitted changes in materials and methods of using the materials and of doing the work in such manner as to be of disadvantage to the United States and of advantage to the contractors; and that he had permitted the use of cheap and inferior materials and had accepted bad and inferior work.

Aside from the elusiveness of a fraud well concocted and unsuspected while going on, there was in the way of the government in this case the fact that, in respect to almost everything which had served to add to the cost of the work and to the profit of the contractors, Carter had confessedly a wide discretion. That he might be controlled in the exercise of this by his superior officers or by the War Department when important changes, modifications, or substitutions were made, is true. But, in actual practice, this War Department approval was largely official and formal when the engineer in charge was regarded as capable and honest and his recommendation *with- [303 in the limit of the appropriation or of the contract as made. It was the fact that such an officer in control of such work had a wide discretion which at once made his fidelity of the utmost importance to the government, and his co-operation and collusion of such large value to the contractors. This discretion was the stumbling block in the way of the circuit court. It was not easy to show in some instances that the work had suffered by the substitution of one material for another, or by the increase of one kind of material in mattress work for another, or by one method of measuring or paying for mattress work rather than by another. When contracts and specifications were elastic enough, as seems to have been the case with the Greene and Gaynor contracts, to justify varying interpretations, or full of options as to materials or methods, as was the fact here, nothing short of conduct or action plainly indefensible as an exercise of honest judgment would justify an inference of corruption. When to this situation there was added the fact that, as a whole, the harbor improvement had been intelligently and scientifically carried out and was apparently an engineering success, and that this result had been reached within the limit of the Congressional appropriation, it was not surprising that upon this line of evidence, considered apart from all other things, the circuit judge found himself unable to predicate fraud and corruption upon the conduct

of Carter in these details which the bill pointed out as the methods by which he had enabled a great fraud upon the government to be carried out, and by which his corrupt collusion was to be established.

The circuit court, upon this aspect of the evidence, said:

"The evidence leaves the court with the impression that there was carelessness in the manner in which some of the work was done, indeed, carelessness for which Carter was justly entitled to be criticized; but considering the material results, the magnitude of the work, and assuming the absence of any mercenary or other ulterior motive on Carter's part, except such as might be justly **304**] deduced from the facts so far *considered, I am of the opinion, as was Senator Edmunds in the court-martial case, that Carter's course in the premises was not necessarily an abuse of the discretion vested in him, nor seriously inconsistent with his claim that he discharged his duty to the government, and that, limited as above stated, under the rule of evidence obtaining in such case, the government has failed to maintain its case."

Excluding, as the circuit court did, all consideration of the extraordinary profit which the contractors had in some way realized upon these contracts, and that, through indirect ways, approximately \$500,000 of this profit had come at last to the possession of Carter, it is not surprising that that court did not find evidence of such gross abuse of discretion as to justify a finding that he had conspired with Greene and Gaynor to defraud the government.

But the case of the United States against the defendants is not to be determined by the consideration of the sufficiency of any one fact or group of facts, but by a judgment based upon the evidence as a whole. The learned circuit judge very nearly fell into error by such a partial view of the case. From ultimate error he was saved by the subsequent consideration of the principal, and really determinative, factors in the case; namely, the abnormal profit which the contractors had in some way been able to realize, and the evidence tracing one third of that profit into Carter's hands, with no credible reason for such result. The circuit court of appeals took a somewhat wider view of the matter. Thus that court said:

"We concur, therefore, in the view expressed in the opinion filed by the trial judge, that the charge of conspiracy between Captain Carter and the contractors to defraud the United States, under the contracts referred to, is: (a) neither established by direct evidence, (b) nor can such charge be upheld under the testimony alone

of methods adopted in making specifications, advertising for bids, treatment of proposed bidders, or letting contracts, (c) nor under one or *the other several branches of **[305** testimony reviewed in the opinion, considered independently of the entire chain of circumstances. But these conclusions are not the tests of sufficiency of the entire chain of circumstantial evidence to sustain that charge. While the fact is established, as there stated, 'that a great wrong was practised in this raid upon the government,' we are not satisfied that the right of the United States 'to a decree awarding to it' all property in question 'arising from funds made up of profits realized by the contractors' therein may rightly rest, as there stated, upon the proposition that Carter must, 'as a conclusion of law, be held chargeable with knowledge of what was being done in the premises.'

"Under the settled facts above recited, however, linked with cumulative evidence, tending to prove actual knowledge on the part of Captain Carter of the excessive profit in the mattress work and of divisions thereof with Westcott in New York, and complicity in the fraudulent transactions, of which (at one time or another) he acquired approximately one third of the net proceeds, we are constrained to the belief that the evidence is decisive, not only of fraud perpetrated by the contractors, but of concurrence and participation therein by Captain Carter." **[96 C. C. A. 598, 172 Fed. 12.]**

If it be once assumed that the defendant Carter did secretly receive from Greene and Gaynor a proportion of the profits gained by them in the execution of the contracts in question, the right of the United States in equity to a decree against him for the share so received is made out. It is immaterial if that appears whether the complainant was able to show any specific abuse of discretion, or whether it was able to show that it had suffered any actual loss by fraud or otherwise. It is not enough for one occupying a confidential relation to another, who is shown to have secretly received a benefit from the opposite party, to say, "You cannot show any fraud, or you cannot show that you have sustained any loss by my conduct." Such an agent has the power to conceal *his fraud and hide the **[306** injury done his principal. It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency. The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or ad-

vantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.

The doctrine is well established and has been applied in many relations of agency or trust. The disability results not from the subject-matter, but from the fiduciary character of the one against whom it is applied. It is founded on reason and the nature of the relation, and is of paramount importance. "It is of no moment," said Lord Thurlow, in *The York Bldgs. Co. v. Mackenzie*, 3 Paton, 378, "what the particular name or description, whether of character or office, situation or position, is, on which the disability attaches." Thus, in *Aberdeen R. Co. v. Blaikie Bros.* 1 Macq. H. L. Cas. 461, 472, it was applied to a contract of a director dealing in behalf of his company. Lord Chancellor Cranworth, in respect to the general rule, said:

"And it is a rule of universal application, that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

"So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.

"It obviously is, or may be, impossible to 307] demonstrate *how far in any particular case the terms of such a contract have been the best for the interest of the *cestui que trust*, which it was possible to obtain.

"It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could have been obtained from any other person,—they may even at the time have been better.

"But still so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this head are numerous and uniform.

"The principle was acted on by Lord King in *Keech v. Sandford* (a), and by Lord Hardwicke in *Whelpdale v. Cookson* (b), and the whole subject was considered by Lord Eldon on a great variety of occasions. It is sufficient to refer to what fell from that very learned and able judge in *Ex parte James*, 8 Ves. Jr. 337.

(a) Cas. t. King, p. 61.

(b) 1 Ves. Sr. 8.

"It is true that the questions have generally arisen on agreements for purchases or leases of land, and not, as here, on a contract of a mercantile character. But this can make no difference in principle. The inability to contract depends not on the subject-matter of the agreement, but on the fiduciary character of the contracting party; and I cannot entertain a doubt of its being applicable to the case of a party who is acting as manager of a mercantile or trading business for the benefit of others, no less than to that of an agent or trustee employed in selling or letting land."

In *Findlay v. Pertz*, 29 L.R.A. 188, 192, 13 C. C. A. 559, 567, 31 U. S. App. 340, 357, 66 Fed. 427, 435, it was applied to a contract where it was shown that a municipal official, buying for the municipality, had received a commission from the seller. In that case the circuit court of appeals said:

"His duty was to give to the public service the full benefit of a disinterested judgment and the utmost fidelity. Any agreement or understanding by which his judgment or duty conflicted with his private interest was corrupting in its *tendency. [308 We know of no more pernicious influence than that brought about through a system of commissions paid to public agents engaged in buying public supplies. Such arrangements are a fruitful source of public extravagance and speculation. The conflict created between duty and interest is utterly vicious, unspeakably pernicious, and an unmingled evil. Justice, morality, and public policy unite in condemning such contracts, and no court will tolerate any suit for their enforcement."

In *Leake on Contracts*, 409, it is said:

"Any profit made by an agent in the execution of his agency must be accounted for to the principal, who may claim it as a debt for money received to his use. A gratuity given to an agent for the purpose of influencing the execution of his agency vitiates a contract subsequently made by him, as being presumptively made under that influence, and a gratuity to an agent after the execution of the agency must be accounted for to his principal."

See also *Perry on Trusts*, § 430, and *Parsons on Contracts*, 6th ed. § 89.

The principle is most often applied in cases where one holding the relation of a trustee buys the trust property, though at public sale. Examples are numerous. *Michoud v. Girod*, 4 How. 503, 555, 11 L. ed. 1076, 1099, is a leading case decided by this court. Referring to the general rule, which forbids one to buy in an estate, directly

or indirectly, when he is acting for the seller, this court said:

"The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from 309] the *faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells."

In *Robertson v. Chapman*, 152 U. S. 673, 681, 38 L. ed. 592, 595, 14 Sup. Ct. Rep. 741, 744, this court, in dealing with the matter of a sale by an agent to himself, effected under cover of another, said:

"If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal; and, at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it. The law will not, in such case, impose upon the principal the burden of proving that he was, in fact, injured, and will only inquire whether the agent has been unfaithful in the discharge of his duty. While his agency continues, he must act in the matter of such agency solely with reference to the interests of his 54 L. ed.

principal. The law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for the principal."

*Reading the evidence in relation to [310] Captain Carter's conduct in drafting the specifications, advertising, acceptance of bids, and more particularly his almost invariable exercise of options and other discretionary powers in the subsequent execution of the contracts let to Greene and Gaynor, in the light of the abnormal profit realized by them, of which, approximately, \$500,000 ultimately found its way into his possession, we can but entertain a strong conviction that his relations with them from the beginning were inconsistent with his fidelity to the United States, and that he must account to his principal for every dollar of gain or profit or advantage which has been derived by him from these contracts.

The defense against such a conclusion rests upon three propositions:

1. That the affirmative evidence that he abused his discretion and secretly and corruptly favored Greene and Gaynor is not sufficient.

We shall not consider this proposition apart from the other two, for it is not material whether the evidence referred to, considered out of relation to the other parts of the case, would or would not make out a case of fraud.

2. That, in view of the great risk attendant upon such works, the profit claimed to have resulted was not so abnormal as to justify an inference of fraud, and that it was in part due to cheap labor, bordering upon peonage.

Neither should this contention be considered apart from the chain of evidence which leads to but one inevitable result; namely, that this great profit was not legitimate. Looked at, apart from everything else, a profit of \$1,815,941.62 upon a job which cost the contractor but \$751,551.86 arouses deep suspicion, and demands a clear explanation. That explanation does not appear in the facts of this record.

3. It is urged that Captain Carter's greatly increased personal expenditures during the progress of this work, and his acquisition of some four hundred thousand dollars' worth of *bonds, stock, and other [311] property, much of which has been impounded in this case as property into which his illicit gains and gratuities have been traced, arose from the generous bounty of Robert F. Westcott, and that Carter was ignorant of any interest Westcott had in the Greene and Gaynor contracts, and of the fact, if it be a fact, that Westcott's gratuities came from his

participation in the distribution of the profit on the Greene and Gaynor contracts.

This last proposition presents the very *cruz* of the case. What was Westcott's relation to the Greene and Gaynor contracts? It has been suggested, rather than urged, that he was, secretly, a partner in these enterprises. There is no evidence that he was, other than the fact that very many profit dividends are traced to bank accounts standing in his name. But, if he was, and Carter bargained with him for a share in the profit, knowing his relation, the legal consequence is the same as if he had received the same interest from Greene or Gaynor. But the apparent participation of Mr. Westcott in the profit arising from the Greene and Gaynor contracts is not inconsistent with a mere agency for Carter, and such an agent we think he was. That Carter could not openly receive any gains or gratuities from Greene and Gaynor is obvious. Some go-between was essential. The requisite conditions for such a screen would suggest Mr. Westcott. He was an aged, retired business man of some fortune, residing in New York. Captain Carter, in October, 1890, married one of his daughters. Mrs. Carter died in December, 1892, leaving no issue. During the marriage, Mr. Westcott made Mrs. Carter a small monthly allowance. His regard and esteem for Captain Carter during the time of and subsequent to this marriage was, on the evidence, very pronounced, and this relation affords the basis for the claim that Captain Carter's greatly increased personal expenditures during the progress of the Greene and Gaynor contracts was due to Mr. Westcott's generous and unceasing gratuities. It is shown that Captain Carter's income was substantially limited to his pay as captain, and that his personal [312] *expenditures did not exceed three or four thousand dollars per annum down to 1892. From then on his expenditures steadily increased, until they reached and passed \$20,000 per annum. Now it cannot escape observation that this great change in his manner of living began with the Greene and Gaynor contracts, and became more and more marked through the progress of the work under his supervision. It does not follow, of course, that the means for such widening expenditures came from these contracts, but the circumstance is suspicious and calls for satisfactory explanation.

Among other details averred in the bill of complaint is, that, beginning in 1892 and continuing down to 1896, Captain Carter was continuously engaged in making investments in loans, real estate, bonds, and stocks, and that the amount so invested aggregated more than \$400,000. Many of

these investments turned out to be in the identical securities, which, after much difficulty, were impounded under the process in this case, and are now in the hands of the receiver.

That the increase from these investments was collected by him, ostensibly for Mr. Westcott, is not questioned. That he applied it to his own personal use is shown by a comparison of the bank accounts standing in his name and those in the name of Westcott, as well as by the inference to be drawn from the remarkable correspondence between the increasing volume of this income and his own personal expenditures. Now Carter does not deny that he did make large investments during 1892, and the years following, nor that the properties and other securities impounded in this case are in large part the result of such investments. What he does claim is that, in making such investments, he was acting for Westcott under powers of attorney which cover most of the time, and under oral authority during the rest. His use of the income from such investments or of means approximating such income, he says, was due to the generous bounty of Mr. Westcott. His title and right to the property in which he made such investments *for Mr. Westcott he dis- [313] tinctly sets up in his sworn answer as resting alone upon donations made to him in October, 1897, and he sets out as evidence of title two receipts. In that he says that he "never had any interest, direct or indirect, in the securities described in the receipts of October 11 and 29, 1897, until the same were respectively given to this defendant as a pure and original donation by said Westcott at the time of said respective receipt in October, 1897."

The first of these receipts reads thus: "Received New York, October 11, 1897, from R. F. Westcott, the following bonds, sixty-three in all." Then follow the numbers and description of bonds. Signed "O. M. Carter." The other reads thus: "Received New York, October 29, 1897, from R. F. Westcott, the following instruments." Then follows a long list of notes, mortgages, stocks, and bonds. Signed "O. M. Carter." The securities described in these receipts are undoubtedly the same securities bought by him from time to time, ostensibly for Mr. Westcott. These purchases and investments show a remarkable correspondence in date and amounts with the dividend distributions of Greene and Gaynor profits, and undoubtedly represent the one third of such profit nominally paid to the account or credit of Westcott. During the years covering these distributions, Captain Carter, according to his own account of matters, stood for and represented Mr. Westcott, sometimes by

oral direction and sometimes by power of attorney. Certain it is that there was a blending of the business affairs of these two men rarely ever seen. Under Carter's powers of attorney he checked upon Westcott's bank account as his own. He had free access to his safe deposit box, where these securities were kept, and collected interest and dividends as they accrued. Certain investments of large amounts were shown to have been made by him which did not appear in Westcott's bank account. This was explained by Carter, who, in substance, said that Mr. Westcott had, on going off to Europe, left a large amount of currency in his safe deposit box, and that he invested this money [314] for Westcott. Not less than \$100,000 of money appears to have come from that source, and yet Carter says that he cannot say how much Mr. Westcott left there, nor how much remained when he returned, and that although he and Mr. Westcott had occasional settlements, they neither gave nor received receipts nor rendered accounts. There is no positive, competent evidence explaining just why these securities were in the personal custody of Mr. Westcott in October, 1897. Captain Carter was relieved at Savannah in July, 1897, by Captain Gillette, who very early discovered indications of maladministration by his predecessor. By direction of General Wilson he pressed his investigations and caused charges to be preferred. In August, 1897, and before Gillette's discoveries had been made public, Captain Carter was sent to England as military *attaché* with the American embassy. Within a month he returned, doubtless due to orders, only to find that serious charges, involving his career and his honor, had been preferred, and that his management of the Savannah district improvements was about to undergo a thorough investigation. There is evidence, as we have before stated, strongly tending to show that he had himself collected the interest and dividends upon the shares and bonds mentioned in these receipts up to the time he went abroad,—a fact which points to his having had personal custody of these securities up to that time. Though there is no competent positive evidence that he did turn these securities over to Westcott, or caused them to be placed in his hands, for safekeeping, before his trip abroad, there is good reason for believing so. Frederick P. Solley, another son-in-law of R. F. Westcott, says that he went with Mr. Westcott to his safe deposit box in October, 1897, to get these securities. The statement then made to him by Westcott as to why he had possession of these instruments was objected to as not competent, being declarations in the absence of Carter. The objection was sustained, and there is no error

assigned. Solley says "that he and Westcott carried them to the office of Mr. Stimson, Westcott's lawyer;" there a list was made out and the witness checked them *ov- [315] er. He did not see them delivered to Carter. But Mr. Stimson did. What explanation Mr. Westcott made to him of the transaction before Carter's arrival and delivery to him has been excluded, because not made in Carter's presence. He, however, saw the transfer, and saw the receipt signed. The significance of Stimson's evidence as to what was said in the presence of both Westcott and Carter is that nothing was said as to this being a gift, and that no acknowledgment was made so indicating. He does not recall anything said by Westcott in the presence of Carter. He does, however, say that after Carter had taken the securities, alluding to a number of bonds which were among the securities, he said: "Daddy, I want you to take these," or "Daddy, I want to give these bonds to you." Something substantially to that effect, and that Mr. Westcott replied: "No," either verbally or with some gesture of dissent. Captain Carter put the bonds which he had referred to back with the others and took them all." A proposal to give to Westcott a part of the very securities which Westcott was then giving to Carter as a "pure donation" is incompatible with the latter contention; it accords more with the attitude of one who was receiving back his own from one who had performed a great service as custodian of property which the owner had reason for concealing from publicity.

A more significant fact pointing to the same conclusion is that Robert F. Westcott did not come forward and testify in favor of his son-in-law before the board of inquiry, or before the subsequent court-martial. The investigation before the board of inquiry and the trial before the court-martial involved Carter's execution of the contracts in question, and his business relations with both the contractors and with Westcott. In both investigations Carter claimed, then as now, that his large personal expenditures were met by gifts to his wife and, after her death, to himself by Mr. Westcott, and that, in the purchase of large amounts of securities and other property, he had only acted for Mr. Westcott. The testimony of Mr. Westcott was vital to his defense upon the merits. The board of *inquiry sat in the [316] fall of 1897, and the court-martial later. Westcott was living during both proceedings; but he appeared in neither, though urged to appear by General Gillespie, the president of the board. When the evidence was taken in the pending case he was dead, having died in July, 1901. If it be conceded that the testimony of one not in the serv-

ice could not have been required in a purely military investigation, it was within Westcott's power to have voluntarily testified as many other witnesses did. After Carter had been convicted, there occurred in the city of New York certain removal proceedings before a United States commissioner, for the purpose of removing Greene and Gaynor from New York to Savannah for trial upon indictments there pending for the very fraud here under consideration. Carter was included in the same indictments, but was not a party to the removal proceedings mentioned. In that case Mr. Westcott was examined by the United States. His evidence then delivered was offered by the United States in the circuit court as evidence in this case, but was excluded upon objection, as having been given in a proceeding to which Carter was not a party, and without opportunity for cross-examination by him. The objection was rightly sustained. The evidence was, however, admitted for the purpose of fixing notice upon the defendants Lorenzo D. Carter and I. Stanton Carter of the character of the title of their brother, Oberlin M. Carter, to the securities involved in this suit. The evidence was properly admitted solely for the purpose of showing Westcott's disclaimer of any title to or interest in the securities which he handed over to Carter, as shown by his receipts mentioned above. We, however, exclude any statement made by him as against the defendant Oberlin M. Carter. The significant fact remains that Robert F. Westcott, though the close friend, and, indeed, the affectionate friend, of his ex-son-in-law, Oberlin M. Carter, did not voluntarily appear before either of the military tribunals in his defense, and, figuratively, stood by and saw him broken in rank and sent in ignominy to serve a term of five years for [317] *having betrayed his trust. It is true that Captain Carter says that he did all he could to persuade Mr. Westcott to appear and testify. Nevertheless, the failure of Captain Carter to secure his evidence, in view of their relation, justifies a presumption that it would not have borne out the defense.

The conclusion we must reach is that Robert F. Westcott was but the agent and representative of Oberlin M. Carter in the receipt of a share in the profit made by Greene and Gaynor.

For whatever gains, profits, or gratuities he is shown to have received, he must account.

The contention that any recovery must be limited to property or securities into which such illicit gains have been traced is not sound.

The facts stated by the bill and support-

ed by the evidence show that Carter received from Greene and Gaynor, directly or indirectly, something in excess of \$500,000 as his share in the Greene and Gaynor contracts. Under the legal principle which we have heretofore announced, the United States may require Captain Carter to account for all he has received by way of gain, gifts, or profits out of the Greene and Gaynor contracts, irrespective of the actual damage it has sustained or its ability to follow such gains into specific property. Undoubtedly it may, as by its bill it sought to do, follow the fund so corruptly received, and assert title to any property into which such illegal gains have gone. But there was a prayer for "other, further, and general relief;" and under that it was entitled to a judgment, as for money had and received for its use, for any difference between the cost of the specific property recovered and the gains so received which it is unable to trace. The decree against O. M. Carter was for a much less sum than such difference.

Neither did the agreement of November 6, 1901, between the parties, of which we shall speak later, afford any defense to the judgments against I. S. and L. D. Carter. Those judgments were for securities traced to their possession, which *had not [318] been disposed of in good faith, in view of the knowledge they had of the character of Captain Carter's title and the legal right of the United States to pursue his illegal gains into the property in their hands. There is no error in the decree below of which the cross appellants can complain.

There remains for consideration the appeal by the United States. This involves allowances made out of the funds in court into which the gains of Carter had been traced, under an agreement between the United States and the defendants O. M. Carter and his brothers. Only the second, seventh, eighth, and ninth paragraphs of the agreement need be set out, and they are set out in the margin.†

† (2) That as to the assets claimed by the government as assets into which it charges the fund intrusted to Oberlin M. Carter, as disbursing officer, was diverted, with the proceeds, income, and reinvestments thereof, where the form of the investments have been changed, and which assets have or may be hereafter traced into the possession, custody, or control of said defendants, and have not theretofore been bona fide disposed of by them, and therefore beyond their control, shall be forthwith by the said defendants turned over to the receiver appointed in this cause. But the court will determine whether the one Kentucky Central bond and one Michigan Telephone bond, charged in the bill to be reinvestments of said alleged

319] *The United States assigns as error the allowance of a fee of \$60,000 to Mr. H. G. Stone for his services in this and the ancillary suits, of which a balance of \$42,500 was directed to be paid by the receiver out of the fund in court. Certain other payments to other counsel and for other expenses are also objected to. The ground of objection is that the allowance to Mr. Stone is excessive, and that neither that fee nor any of the other items should have been paid, *because the condition upon which the United States agreed to the use of the fund had not been complied with.*

So far as the amount of the allowance is concerned, we do not feel authorized to disturb it, as two courts in succession **320]** *have concurred in the amount allowed as reasonable. The consideration for the stipulation was abundantly sufficient to justify the assent of the United States. As it turns out, the bargain may appear to have been too generous, for the right of the United States to the entire fund which had been turned over to Lorenzo D. and I. Stanton Carter, as things now appear, was clear. Whether the securities which were the subject of this stipulation could have been seized and subjected was not so clear then, nor was the character of the claims which might be asserted by L. D. and I. S. Carter to these assets then fully known. Upon this stipulation they agreed to turn over to the receiver the assets claimed by the Unit-

ed States in the pending bill, which had not been theretofore "*bona fide disposed of by them, and therefore beyond their control.*" This agreement necessarily left open for adjustment the question as to what assets received from O. M. Carter by his brothers, the defendants L. O. and I. S. Carter, *had been theretofore disposed of by them bona fide*, and which were therefore beyond their control. Immediately thereafter I. S. Carter delivered to the receiver assets in specie aggregating \$71,660. The receiver's receipt is dated November 11, 1901. On May 23, 1900, I. S. Carter and Ditson P. Carter received from one J. H. Paul, in trust, for O. M. Carter, a long list of securities, of which a part went into the possession of Ditson P. Carter and the rest into the possession of I. S. Carter. The securities turned over on November 11, 1901, by I. S. Carter, are a part of those covered by the receipt given to J. H. Paul. On December 23, 1901, Mr. H. G. Stone, counsel for the Carters, reported to Mr. Edward I. Johnson, representing the United States, that, aside from the securities theretofore turned over by I. S. Carter on November 11, 1901, there remained to be accounted for assets which he listed, aggregating \$69,704.53. Against this he claimed that I. S. Carter and L. D. Carter had disbursed \$119,127.42. This left the parties very wide apart. The matter was referred to Mr. William M. Booth, as special master. In the *accounting which en- **[321**

trust fund, and which bonds are claimed by I. Stanton Carter, should be held by the receiver pending the litigation.

(7) From said fund to be accounted for to the receiver, the sum of \$5,000 shall be left in the hands of H. G. Stone, chief counsel for said Oberlin M. Carter, from which to compensate and cover the expense of employment of local counsel in any of the districts in which local counsel have been or may be employed in any branch of this case.

(8) From said fund, to be accounted for to the receiver, there shall be paid:

(a) The fees, traveling expenses, and other expenses of Oberlin M. Carter's chief counsel and of his attorney at Chicago, to be fixed and allowed by the court.

The importance of the case, and the means and methods taken to bring the same to a just determination speedily, and not the length to which the proceedings may be protracted, to be considered as elements of merits in fixing such fees.

(b) Also the fee of his attorney for representing said Carter in case of any criminal trial in Georgia, if Carter should be placed on trial there prior to the final disposition of this case.

(c) The expenses of taking evidence in behalf of said Carter, including the services of an accountant at not exceeding \$10 per day for his services when needed and actually employed, plus his expenses, if any.

54 L. ed.

(d) And if, before the final determination of this cause, the said Oberlin M. Carter shall be liberated from prison, he shall be allowed his reasonable personal expenses incurred by him while engaged in work in this cause, including the taking of evidence, but with no compensation for his time. Such expenses to be determined by the court and paid out of the moneys in court.

Payments and allowances under paragraph numbered "(8)" of this agreement to be determined by the court from time to time on petition, with the right of the United States to contest the same as unreasonable, or that any expense was not incurred as stated.

(9) The assent of the United States to paragraphs numbered "(1)," "(7)," and "(8)" of this agreement is predicated upon the understanding that the said defendants will turn over to the receiver at least substantially all of the assets turned over to I. Stanton Carter and L. D. Carter, by J. H. Paul and R. E. Westcott and James Bragg, or their proceeds and reinvestments, except such as have been, prior to the receivership, bona fide paid out or pledged by them for attorneys' fees or as expenses in defense of Carter, or expended by them legitimately in the handling of said properties, or which have not already been taken possession by receivers in this cause.

sued it appeared that many of the securities which had been received by one or the other of the Carter brothers in trust for O. M. Carter had been sold and the proceeds either reinvested or disbursed by them, or retained as salaries under agreements made between them and O. M. Carter. The master reported that there were very wide divergencies between the defendants and the United States as to the rule of accountability, the defendants insisting that any disbursements made by them satisfactory to O. M. Carter were proper credits, including large sums appropriated as salaries for managing these assets, as well as other large amounts for which no vouchers could be furnished. On the other hand, it was claimed that disbursements made by them must be accounted for to the complainant, as to a *cestui que trust*, and that all sums retained by them as compensation for their services should be disallowed, in view of their undoubted knowledge of the character of Carter's title.

We shall not go further into this matter than to say that the final result in the court of appeals was to disallow the salary claims and some of the disbursements, for which no good reason was shown, or no vouchers produced. Among the assets in the hands of these trustees, at the date of the account, were twenty-one Kentucky Central bonds of \$1,000 each, which appeared to have been the result of re-investments which had been appropriated by them on account of salaries. These the court required them to account for. The result was that, although they were allowed many thousand dollars on account of very questionable disbursements, there was a considerable decree against each of them for assets not accounted for or turned over in specie. The single question to which we shall apply this generalization of facts respecting this accounting is as it affects the condition upon which the United States agreed that, out of the funds in court, Captain Carter's expenses in conducting his defense, including counsel fees, should be paid. The stipulation was that "fees, traveling expenses, and other [322] expenses of Oberlin *M. Carter's chief counsel [meaning Mr. H. G. Stone], and of his attorney at Chicago, to be fixed and allowed by the court," etc. The "condition" which the United States claims was violated was "that the said defendants will turn over to the receiver at least substantially all of the assets turned over to I. S. Carter and L. D. Carter by J. H. Paul and R. E. Westcott and James Bragg, or their proceeds and reinvestments, except such as have been, prior to the receivership, bona fide paid out or pledged by them for attorneys' fees, or as expenses in defense of said Carter, or expended by

them legitimately in the handling of said properties," etc. This condition, we think, has not been violated by the insistence upon a credit for all disbursements made by them in Captain Carter's defense and in the care of his estate in their hands, nor by their claim to the compensation which he had agreed to allow them. The original agreement, as well as the provision inserted by the United States, alike provided that they should not be required to turn over that which had been disbursed in good faith. This involved the right to have their disbursements and their claims for services inquired into from their point of view. The Central Kentucky bonds represented, as the court found, reinvestments of funds or income from funds. They claimed that these bonds were rightfully their own property under the agreement with Captain Carter for a salary of \$10,000 per year for one of them and \$3,600 per year for the other. The court decided against this claim, but we do not believe that counsel, who, in good faith, presented the defense of the Carters for such salaries or for other disbursements made by them, should be deprived of the benefit of the stipulation which provided for their compensation. The bargain with the government may appear a bad one, but it was a contract and should be observed.

The petition for a writ of prohibition, being calendar No. 10, original, will be dismissed, as the court, in view of the affirmation of the decree appealed from, finds it now *unnecessary to decide any question [323] as to the jurisdiction of the circuit court pending the appeal just disposed of.

The errors assigned by the United States are overruled and the decree affirmed in all particulars.

WILLIAM W. STEWART, Appt.,
v.

LEWIS A. GRIFFITH, Executor of Alfred
W. Ball, Deceased.

(See S. C. Reporter's ed. 323-332.)

**Vendor and purchaser — default —
vendor's election.**

1. The vendor may elect either to insist upon the forfeiture or enforce specific performance after default in payment of the balance of the purchase price, under a contract which provides that if such balance be not paid on a specified date, the amount paid "is to be forfeited, and the contract of sale and conveyance to be null and void, and of no effect in law," where the sum paid is stated to be "part purchase price of the total sum to be paid," the land is described as "being sold," and the purchase price "is to be" divided, and the notes secured by

mortgage "to be given," and in the case of a lot reserved, the vendor "shall have paid to him" a specified sum if he elects to abandon it.

[Rights and liabilities of parties to land contract, see Vendor and Purchaser, II., in Digest Sup. Ct. 1908.]

Foreign executors—suits by—in District of Columbia.

2. An executor who could have maintained in Maryland, where the land lies, a suit for the specific performance of a contract for its sale, can, under D. C. Code, § 329 (31 Stat. at L. 1242, chap. 854), maintain the suit in the District of Columbia if the defendant resides there.

[For other cases, see Executors and Administrators, 153-161, in Digest Sup. Ct. 1908.]

Executors and administrators—suits by—specific performance.

3. An executor may maintain a suit for the specific performance of a contract for the sale of land, the property of the testator, under Md. Code 1888, art. 93, § 104, empowering an executor to prosecute any personal action whatever, whether in law or in equity, that the testator might have prosecuted, except an action for slander, and § 81 of the same article, authorizing the executor of a person who shall have made sale of real estate, and has died before receiving the purchase money, or conveying the same, to make a conveyance to the purchaser, provided he shall satisfy the court that such purchaser has paid the full amount of the purchase price.

[For other cases, see Executors and Administrators, VI. a, in Digest Sup. Ct. 1908.]

Executors—powers—completing executory land contracts.

4. Authority to carry out an executory contract for the sale of testator's real property is conferred upon the executor by a will which invests him with full and complete authority over the testator's estate, and empowers him to sell the real property at public sale after one month's notice, upon such terms as he thinks proper.

[For other cases, see Executors and Administrators, IV. g, in Digest Sup. Ct. 1908.]

[No. 145.]

Argued April 8, 11, 1910. Decided April 25, 1910.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which, reversing a decree of the Supreme Court of the District, directed the entry of a decree for the specific performance of a contract for the sale of real property. Affirmed.

See same case below, 31 App. D. C. 29.

The facts are stated in the opinion.

Messrs. **James E. Padgett** and **Henry E. Davis** argued the cause and filed a brief for appellant:

There can be no doubt as to the meaning of the avoiding clause of the contract, and 54 L. ed.

when the contingency happened, the contract terminated, and has since had no existence.

Pullman's Palace Car Co. v. Central Transp. Co. 139 U. S. 63, 35 L. ed. 69, 11 Sup. Ct. Rep. 489; *Cherry v. Stein*, 11 Md. 1.

But if there should be any doubt, then the conduct and conversations of the parties and their agents maintain our contention.

Varnum v. Thruston, 17 Md. 471; *Roberts v. Bonaparte*, 73 Md. 191, 10 L.R.A. 689, 20 Atl. 918; *United States v. Bethlehem Steel Co.* 205 U. S. 118, 51 L. ed. 736, 27 Sup. Ct. Rep. 450.

And the acts and declarations of agents of the parties, in the course of their employment, are admissible.

Main v. Aukam, 12 App. D. C. 375.

Can the appellee convey such title to the land as the contract calls for?

Adams v. Henderson, 168 U. S. 573, 580, 581, 42 L. ed. 584, 587, 588, 18 Sup. Ct. Rep. 179; *Gill v. Wells*, 59 Md. 493; *Wesley v. Eells*, 177 U. S. 370, 376, 377, 44 L. ed. 810, 812, 813, 20 Sup. Ct. Rep. 661; *Watts v. Waddle*, 6 Pet. 389, 8 L. ed. 437; *Hepburn v. Auld*, 5 Cranch, 262, 3 L. ed. 96; *Emmert v. Stouffer*, 64 Md. 543, 3 Atl. 293, 6 Atl. 177; *McCaffrey v. Little*, 20 App. D. C. 116; *Baltimore & O. R. Co. v. Winslow*, 18 App. D. C. 453.

The execution of said contract did not work a conversion of the real estate into personality.

3 Pom. Eq. Jur. § 129; *Lynn v. Gephart*, 27 Md. 547; *Keller v. Harper*, 64 Md. 74, 1 Atl. 65; *Dalrymple v. Taneyhill*, 4 Md. Ch. 175; *Jones v. Plummer*, 20 Md. 416; *Rizer v. Perry*, 58 Md. 112.

Until the appellant had made his first payment under the contract, or, in the event of his default, until Ball had made his election, assuming that he had the right so to do, to enforce the contract, there could be no equitable conversion.

3 Pom. Eq. Jur. 132; *Re London Improvement Act*, 30 Beav. 206; *White's Estate*, 167 Pa. 206, 31 Atl. 569; *Edwards v. West*, L. R. 7 Ch. Div. 858; *Smith v. Loewenstein*, 50 Ohio St. 346, 34 N. E. 159.

The interest of the vendee is equitable merely, and whatever puts an end to the equitable interest—as notice, an agreement of the parties, a surrender, an abandonment—places the vendor where he was before the contract was made.

Jennison v. Leonard, 21 Wall. 302, 22 L. ed. 539.

Assuming that there was a conversion at the date of the contract of sale, and that Ball held the legal title in trust for appellant, and that the purchase money became a part of Ball's personal assets, and, upon his death, became vested in appellee, as exec-

utor, yet the title to the real estate descended to Ball's heirs, and they are the only persons who could make a valid conveyance of the title to the appellant.

1 Pom. Eq. Jur. § 368.

Messrs. Charles H. Merillat and George R. Gaither argued the cause, and, with Mr. Charles J. Kappler, filed a brief for appellee:

The phrase in the agreement that if the balance of the purchase money were not paid by November 7, the \$500-down payment should be forfeited and the agreement be null and void, does not import an option contract terminable by default of the vendee, but means that the vendor has the election, on default, to forfeit the down payment, or to compel performance of the contract by the vendee.

Wileoxson v. Stitt, 65 Cal. 596, 52 Am. Rep. 310, 4 Pac. 629; Dana v. St. Paul Invest. Co. 42 Minn. 194, 44 N. W. 55; Dooley v. Watson, 1 Gray, 415; Western Bank v. Kyle, 6 Gill, 343; Hooker v. Pynchon, 8 Gray, 552; Mason v. Caldwell, 10 Ill. 196, 48 Am. Dec. 330; Hull v. Sturdivant, 46 Me. 34; Cathcart v. Robinson, 5 Pet. 264, 8 L. ed. 120; Fry, Spec. Perf. p. 56; Hazleton v. Le Due, 10 App. D. C. 379; Cochran v. Blout, 161 U. S. 350, 40 L. ed. 729, 16 Sup. Ct. Rep. 454.

Though the action be brought in one jurisdiction, specific performance may be compelled, though the land be in another jurisdiction. The reason is that the action is a personal, transitory one, and equity coerces the individual into paying the price and taking the land. The decree operates upon the person of the defendant.

Worthington v. Lee, 61 Md. 530; Hart v. Sansom, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586; Cloud v. Greasley, 125 Ill. 313, 17 N. E. 826; Epperly v. Ferguson, 118 Iowa, 47, 91 N. W. 816.

The title comes from the deed executed.

Grant Coal Co. v. Clary, 59 Md. 441.

Wills are interpreted according to popular import, and not technical rules.

Phelps v. Harris, 101 U. S. 370, 25 L. ed. 855; Peter v. Beverly, 10 Pet. 532, 9 L. ed. 522.

Where an executor is empowered to sell lands, he takes the fee simple.

Alger v. Anderson, 78 Fed. 729; Hanson v. Brewer, 78 Me. 197, 3 Atl. 574; Nelson v. Cowing, 6 Hill, 336; Sandford v. Handy, 23 Wend. 260; Kidwell v. Brummagin, 32 Cal. 437; Miller v. Meetch, 8 Pa. 418.

Executors or trustees take an estate commensurate with the exigencies of their trust. Where powers given under a will require the executor to have the legal estate, the will must be held to invest him with it.

Neilson v. Lagow, 12 How. 98-111, 13 L.

ed. 909-915; Webster v. Cooper, 14 How. 499, 14 L. ed. 515; Doe ex dem. Poor v. Considine, 6 Wall. 471, 18 L. ed. 873; Johns Hopkins University v. Middleton, 76 Md. 188, 24 Atl. 454; Franklin v. Osgood, 2 Johns. Ch. 20.

Wherever the specific execution of a contract or covenant respecting lands would have been decreed as between the original parties, it will be decreed as between all persons claiming under them in privity of estate, or of representation, or of title.

Worthington v. Lee, 61 Md. 530; Mundorff v. Kilbourn, 4 Md. 463.

By the will, the real estate as well as personalty being charged with payment of debts, the administrator or executor was the proper party.

Thompson v. Duncan, 1 Tex. 487.

In an action for the specific performance of a contract made by the testator for the conveyance of land, it is not necessary that the heirs should be made parties in order to bind them.

Shannon v. Taylor, 16 Tex. 413; Holt v. Clemmons, 3 Tex. 423; Ottenhouse v. Burleson, 11 Tex. 87.

Execution of the contract, with partial payment, was a transfer in equity of the title; and by the terms of the will this title was vested in the executor.

Bissell v. Heyward, 96 U. S. 580, 24 L. ed. 678; Smith v. Wyckoff, 11 Paige, 50.

In equity there was a conversion of the land into money, and the fund to be derived as a result of the sale passed to the personal representatives, and not to the heirs. Hence, the heirs were neither indispensable nor proper parties.

Smith v. Ayer, 101 U. S. 326, 25 L. ed. 958.

The executor becomes vested with the title to all corporeal personal property, or things in possession and visible and tangible, and also the title to incorporeal property, or things in action.

Hickox v. Frank, 102 Ill. 660; Hitchcock v. Mosher, 106 Mo. 578, 17 S. W. 638.

The vendor's interest ceases to be real estate. It becomes a chose in action, a personal demand for the consideration of money, which, in case of death, goes to his personal representative; and the legal title is held only as a security for the payment of the debt. The vendee becomes in substance the owner of the estate. This conversion takes place notwithstanding it may be defeated afterwards by the nonpayment of the purchase money.

Longwell v. Bentley, 23 Pa. 99.

By a contract of sale of land, the estate of the decedent is converted into personalty, over which the personal representatives have absolute control.

Simmons's Estate, 140 Pa. 567, 21 Atl. 402; Dent v. Maddox, 4 Md. 523.

The administrator, and not the heirs of a deceased vendor of land, is the proper person to bring suit for the unpaid purchase money.

Rockford v. Rockford, 12 Ky. L. Rep. 153, 13 S. W. 1075; West Hickory Min. Asso. v. Reed, 80 Pa. 38.

Where an agreement is made to sell land, the vendor holds the legal title as trustee for the vendee, and the vendee is a trustee for the vendor as to the purchase money.

Lewis v. Hawkins, 23 Wall. 126, 23 L. ed. 114.

The administrator is the representative of the rights of the heirs and creditors of the estate, and has the same right to sue as the intestate, and has the exclusive right and duty.

Meeks v. Olpherts, 100 U. S. 566, 25 L. ed. 736.

Where a person had contracted to sell his estate, and died, there was a conversion; in equity he had alienated the land and had acquired title to the purchase money. The heirs at law were not entitled to the estate.

Curre v. Bowyer, 5 Beav. 8; Tye v. Tye, 88 Mo. App. 330; Sutter v. Ling, 25 Pa. 466; Krause's Appeal, 162 Pa. 25, 29 Atl. 296.

The executor, under the orphans' court orders, can complete the testator's contract. The heirs are not necessary, the will being admitted. Appellant, by his default, cannot defeat his own contract and his own title. Equity will mold its decree, protect all parties, and specifically enforce the contract.

Montgomery v. Williamson, 37 Md. 421; Gale v. Best, 20 Wis. 45; Livingston v. Cochran, 33 Ark. 294; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Corbett v. Nutt, 10 Wall. 464; 19 L. ed. 976; Orr v. Irwin, 4 N. C. (2 Car. Law Repos. 465); Keplinger v. Maccubbin, 58 Md. 213; Hyde v. Heller, 10 Wash. 586, 39 Pac. 249; Huggins's Estate, 204 Pa. 167, 53 Atl. 746; Weed v. Peck, 38 Conn. 88; Miller v. Miller, 25 N. J. Eq. 354; Fulwider v. Peterkin, 2 G. Greene, 522; Bryant v. Atlantic Coast Line R. Co. 119 Ga. 608, 46 S. E. 829; West Hickory Min. Asso. v. Reed and Simmons's Estate, supra; Spier v. Robinson, 9 How. Pr. 325; Robinson v. Appleton, 124 Ill. 276, 15 N. E. 761; Newton v. Swazey, 8 N. H. 9; Butler v. Rockwell, 14 Colo. 125, 23 Pac. 462; Grant Coal Co. v. Clary, 59 Md. 441.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity, brought by the executor of one Ball for the specific performance of a contract made by the appellant to purchase certain land. The plaintiff had a decree in the court of appeals for

the District of Columbia, and the defendant appealed. 31 App. D. C. 29.

The material parts of the contract are as follows: "This agreement, made by and between L. A. Griffith, duly authorized agent and attorney, under a certain power of attorney *from Alfred W. Ball, both of [327 Prince George's county, Maryland, parties of the first part, and Wm. W. Stewart of Washington, District of Columbia, of the second part. Witnesseth that the said W. W. Stewart has paid to the said L. A. Griffith, agent, the sum of five hundred dollars (\$500) part purchase price of the total sum to be paid for a certain tract of land, owned by the said Alfred W. Ball," in Maryland, as described, "same being sold at the rate of \$40 per acre." "And the said L. A. Griffith, as the agent and duly authorized attorney of said Alfred W. Ball, hereby grants, bargains, and sells, and agrees to convey by proper deed . . . duly executed by the said Ball to the said Stewart, the said 240 acres of land upon further payments and conditions hereinafter named, to wit: The balance of one half of the purchase price of the said 240 acres, more or less, at the rate of \$40 per acre, is to be paid to the party of the first part on the 7th day of November, 1903, and the remaining one half of the total purchase price is to be divided into five equal payments, secured by five promissory mortgage notes, secured by purchase-money mortgage upon the said property, to be given by the said Stewart and wife," with immaterial details. A burial lot of one acre is reserved, "conditioned, however, that if the said Ball should desire to abandon the said burial tract. . . . he shall have paid to him therefor by the said party of the second part the sum of (\$40) forty dollars," etc. "The said land is to be surveyed and a plat made thereof, and the total purchase price is to be at the rate of \$40 per acre, as determined by the said survey; the cost of the said survey is to be borne equally by the said parties of the first part and the second parts; the said L. A. Griffith and W. W. Stewart each to pay one half of the total survey costs. Proper deed or deeds of conveyance and abstracts of title of the said land, based upon title search therefor, is to be made and by J. K. Roberts . . . showing clear and unencumbered fee-simple title, in the said land above mentioned and described, in the said Alfred W. Ball, and one half of the total costs for *same, [328 not exceeding \$50, is to be borne equally by the parties hereto. In case the remainder of the first half of the purchase price be not paid on November 7, 1903, then the said \$500 so paid to the said Griffith is to be forfeited and the contract of sale and con-

veyance to be null and void, and of no effect in law, otherwise to be and remain in full force. . . . The possessory right to all of the said premises on the property mentioned herein is to remain in the said Ball, until the one half payment of the total purchase price herein provided for on November 7th, 1903, has been fully paid and satisfied, to the said L. A. Griffith, agent. Witness our hands and seals this 5th day of June, 1903. L. A. Griffith. Wm. W. Stewart." With seals.

The first defense is based on this document itself. It is said that the defendant made no covenant, and therefore was free to withdraw if he chose to sacrifice the \$500 that he had paid. This contention should be disposed of before we proceed to the other questions in the case. The argument is that the condition of forfeiture just stated and the consequence that the contract is to be void and of no effect in law disclose the only consequences of default on the purchaser's part, much as until well after Lord Coke's time the only consequence of breaking the condition of a bond was an obligation to pay the penalty. The obligor was held to have an election between performing the condition and payment. *Bromage v. Genning*, 1 Rolle Rep. 368; 1 Inst. 206b; *Hulbert v. Hart* (1682) 1 Vern. 133. Some circumstances were referred to in aid of this conclusion, but, as we think the meaning of the document plain, we shall not mention them, except in connection with other matters, further than to say that there is nothing that would change or affect our view.

It seems to have been held within half a century after *Hulbert v. Hart*, that, under some circumstances, at least, a bond would be construed to import a promise of the event constituting the condition. *Hopson v. Trevor* (1723) 1 Strange, 533, s. c. 2 P. Wms. 191; *Anonymous* (1728) Mosely, 37; 329] *Roper v. Bartholomew*, 12 Price, 797, 811, 822, 826, 832; *Hooker v. Pyncheon*, 8 Gray, 550, 552. But in this case we are not confined to a mere implication of a promise from the penalty. The tenor of the "agreement" throughout imports mutual undertakings. The \$500 is paid as "part purchase price of the total sum to be paid;" that is, that the purchaser agrees to pay. The land is described as "being sold." There are words of present conveyance, inoperative as such, but implying a concluded bargain, like the word "sold" just quoted. So one half of the purchase price "is to be" divided and the notes secured by mortgage "to be given;" and in the case of the burial lot, Ball "shall have paid to him" \$40 if he elects to abandon it. Here is an absolute promise in terms which it would be unreasonable to make

except on the footing of a similar promise as to the main parcel that the purchaser desired to get. We are satisfied that Stewart bound himself to take the land. See *Wilcoxson v. Stitt*, 65 Cal. 596, 52 Am. Rep. 310, 4 Pac. 629; *Dana v. St. Paul Invest. Co.* 42 Minn. 194, 44 N. W. 55. The condition plainly is for the benefit of the vendor, and hardly less plainly for his benefit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word "void" means voidable at the vendor's election, and the condition may be insisted upon or waived, at his choice. *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *Oakes v. Manufacturers' F. & M. Ins. Co.* 135 Mass. 248, 249; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410, 419.

Ball died on November 5 or 6, 1903, just before the date fixed by the contract for the payments (November 7). He left a will appointing Griffith his executor, and containing provisions to which we shall refer later. Before probate, Griffith wrote to Stewart as follows, on November 10:

"I have consulted two lawyers and am satisfied that I am fully authorized and empowered to complete sale of land and give deed. It rests with you. Please let me know positively on or before Monday next (16th) what you intend to do. There is a proposition on hand from other sources, and I have under *this will power to act. [330 I will make private arrangements at once for the disposition of it, if you do not take it. If you do not meet the requirements, and satisfactory arrangements are not made before Monday, 16th, at 12 o'clock, please consider the matter ended. I think you entitled to the property, and I desire that you shall get it, but I must do for the best interests of the estate, and I will gladly wait for you until Monday, 16th." There is a suggestion in argument, not quite unwarranted by the language of this letter, that, so far as in Griffith's power, he then left the choice to Stewart whether to go on with the bargain or not. But apart from Griffith's lack of authority to change rights at that time, we are satisfied that the true import of the letter was politely to apply a spur to Stewart on the assumption that he had a bargain that he would not want to let go. The land was supposed to contain oil.

The stipulations in the contract were performed on the part of the vendor, and it now may be assumed that Stewart's obligation is outstanding, although repudiated by him, and that the only question is whether it can be enforced by Griffith in this action. To be sure, there was some

attempt on Stewart's part, earlier, to say that he merely represented an oil company, and that the company alone was bound; but this properly was abandoned at the argument,—Stewart's name is the only one appearing in the instrument, and he signed and sealed it, so that no such escape is open. *Glenn v. Allison*, 58 Md. 527; *M'Ardle v. Irish Iodine & Marine Salts Mfg. Co.* 15 Ir. C. L. Rep. 146, 153.

Coming, then, to the question that remains, it is to be noticed as a preliminary that if Ball's executor could have maintained this suit in Maryland, where the land lies, he can maintain it here, where the defendant resides. D. C. Code, § 329 [31 Stat. at L. 1242, chap. 854]. Some technical objections were raised before us as to the proof of the probate proceedings, but it sufficiently appears that Ball's will was proved and that the plaintiff qualified as executor under the same.

331] *By the Maryland Code, an executor may prosecute any personal action whatever, whether at law or in equity, that the testator might have prosecuted, except an action for slander. Code of 1888, art. 93, § 104. And by § 81 of the same article, the executor of a person who shall have made sale of real estate, and has died before receiving the purchase money, or conveying the same, may convey said real estate to the purchaser, and his deed shall be good and valid in law, and shall convey all the right, title, claim, and interest of such deceased person in such real estate as effectually as the deed of the party so dying would have conveyed the same; provided, the executor of the person so dying shall satisfy the orphans' court granting him administration that the purchaser has paid the full amount of the purchase money. These seem sufficient to make out the plaintiff's case, if there were nothing more. The proviso in the Maryland statute obviously must create a condition subsequent only, as it is not to be supposed that a purchaser would pay unless he got what he paid for at the same time. In substance, the Code points out the executor as the proper person to enforce the contract, gives him a right of action to that end, and empowers him to make the deed. We do not perceive how a conveyance could be questioned, if made by an executor upon a contemporaneous payment of the price, in pursuance of a binding contract of his testator, even without obtaining antecedent authority from the orphans' court. Therefore we do not perceive why the executor is not entitled to require specific performance if he is ready to deliver a deed at the moment of receiving the price. In this case the executor obtained an order from the orphans' court,

54 L. ed.

purporting to authorize him to complete the sale, as if it had been an application for leave to sell under § 276. This seems to us to have been superfluous, but it did no harm, and it does not narrow the plaintiff's right to recover, by being set out as one of the foundations of the bill.

Next, apart from statute, it would be going far in search of possible doubts to say that sufficient authority could not be *derived from the will. The language [332 is, "I direct, authorize, and empower" the executor "to have full and complete power and authority over my entire estate, real, personal, and mixed;" and it directs and empowers him to sell the testator's real estate at public sale, after one month's notice, upon such terms as he thinks proper. We are not inclined to disagree with the court of appeals in its opinion that the words, taken with the whole will, imply a devise of the legal title to his executor, and an authority sufficient to warrant his carrying out the sale. It is urged that the probate of the will does not establish it conclusively as to real estate, and that the heirs might attack it hereafter; but it is answered that, by the contract, the land had become personally as against them, and that therefore, so far as this land is concerned, the will is safe from collateral attack. Moreover, as it is clear that the estate has and is subject to a binding contract, it is hard to see how it matters to the heirs who does the formal acts of accomplishment, so long as he is accountable to the orphans' court.

No question was raised on either side as to the covenants of Stewart being enforceable only by Griffith personally, because the agreement was under seal, and Griffith alone was party to it. *Berkeley v. Hardy*, 5 Barn. & C. 355; *Frontin v. Small*, 2 Ld. Raym. 1418, 1419. It is enough to say that Stewart could not have profited by the suggestion, had it been made.

Decree affirmed.

Mr. Justice Harlan concurs in the result.

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*UNITED STATES, Plff. in Err., [333
v.

CORA WELCH and David Welch, Her Husband, Jesse Wilson, Ella Wilson Brown, et al.

(See S. C. Reporter's ed. 333-339.)

Eminent domain — taking — easement.

The owner of a farm, a part of which is permanently flooded by a government dam, must be compensated, in addition to the

value of the land taken, for the lessened value of the farm, caused by the consequent cutting off of a private way across the lands of others, which is the only practicable outlet from the farm to the county road. [For other cases, see *Eminent Domain*, V., in *Digest Sup. Ct. 1908*.]

[No. 147.]

Argued April 11, 1910. Decided April 25, 1910.

IN ERROR to the Circuit Court of the United States for the Eastern District of Kentucky to review a judgment awarding damages to the owner of property permanently flooded by a government dam. Affirmed.

The facts are stated in the opinion.

Assistant Attorney General **John Q. Thompson** argued the cause, and, with Mr. A. C. Campbell, filed a brief for plaintiff in error:

If private property is merely lessened in value by the erection of a public improvement, and is not invaded or encroached upon, there is no implied contract to make compensation therefor.

Northern Transp. Co. v. Chicago, 99 U. S. 635, 642, 25 L. ed. 336, 338; *United States v. Lynah*, 188 U. S. 445, 465, 47 L. ed. 539, 546, 23 Sup. Ct. Rep. 349; *Mills v. United States*, 12 L.R.A. 673, 46 Fed. 742.

To constitute a taking of private property such as is inhibited by the 5th Amendment to the Constitution, unless just compensation is made, it must be shown that the owner thereof has been wholly deprived of the use of the same. If it has been merely injured or its use impaired, there is no taking such as is contemplated by said Amendment.

Northern Transp. Co. v. Chicago, *supra*; *Bedford v. United States*, 192 U. S. 217, 223-225, 48 L. ed. 414, 416, 417, 24 Sup. Ct. Rep. 238; *Manigault v. Springs*, 199 U. S. 473, 484, 485, 50 L. ed. 274, 280, 281, 26 Sup. Ct. Rep. 127; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 583, 584, 50 L. ed. 596, 605, 606, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175.

Where ingress and egress to and from private property are rendered more difficult by reason of the erection of a public improvement, and the value of the property is thereby lessened, there is not a taking such as is contemplated by said Amendment.

NOTE.—On liability for damming back water of stream—see note to *Avery v. Vermont Electric Co.* 59 L.R.A. 817.

On cutting off access to a highway as a taking—see note to *Ranson v. Sault Ste. Marie*, 15 L.R.A. (N.S.) 49.

Gibson v. United States, 166 U. S. 269, 270, 275, 276, 41 L. ed. 996-998, 1002, 17 Sup. Ct. Rep. 578.

A claim for damages against the government, which arises out of the construction of a lock and dam to improve the navigable capacity of a river, whereby a private road has been destroyed which afforded to the owners of the farm convenient access to and from a public highway, is not a claim founded upon the Constitution, even though the destruction of the private road has lessened the value of the farm.

Scranton v. Wheeler, 179 U. S. 141, 164, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48.

Assistant Attorney General **John Q. Thompson** and Mr. **Percy M. Cox** also filed a brief for plaintiff in error:

Private rights are always subservient to the public good.

3 *Grotius*, de Jure Belli, chap. 20, § 7; *Surocco v. Geary*, 3 Cal. 70, 58 Am. Dec. 385.

No liability attaches for remote or consequential damages.

Lansing v. Smith, 8 Cow. 149; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 549, 3 Am. Rep. 269; *Cooley*, Const. Lim. 6th ed. p. 473; *Dill. Mun. Corp.* § 987; *Sedgw. Stat. & Const. Law*, 2d ed. pp. 456 et seq; *Harvard College v. Stearns*, 15 Gray, 1; *Louisville & F. R. Co. v. Brown*, 17 B. Mon. 763; *Lewis, Em. Dom.* 3d ed. § 202; *Shrink v. Schuykill Nav. Co.* 14 Serg. & R. 71; *Keasy v. Louisville*, 4 Dana, 154, 29 Am. Dec. 395; *Wolfe v. Covington & L. R. Co.* 15 B. Mon. 404; *Hollister v. Union Co.* 9 Conn. 436, 25 Am. Dec. 36; *Sharp v. United States*, 191 U. S. 341, 48 L. ed. 211, 24 Sup. Ct. Rep. 114; *Currie v. Waverly & N. Y. B. R. Co.* 52 N. J. L. 392, 19 Am. St. Rep. 452, 20 Atl. 56; *High Bridge Lumber Co. v. United States*, 16 C. C. A. 460, 37 U. S. App. 234, 69 Fed. 324; *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Lambar v. St. Louis*, 15 Mo. 610; *Benjamin v. Wheeler*, 8 Gray, 409; *Gould v. Hudson River R. Co.* 6 N. Y. 522; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101; *Boston & W. R. Corp. v. Old Colony R. Corp.* 12 Cush. 605; *Richardson v. Vermont C. R. Co.* 25 Vt. 465, 60 Am. Dec. 283; *Beseman v. Pennsylvania R. Co.* 50 N. J. L. 235, 13 Atl. 164.

More inconvenience or additional expense in operation does not constitute a taking.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; *Manigault v. Springs*, 199 U. S. 473, 484, 485, 50 L. ed. 274, 280, 281, 26 Sup. Ct. Rep. 127; *United States v. Lynah*, 188 U. S. 473, 474, 47 L. ed. 549, 550, 23 Sup. Ct. Rep. 349.

No action can be maintained against the United States under the act of March

3, 1887 (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752), to recover damages in the nature of a trespass, whether proximate or consequential, because such action would necessarily sound in tort, and therefore be without the jurisdiction of the court.

Philadelphia, W. & B. R. Co. v. Philadelphia H. de G. Steam Towboat Co. 23 How. 209, 16 L. ed. 433; Mills v. United States, 12 L.R.A. 673, 46 Fed. 738; Wright v. Freeman, 5 Harr. & J. 467; Lambert v. Hoke, 14 Johns. 383; Cushing v. Adams, 18 Pick. 110; Shrieve v. Stokes, 8 B. Mon. 453, 48 Am. Dec. 401; Bigby v. United States, 188 U. S. 400, 47 L. ed. 519, 23 Sup. Ct. Rep. 468; Hill v. United States, 149 U. S. 593, 598, 599, 37 L. ed. 862, 864, 13 Sup. Ct. Rep. 1011; Gibson v. United States, 29 Ct. Cl. 18.

Mr. Edward S. Jouett argued the cause, and, with Mr. W. M. Beckner, filed a brief for defendants in error:

Easements are subject to the law of eminent domain.

14 Cyc. Law & Proc. p. 1139; 15 Cyc. Law & Proc. p. 607; Ross v. Georgia, C. & N. R. Co. 33 S. C. 477, 12 S. E. 101; Deavitt v. Washington County, 75 Vt. 156, 53 Atl. 563; Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 133, 1 A. & E. Ann. Cas. 517.

Permanent overflowing is a taking within the meaning of the constitutional provision.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557.

Mr. Edward S. Jouett also filed a separate brief for defendants in error:

Wherever there is an actual physical invasion, compensation is due, and the law then fixes the measure of that compensation to be the value of the part taken, plus the damage to the remainder of the property, resulting from such taking.

Louisville & F. R. Co. v. Brown, 17 B. Mon. 763; Hollister v. Union Co., 9 Conn. 436, 25 Am. Dec. 36; Currie v. Waverly & N. Y. B. R. Co. 52 N. J. L. 392, 19 Am. St. Rep. 452, 20 Atl. 56; Sharpe v. United States, 57 L.R.A. 932, 50 C. C. A. 597, 112 Fed. 893.

The Welch farm and its private roadway should be considered as one property.

Sharp v. United States, 191 U. S. 341, 48 L. ed. 211, 24 Sup. Ct. Rep. 114; Sharpe v. United States, 57 L.R.A. 932, note; Westbrook v. Muscatine, N. & S. R. Co. 115 Iowa, 106, 88 N. W. 202; Potts v. Pennsylvania S. Valley R. Co. 119 Pa. 278, 4 Am. St. Rep. 646, 13 Atl. 291; Peck v. Superior Short Line R. Co. 36 Minn. 343, 31 N. W. 217.

This action does not sound in tort.

United States v. Great Falls Mfg. Co. 112 54 L. ed.

U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; United States v. Lynah, 188 U. S. 446, 47 L. ed. 539, 23 Sup. Ct. Rep. 349.

Mr. Justice Holmes delivered the opinion of the court:

This is a proceeding under the act of March 3, 1887, chap. 359, § 2, 24 Stat. at L. 505, U. S. Comp. Stat. 1901, p. 753, to recover the value of land taken by the United States. It is admitted that a strip of about 3 acres of land lying along the side of Four Mile creek, and running east and west, was taken, and is to be paid for. It was permanently flooded by a dam on the Kentucky river, into which Four Mile creek flows. United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349. Manigault v. Springs, 199 U. S. 473, 484, 50 L. ed. 274, 280, 26 Sup. Ct. Rep. 127. The plaintiffs owned other land south of and adjoining the strip taken, and had a private right of way at right angles to the creek, northerly, across land of other parties, to the Ford county road, which ran parallel to the creek and at some distance from it. This was the only practical outlet from the plaintiffs' farm to the county road. The taking of the intervening strip of course cut off the use of the way, and the judge who tried the case found that it lessened the value of the farm \$1,700. He allowed this sum in addition to \$300 for the land taken. The United States took a writ of error on the ground that the former item was merely for collateral damage not amounting to a taking and of a kind that cannot be allowed; that at most it was only a tort. The case is likened to the depreciation in value of a neighboring but distinct tract by reason of the use to which the government intends to put that which it takes. Sharp v. United States, 191 U. S. 341, 355, 48 L. ed. 211, 216, 24 Sup. Ct. Rep. 114.

The petition, like the form of the finding, lends some countenance to this contention, by laying emphasis on the damage *to [339] the farm, although it is to be noted that, even in this aspect, the damage is to the tract of which a part is taken. 191 U. S. 354. But both petition and finding in substance show clearly that the way has been permanently cut off. A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits that it must pay. But if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would be an appropriation for the same end. Miller v. Horton, 152 Mass. 540, 547, 10 L.R.A. 116, 23 Am. St. Rep. 850,

26 N. E. 100. The same reasoning that allows a recovery for the taking of land by permanent occupation allows it for a right of way taken in the same manner; and the value of the easement cannot be ascertained without reference to the dominant estate to which it was attached. The argument is only confused by reference to cases like *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Harvard College v. Stearns*, 15 Gray, 1; *Smith v. Boston*, 7 Cush. 254, etc., where it was held, although there are decisions the other way, that a landowner cannot recover for the obstruction of a public water course, the discontinuance of a public way, or the like. The ground of such decisions is that the plaintiff's rights are subject to superior public rights, or that he has no private right, and that his damage, though greater in degree than that of the rest of the public, is the same in kind. Here there is no question of the plaintiffs' private right.

Judgment affirmed.

Mr. Justice **Harlan** concurs in the judgment only so far as it allows the item of \$300.

340] *AUSTIN W. LORD and J. Monroe Hewlett, Doing Business under the Firm Name and Style of Lord & Hewlett, Apts.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 340-348.)

Public contracts—prize competition.

The acceptance of a design for a public building, submitted in the competition devised under the act of March 2, 1901 (31 Stat. at L. 922, chap. 805), does not bind the government to commission the successful architects to construct the building provided for in the separate and independent act of February 9, 1903 (32 Stat. at L. 806, chap. 528), where the earlier act expressly directed that the plans and recommendations thereon were to be transmitted to Congress, and the program of competition called for the payment of a stipulated sum to each of the competing architects, in full compensation for their services in preparing and submitting designs, and explicitly stated that the statute did not provide for a building, but only for designs to be approved by Congress.

[For other cases, see *Contracts*, 680, 681, in *Digest Sup. Ct. 1903*.]

[No. 162.]

Argued April 20, 1910. Decided May 2, 1910.

APPEAL from the Court of Claims to review a judgment dismissing a petition for architects' commissions for the construction of a public building. Affirmed.

See same case below, 43 Ct. Cl. 282.

The facts are stated in the opinion.

Mr. **Charles Fuller** argued the cause, and, with Messrs. Benjamin F. Tracy and Paul Fuller, filed a brief for appellants:

The programme of competition with its conditions, offered the claimants by the Secretary of Agriculture under the act of March 2, 1901, the acceptance by the claimants of its terms, the selection thereunder by the Secretary of Agriculture of the claimants' plans, and the subsequent act of February 9, 1903, authorizing the building, constitute a binding contract between claimants and the United States.

Walsh v. St. Louis Exposition, 16 Mo. App. 502, affirmed by the supreme court of Missouri, 90 Mo. 459, 2 S. W. 842; *Palmer v. Central Bd. of Education*, 220 Pa. 568, 70 Atl. 433.

The architects, at the request of the defendant, undertook to make plans for the building, to use their professional knowledge, skill, and labor,—things which, prior to the agreement, they were not bound to do. This consideration is sufficient.

Newall v. Paige, 10 Gray, 366; *Devecon v. Shaw*, 69 Md. 199, 9 Am. St. Rep. 422, 14 Atl. 464; *Hamer v. Sidway*, 124 N. Y. 538, 12 L.R.A. 463, 21 Am. St. Rep. 693, 27 N. E. 256; *Molyneux v. Collier*, 17 Ga. 46.

Assistant Attorney General **John Q. Thompson** argued the cause, and, with Mr. George M. Anderson, filed a brief for appellee:

This court will not review the findings made by the court below.

McClure v. United States, 116 U. S. 145, 29 L. ed. 572, 6 Sup. Ct. Rep. 321; *Talbert v. United States*, 155 U. S. 45, 39 L. ed. 64, 15 Sup. Ct. Rep. 4; *District of Columbia v. Barnes*, 197 U. S. 146, 150, 49 L. ed. 699, 700, 25 Sup. Ct. Rep. 401; *Sisseton Indians v. United States*, 208 U. S. 561, 566, 52 L. ed. 621, 623, 28 Sup. Ct. Rep. 352.

An offer made by one party must be accepted by the other without alteration of its terms or conditions in order to render it a contract between the parties.

Eliason v. Henshaw, 4 Wheat. 225, 4 L. ed. 556; *Webb v. Alton M. & F. Ins. Co.* 10 Ill. 225; *Maclay v. Harvey*, 90 Ill. 525, 32 Am. Rep. 35; *Tilley v. Cook County* (*Tilley v. Chicago*), 103 U. S. 161, 26 L. ed. 376.

Mr. Justice **Harlan** delivered the opinion of the court:

The appellants, doing business as architects under the name of Lord & Hewlett,

217 U. S.

brought this action to recover from the United States the sum of \$75,000 as due them on account of certain transactions relating to a public building which the United States proposed to have constructed and used by the Department of Agriculture.

The court of claims adjudged, upon the facts found, that the plaintiffs had no cause of action against the United States, and dismissed the claimants' petition.

The material facts are as will be now stated: By the act of March 2d, 1901, chap. 805, Congress appropriated the sum of \$5,000, to be immediately available, **341**] *"to enable the Secretary of Agriculture to have prepared, under his direction, plans for a fireproof administrative building, to be erected on the grounds of the Department of Agriculture, in the city of Washington, said plans and such recommendations thereon as the Secretary of Agriculture may deem necessary, to be transmitted to Congress at its next regular session."* 31 Stat. at L. 922, 938.

Thereafter, the Supervising Architect of the Treasury Department prepared what is described in the record as a "programme and conditions of a competition for a building for the Department of Agriculture." That programme was approved by the Secretary of Agriculture. It recited the purpose to obtain designs for the proposed building by competition between ten architects of good professional standing and citizens of the United States, to be designated by a special commission, and consisting of the Secretary of Agriculture, the Supervising Architect of the Treasury, and three named persons not in the service of the government, who should report as to the relative merits of the designs submitted. The programme contained, among other provisions, the following: "It must be understood, however, that while the ultimate purpose of the competition is the selection of an architect, *the act does not provide for a building, but simply for a design to be approved by Congress at the next session*; and, therefore, while it is to be supposed that the architect or firm of architects whose design shall be placed first in this competition will receive the commission to carry out the work *when the building is authorized*, it must be understood that the Secretary of Agriculture has no authority at this time to enter into any contract further than is provided for by this programme. The programme sets forth, approximately, the conditions and location of the building, modifications of which may become necessary. If Congress provides for the erection of the building, the selected architect is then to prepare such design or designs as may, in the judgment of the Su-

pervising Architect of the Treasury, be necessary to meet the *conditions finally **[342]** adopted by him. . . . The three members of this commission, not in government service, shall receive in full compensation for their services, including traveling and subsistence expenses, the sum of two hundred and fifty dollars (\$250). . . . A uniform sum of three hundred and fifty dollars (\$350) will be paid to each of the competitors invited, with the understanding and agreement that unless otherwise provided for by act of Congress, the architect or architects whose design shall be placed first will be awarded the commission for carrying out the work, at a fee computed on the basis of the schedule of charges adopted by the American Institute of Architects. It must be understood that no claim shall be made upon the United States by any competitor for any fee, percentage, or payment whatever, or for any expense incident to or growing out of his participation in this competition, other than is expressly provided for by the terms mentioned herein."

On the 24th of October, 1901, the appellants—who were among the ten architects selected to furnish necessary designs in competition—received notice from the Secretary of Agriculture that their plans for the building were selected by the commission, and they received and accepted the compensation (\$350) which had been fixed by the programme of competition as full compensation for this preliminary work. Subsequently, October 28th, 1901, the Secretary of Agriculture notified Congress that the award had been made to the appellants.

However, the parties, after discussion, concurred in the view that, as the Department proposed a building of increased size and of more expensive materials, the cost would probably amount to \$2,500,000, and a bill appropriating that amount was sent to Congress for its consideration and action. But Congress took no action on the general subject of a public building for the Agricultural Department until February 9th, 1903, when, without the knowledge of the Secretary of Agriculture, it passed an act entitled, "An Act for the Erection of a *Building **[343]** for the Use and Accommodation of the Department of Agriculture." That act, it may be observed, did not refer to the above act of 1901, or to anything done under it. It yet provided for a commodious fireproof building on the grounds of the Department of Agriculture for the use of that Department and its Bureaus, "to be constructed in accordance with plans to be procured, based on accurate estimates, providing for the erection of said building, complete in all of its details, as herein described, and within

the total cost of not exceeding the sum herein stipulated, and he is hereby authorized, after procuring such plans, and after due advertisement for proposals, to enter into contracts within the limit of cost hereby fixed, and subject to appropriations to be made by Congress, for the erection of said building complete, including heating and ventilating apparatus, elevators, and approaches, and the removal of the present building or buildings of the Department of Agriculture on said grounds. Sec. 2. That the supervision of the construction of said building shall be placed in charge of an officer of the government especially qualified for the duty, to be appointed by the Secretary of Agriculture, subject to the approval of the head of the Department in which such officer is employed, who shall receive for his additional services an increase of 25 per centum of his present salary, such increase to be paid out of the appropriation for the building herein authorized. Sec. 3. That the limit of cost for the construction of said building complete, including heating and ventilating apparatus, elevators, and approaches, and the cost for removal of the present building or buildings of the Department of Agriculture, is hereby fixed at \$1,500,000, and no contract shall be entered into or expenditure authorized in excess of said amount." 32 Stat. at L. 806, chap. 528.

The sundry civil appropriation act of March 3d, 1903, contained this additional provision: "To commence the erection of a new building for the Department of Agriculture, authorized by the act approved February 9th, 1903, authorized by the act approved February ninth, nineteen hundred and three, two hundred and fifty thousand dollars, of which sum one hundred thousand dollars shall be immediately available; and the Secretary of Agriculture is hereby authorized to enter into a contract or contracts for the completion of said building within the limit of cost of one million, five hundred thousand dollars, fixed by said act." 32 Stat. at L. 1139, chap. 1007.

Shortly after the passage of the act of March 2d, 1901, the Supervising Architect of the Treasury, Taylor, was designated by the Secretary of Agriculture as expert adviser, and an advisory building committee, of which B. T. Galloway was chairman, was also formed. It was found by the court of claims that "neither Mr. Taylor nor any of the members of this committee had authority to enter into any contract or agreement with the claimants, which arrangement was continued under the act of 1903 until May 4, 1903, when Taylor was superseded as expert adviser to the Secretary of Agriculture by the appointment of Capt. John S. Sewell in his stead."

After the passage of the act of February 9th, 1903, negotiations were had with the

claimants, in relation to the detail of plans and specifications for the erection of a building provided for in that act. But it is found that at no time prior to May 4th, 1903, when Sewell succeeded Taylor as expert adviser, "had the claimants and the Secretary of Agriculture or any person or committee appointed by him to act for him, agreed upon or accepted any specific plans or specifications theretofore prepared and submitted by claimants for the erection of said building." On the contrary, they could not agree, and their relations were terminated by the letter from the advisory committee, addressed to the appellants, under date of April 15th, 1903. Subsequently, negotiations between the parties were resumed, Capt. Sewell representing the Department as expert adviser. The findings state: "On May 4, 1903, and subsequent thereto, the negotiations between claimants and Captain Sewell, superintendent, as aforesaid, had *to do exclusively with the [345] preparation and execution of a written contract providing for their employment as architects for said building. Captain Sewell had prepared and submitted to claimants two forms of contracts wherein claimants' compensation for services as architects for said building was fixed at 3½ per cent of contract price. After much lengthy correspondence, discussing the propriety of such a fee, and likewise the respective duties of the architects and superintendent of construction, provided for by the act of February 9, 1903, claimants declined to accept the terms of the said agreement, at the same time insisting that the compensation provided for in the original programme of the Secretary, to wit, 5 per cent, should obtain; that they were employed under and by virtue of said programme, and subsequent proceedings thereto."

The findings further show that on February 16th, 1903, Taylor, who was then expert adviser to the Secretary, had submitted to claimants for their examination and approval a form of contract looking toward their employment as architects for the construction of said building, in which contract the compensation set forth was 5 per cent of the sum expended in the erection of the same. Claimants do not appear to have examined, approved, executed, or returned said contract. What disposition was ever made of it is not shown. Finally, on May 13th, 1903, the Secretary of Agriculture addressed a letter to the claimants, in which he referred to the failure of the claimants to accept the above contracts submitted to them by the Department, and announced his purpose to look elsewhere than to them for assistance.

This statement of the controlling facts is quite sufficient to show that the judgment

below was right. We perceive no ground whatever for a judgment against the United States. Nothing done under the act of March 2d, 1901, created any obligation upon the part of the Secretary of Agriculture, as representing the United States, to proceed under the plans made by the appellants for 348] the construction of the building *referred to in that act. The "programme" of competition, devised under that act by the Architect of the Treasury, under the direction of the Secretary, contemplated the payment of \$350 to each of the ten competing architects, in full compensation for their services in preparing and submitting designs. That amount was paid to the appellants. And they were expressly informed by the above act that the plans and recommendations of the Secretary were to be transmitted to Congress. Besides, the programme of competition explicitly stated that the act did not provide for a building, but only for designs to be approved by Congress. The Secretary was without authority under the act of 1901 to make any binding contract for the erection of the proposed building; and Congress, it seems, took no action in reference to the designs prepared by the appellants under that act. Nothing more was done by either side until Congress, by the act of February 9th, 1903, made independent provisions for the erection of a building for the use of the Department of Agriculture, at a cost not exceeding \$1,500,000. But no contract was made under that act with the appellants. On the contrary, the minds of the parties never met as to the terms of any contract in execution of the provisions of the act of February 9th, 1903. The appellants declined to accept the contract prepared and submitted by the Department. Clearly, the appellants were not entitled, simply because of the acceptance of their plans, prepared under the act of 1901, to construct the building provided for in the separate, independent act of February 9th, 1903; and as no contract was made with them by the Secretary under the latter act, they have no cause of action against the United States.

Judgment affirmed.

349] *PAUL A. WEEMS, Plff. in Err.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 349-413.)

Criminal complaint — sufficiency — description.

1. The description of the accused in a criminal complaint charging falsification
54 L. ed.

of a public document, as "disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands," is sufficient as against demurrer, although technically there may be no such body politic as "the United States government of the Philippine Islands," especially in view of the provisions of the Philippine Islands Criminal Code of Procedure, which require a public offense to be described in ordinary and concise language, so as to enable a person of common understanding to know what is intended, and the court to pronounce judgment according to the right, and declare that defects in matter of form are not material where they do not tend to prejudice substantial rights.

[For other cases, see Indictment and Information, II., in Digest Sup. Ct. 1908.]

Appeal — scope of review — questions not raised below.

2. Questions not raised below, respecting the denial of rights which find expression and sanction in the Federal Constitution and the Philippine Bill of Rights, may be considered by the Federal Supreme Court, on error to the supreme court of the Philippine Islands, in the exercise of its discretion, under Supreme Court rule 35, to notice a plain error not assigned.

[For other cases, see Appeal and Error, VIII. j, in Digest Sup. Ct. 1908.]

Criminal law — cruel and unusual punishment.

3. Cruel and unusual punishment, forbidden by the Philippine Bill of Rights, is inflicted by the provisions of the Philippine Penal Code under which the falsification by a public official of a public and official document must be punished by fine and imprisonment at hard and painful labor for a period ranging from twelve years and a day to twenty years, the prisoner being subject, as accessories to the main punishment, to carrying, during his imprisonment, a chain at the ankle, hanging from the wrist, to deprivation during the term of imprisonment of civil rights, and to perpetual absolute disqualification to enjoy political rights, hold office, etc., and to surveillance of the authorities during life.

[For other cases, see Criminal Law, V. b, in Digest Sup. Ct. 1908.]

Statutes — invalid in part.

4. The imprisonment features of the provisions of the Philippine Penal Code for the punishment of the falsification by a public official of a public and official document are not separable from the invalid accessory punishments therein provided, of deprivation of civil rights and subjection to perpetual disqualification to enjoy political

NOTE.—On cruel and unusual punishments—see note to State ex rel. Garvey v. Whitaker, 35 L.R.A. 561.

On statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363, and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

rights, and to perpetual surveillance of the authorities.

[For other cases, see Statutes, I. d. 4, in Digest Sup. Ct. 1908.]

[No. 20.]

Argued November 30 and December 1, 1909.

Decided May 2, 1910.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a conviction in the Court of First Instance for the City of Manila of the falsification by a public official of a public and official document. Reversed, and remanded with directions to dismiss the proceeding.

See same case below, 7 Philippine, 241.

The facts are stated in the opinion.

Mr. A. S. Worthington argued the cause and filed a brief for plaintiff in error:

If Weems was a public official of any government, it was the government of the Philippine Islands, and not the United States government.

Carrington v. United States, 208 U. S. 1, 52 L. ed. 367, 28 Sup. Ct. Rep. 203.

The sentence in this case imposed a cruel and unusual punishment, and for that reason it should be set aside, even if the conviction be not reversed.

O'Neil v. Vermont, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; Waters-Pierce Oil Co. v. Texas, 212 U. S. 111, 53 L. ed. 430, 29 Sup. Ct. Rep. 220; Paraiso v. United States, 207 U. S. 368, 52 L. ed. 249, 28 Sup. Ct. Rep. 127; State v. Galveston, H. & S. A. R. Co. 100 Tex. 174, 97 S. W. 71; Cooley, Const. Lim. 7th ed. p. 471; Charles v. State, 27 Neb. 881, 44 N. W. 39; Stoutenburgh v. Frazier, 16 App. D. C. 229, 48 L.R.A. 220; State v. Driver, 78 N. C. 423; Hobbs v. State, 133 Ind. 404, 18 L.R.A. 774, 32 N. E. 1019; Johnson v. Waukesha County, 64 Wis. 288, 25 N. W. 7; State ex rel. Garvey v. Whitaker, 48 La. Ann. 527, 35 L.R.A. 561, 19 So. 457; Thomas v. Kinkead, 55 Ark. 502, 15 L.R.A. 558, 29 Am. St. Rep. 68, 18 S. W. 854; Martin v. Johnson, 11 Tex. Civ. App. 628, 33 S. W. 309; State v. Becker, 3 S. D. 29, 51 N. W. 1018; Re Bayard, 63 How. Pr. 73; Re Frazee, 63 Mich. 397, 6 Am. St. Rep. 310, 30 N. W. 72; People v. Murray, 72 Mich. 10, 40 N. W. 29.

Assistant Attorney General Fowler argued the cause and filed a brief for defendant in error:

In order to give jurisdiction to this court, the jurisdictional question must be raised in the court below.

Paraiso v. United States, 207 U. S. 368, 370, 52 L. ed. 249, 250, 28 Sup. Ct. Rep. 127; Crain v. United States, 162 U. S. 625, 40 L.

ed. 1097, 16 Sup. Ct. Rep. 952; Lawler v. Walker, 14 How. 149, 152, 14 L. ed. 364, 365; Spies v. Illinois, 123 U. S. 131, 181, 31 L. ed. 80, 91, 8 Sup. Ct. Rep. 21, 22; Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; Morrison v. Watson, 154 U. S. 111, 115, 38 L. ed. 927, 929, 14 Sup. Ct. Rep. 995; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 540, 40 L. ed. 252, 16 Sup. Ct. Rep. 88; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 658, 41 L. ed. 1149, 1152, 17 Sup. Ct. Rep. 709; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 643, 43 L. ed. 840, 843, 19 Sup. Ct. Rep. 530, 571; Home for Incurables v. New York, 187 U. S. 155, 157, 47 L. ed. 117, 118, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; Johnson v. New York L. Ins. Co. 187 U. S. 491, 495, 47 L. ed. 273, 274, 23 Sup. Ct. Rep. 194; Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200; Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617; Osborne v. Clark, 204 U. S. 565, 51 L. ed. 619, 27 Sup. Ct. Rep. 319; Serra v. Mortiga, 204 U. S. 470, 51 L. ed. 571, 27 Sup. Ct. Rep. 343; Arkansas v. Sehlert, 179 U. S. 598, 45 L. ed. 325, 21 Sup. Ct. Rep. 229; Carey v. Houston & T. C. R. Co. 150 U. S. 170, 181, 37 L. ed. 1041, 1044, 14 Sup. Ct. Rep. 63; Ansbros v. United States, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; Cornell v. Green, 163 U. S. 75, 78, 41 L. ed. 76, 16 Sup. Ct. Rep. 969; Cincinnati, H. & D. R. Co. v. Thieband, 177 U. S. 615, 620, 44 L. ed. 911, 913, 20 Sup. Ct. Rep. 822.

The Bill of Rights for the Philippines, giving the accused the right to demand the nature and cause of the accusation against him, does not fasten forever upon those islands the inability of the seventeenth century common law, to understand or accept a pleading that does not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert.

Paraiso v. United States, 207 U. S. 368, 372, 52 L. ed. 249, 251, 28 Sup. Ct. Rep. 127.

The punishment imposed is not cruel or unusual within the meaning of the Philippine Bill of Rights.

Wilkerson v. Utah, 99 U. S. 130, 25 L. ed. 345; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930.

The majority of the cases hold that the words employed in the Constitution signify such punishment as would amount to torture, or which is so cruel as to shock the conscience and reason of men; that something inhuman and barbarous is implied.

State v. Williams, 77 Mo. 310; Miller v. State, 149 Ind. 607, 40 L.R.A. 109, 49 N. E. 894; Hobbs v. State, 133 Ind. 404, 18 L.R.A. 774, 32 N. E. 1019; Re Bayard, 25 Hun. 546; State v. Becker, 3 S. D. 29, 51 N. W. 1018;

Territory v. Ketchum, 10 N. M. 718, 55 L.R.A. 90, 65 Pac. 169; People v. Morris, 30 Mich. 634, 8 L.R.A. 685, 45 N. W. 591.

Solicitor General Hoyt also filed a brief for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

This writ of error brings up for review the judgment of the supreme court of the Philippine Islands, affirming the conviction of plaintiff in error for falsifying a "public and official document."

In the "complaint," by which the prosecution was begun, it was charged that the plaintiff in error, "a duly appointed, qualified, and acting disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands," did, as such, "corruptly, and with intent then and there to deceive and defraud the United States government of the Philippine Islands and its officials, falsify a public and official document, namely, a cash book of the captain of the port of Manila, Philippine Islands, and the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands," kept by him as disbursing officer of that bureau. The falsification, which is alleged with much particularity, was committed by entering as paid out, "as wages of employees of the lighthouse service 358] *of the United States government of the Philippine Islands," at the Capul lighthouse, of 204 pesos, and for like service at the Matabriga lighthouse of 408 pesos, Philippine currency. A demurrer was filed to the "complaint," which was overruled.

He was convicted, and the following sentence was imposed upon him: "To the penalty of fifteen years of cadena, together with the accessories of § 56 of the Penal Code, and to pay a fine of 4,000 pesetas, but not to serve imprisonment as a subsidiary punishment in case of his insolvency, on account of the nature of the main penalty, and to pay the costs of this cause."

The judgment and sentence were affirmed by the supreme court of the islands.

It is conceded by plaintiff in error that some of the questions presented to the supreme court of the Philippine Islands cannot be raised in this court, as the record does not contain the evidence. Indeed, plaintiff in error confines his discussion to one point raised in the court below and to three other questions, which, though not brought to the attention of the supreme court of the islands, and not included in the assignment of errors, are of such importance, it is said, that this court will consider them under the right reserved in rule 35.

54 L. ed.

*These questions are as follows: [359

"1. The court below erred in overruling the demurrer to the complaint, this assignment being based upon the fact that, in the complaint, the plaintiff in error is described as the 'disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands,' and the cash book referred to in the complaint is described as a book 'of the captain of the port of Manila, Philippine Islands,' whereas there is no such body politic as the 'United States government of the Philippine Islands.'

"2. The record does not disclose that the plaintiff in error was arraigned, or that he pleaded to the complaint after his demurrer was overruled and he was 'ordered to plead to the complaint.'

"3. The record does not show that the plaintiff in error was present when he was tried, or, indeed, that he was present in court at any time.

"4. The punishment of fifteen years' imprisonment was a cruel and unusual punishment, and, to the extent of the sentence, the judgment below should be reversed on this ground."

The second assignment of error was based upon a misapprehension of the fact, and has been abandoned.

The argument to support the first assignment of error is based upon certain acts of Congress and certain acts of the Philippine Commission in which the government of the United States and the government of the Islands are distinguished. *And it is [360 urged that in one of the acts (§ 3396 of the acts of the commission) it is recognized that there may be allegiance to or treason against both or "either of them," and (§ 3397) that there may be "rebellion or insurrection against the authority" of either, and (§ 3398) that there may be a conspiracy to overthrow either, or to "prevent, hinder, or delay the execution of any law of either." Other sections are cited, in which it is contended that the insular government is spoken of as an "entity," and distinguished from that of the United States. Section 1366, which defines the duty of the attorney general, it is pointed out, especially distinguishes between "causes, civil or criminal, to which the United States or any officer thereof in his official capacity is a party," and causes, civil or criminal, to which the "government of the Philippine Islands or any officer thereof in his official capacity is a party." And still more decisively, it is urged, by subdivision "C" of § 1366, in which it is recognized that the cause of action may be for money, and that the judgment may be for money "belonging to the government of the United States and that of the Philippine Islands or

some other province." It is therefore contended that the government of the United States and that of the Philippine Islands are distinct legal entities, and that there may be civil obligations to one, and not to the other; that there may be governmental liability to the one, and not to the other; and that proceedings, civil or criminal, against either, must recognize the distinction to be sufficient to justify a judgment. To apply these principles, let us see what the information charges. It describes Weems, plaintiff in error, as "a public official of the United States government of the Philippine Islands; to wit, a duly appointed and qualified acting disbursing official of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands;" and it is charged that, by taking advantage of his official position, with intent to "deceive and defraud the United States government of the Philippine Islands," he falsified a public and official document. In the same manner the government **361**] "is designated throughout the information. It is contended that "there is no such body politic as the 'United States government of the Philippine Islands,'" and it is urged that the objection does not relate to a matter of form. "It is as substantial," it is said, as the point involved in *Carrington v. United States*, 208 U. S. 1, 52 L. ed. 367, 28 Sup. Ct. Rep. 203, where a military officer of the United States was prosecuted as a civil officer of the government of the Philippines. His conviction was reversed, this court holding that, "as a soldier, he was not an official of the Philippines, but of the United States."

It is true that the distinctions raised are expressed in the statutes, and necessarily so. It would be difficult otherwise to provide for government where there is a paramount authority making use of subordinate instrumentalities. We have examples in the states of the Union and their lesser municipal divisions, and rights may flow from and to such lesser divisions. And the distinction in the Philippine statutes means no more than that, and, conforming to that, a distinction is clearly made in the information. Weems's official position is described as "disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands." There is no real uncertainty in this description, and whatever technical nicety of discrimination might have been insisted on at one time cannot now be, in view of the provisions of the Philippine Criminal Code of Procedure, which requires a public offense to be described in "ordinary and concise language," not necessarily in the words of the statute, "but in such form

as to enable a person of common understanding to know what is intended, and the court to pronounce judgment according to the right." And it is further provided that "no information or complaint is insufficient, nor can the trial, judgment, or other proceeding be affected, by reason of a defect in matter of form which does not tend to prejudice a substantial right of the defendant upon the merits" (§ 10).

Carrington v. United States, 208 U. S. 1, 52 L. ed. 367, 28 Sup. Ct. Rep. 203, is not in point. In that case it was attempted **362** to hold Carrington guilty of an offense as a civil officer for what he had done as a military officer. As he was the latter, he had not committed any offense under the statute. The first assignment of error is therefore not sustained.

It is admitted, as we have seen, that the questions presented by the third and fourth assignments of error were not made in the courts below, but a consideration of them is invoked under rule 35, which provides that this court, "at its option, may notice a plain error not assigned."

It is objected on the other side that *Paraiso v. United States*, 207 U. S. 368, 52 L. ed. 249, 28 Sup. Ct. Rep. 127, stands in the way. But the rule is not altogether controlled by precedent. It confers a discretion that may be exercised at any time, no matter what may have been done at some other time. It is true we declined to exercise it in *Paraiso v. United States*, but we exercised it in *Wiborg v. United States*, 163 U. S. 632, 658, 41 L. ed. 289, 298, 16 Sup. Ct. Rep. 1127, 1197; *Clyatt v. United States*, 197 U. S. 207, 221, 49 L. ed. 726, 731, 25 Sup. Ct. Rep. 429, and *Crawford v. United States*, 212 U. S. 183, 53 L. ed. 465, 29 Sup. Ct. Rep. 260, 15 A. & E. Ann. Cas. 392. It may be said, however, that *Paraiso v. United States* is more directly applicable, as it was concerned with the same kind of a crime as that in the case at bar, and that it was contended there, as here, that the amount of fine and imprisonment imposed inflicted a cruel and unusual punishment. It may be that we were not sufficiently impressed with the importance of those contentions, or saw in the circumstances of the case no reason to exercise our right of review under rule 35. As we have already said, the rule is not a rigid one, and we have less reluctance to disregard prior examples in criminal cases than in civil cases, and less reluctance to act under it when rights are asserted which are of such high character as to find expression and sanction in the Constitution or Bill of Rights. And such rights are asserted in this case.

The assignment of error is that "a punishment of fifteen years' imprisonment was a

cruel and unusual punishment, and, to the extent of the sentence, the judgment below should be reversed on this ground." Weems 363] was convicted, as we *have seen, for the falsification of a public and official document, by entering therein, as paid out, the sums of 208 and 408 pesos, respectively, as wages to certain employees of the lighthouse service. In other words, in entering upon his cash book those sums as having been paid out when they were not paid out; and the "truth," to use the language of the statute, was thereby perverted "in the narration of facts."

A false entry is all that is necessary to constitute the offense. Whether an offender against the statute injures anyone by his act, or intended to injure anyone, is not material, the trial court held. The court said: "It is not necessary that there be any fraud nor even the desire to defraud, nor intention of personal gain on the part of the person committing it, that a falsification of a public document be punishable; it is sufficient that the one who committed it had the intention to pervert the truth and to falsify the document, and that by it damage might result to a third party." The court further, in the definition of the nature of the offense and the purpose of the law, said: "In public documents, the law takes into consideration not only private interests, but also the interests of the community;" and it is its endeavor (and for this a decision of the Supreme Court of Spain, delivered in 1873, was quoted) "to protect the interest of society by the most strict faithfulness on the part of a public official in the administration of the office intrusted to him," and thereby fulfil the "responsibility of the state to the community for the official or public documents under the safeguard of the state." And this was attempted to be secured through the law in controversy. It is found in § 1 of chapter 4 of the Penal Code of Spain. The caption of the section is, "Falsification of Official and Commercial Documents and Telegraphic Despatches." Article 300 provides as follows: "The penalties of *cadena temporal* and a fine of from 1,250 to 12,500 pesetas shall be imposed on a public official who, taking advantage of his authority, shall commit a falsification. . . . By perverting the truth in the narration of facts . . ."

By other provisions of the Code we find that 364] there are only *two degrees of punishment higher in scale than *cadena temporal*,—death, and *cadena perpetua*. The punishment of *cadena temporal* is from twelve years and one day to twenty years (arts. 28 and 96), which "shall be served" in certain "penal institutions." And it is provided

ed that "those sentenced to *cadena temporal* and *cadena perpetua* shall labor for the benefit of the state. They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution." Arts. 105, 106. There are, besides, certain accessory penalties imposed, which are defined to be (1) civil interdiction; (2) perpetual absolute disqualification; (3) subjection to surveillance during life. These penalties are defined as follows:

"Art. 42. Civil interdiction shall deprive the person punished, as long as he suffers it, of the rights of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property, and the right to dispose of his own property by acts *inter vivos*. Those cases are excepted in which the laws explicitly limit its effects.

"Art. 43. Subjection to the surveillance of the authorities imposes the following obligations on the persons punished:

"1. That of fixing his domicile and giving notice thereof to the authority immediately in charge of his surveillance, not being allowed to change it without the knowledge and permission of said authority, in writing.

"2. To observe the rules of inspection prescribed.

"3. To adopt some trade, art, industry, or profession should he not have known means of subsistence of his own.

"Whenever a person punished is placed under the surveillance of the authorities, notice thereof shall be given to the government and to the governor general."

The penalty of perpetual absolute disqualification is the deprivation of office, even though it be held by popular election, the deprivation of the right to vote or to be elected to *public office, the disquali- [365 fication to acquire honors, etc., and the loss of retirement pay, etc.

These provisions are attacked as infringing that provision of the Bill of Rights of the islands which forbids the infliction of cruel and unusual punishment. It must be confessed that they, and the sentence in this case, excite wonder in minds accustomed to a more considerate adaptation of punishment to the degree of crime. In a sense the law in controversy seems to be independent of degrees. One may be an offender against it, as we have seen, though he gain nothing and injure nobody. It has, however, some human indulgence,—it is not exactly Draconian in uniformity. Though it starts with a severe penalty, between that and the maximum penalty it yields something to extenuating circumstances. In-

deed, by article 96 of the Penal Code the penalty is declared to be "divisible," and the legal term of its "duration is understood as distributed into three parts, forming the three degrees,—that is, the minimum, medium, and maximum,"—being respectively twelve years and one day to fourteen years and eight months; from fourteen years, eight months, and one day to seventeen years and four months; from seventeen years, four months, and one day to twenty years. The law therefore allows a range from twelve years and a day to twenty years, and the government, in its brief, ventures to say that "the sentence of fifteen years is well within the law." But the sentence is attacked as well as the law, and what it is to be well within the law a few words will exhibit. The minimum term of imprisonment is twelve years, and that, therefore, must be imposed for "perverting the truth" in a single item of a public record, though there be no one injured, though there be no fraud or purpose of it, no gain or desire of it. Twenty years is the maximum imprisonment, and that only can be imposed for the perversion of truth in every item of an officer's accounts, whatever be the time covered and whatever fraud it conceals or tends to conceal. Between these two possible sentences, which seem to have no adaptable relation, or 366] rather *in the difference of eight years for the lowest possible offense and the highest possible, the courts below selected three years to add to the minimum of twelve years and a day for the falsification of two items of expenditure, amounting to the sums of 408 and 204 pesos. And the fine and "accessories" must be brought into view. The fine was 4,000 pesetas,—an excess also over the minimum. The "accessories" we have already defined. We can now give graphic description of Weems's sentence and of the law under which it was imposed. Let us confine it to the minimum degree of the law, for it is with the law that we are most concerned. Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council. These parts of his penalty endure for the term of imprisonment. From other parts there is no intermission. His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil

without giving notice to the "authority immediately in charge of his surveillance," and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him, and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. No circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain. Such penalties for such offenses amaze those *who have formed their conception of [367 the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.

Is this also a precept of the fundamental law? We say fundamental law, for the provision of the Philippine Bill of Rights, prohibiting the infliction of cruel and unusual punishment, was taken from the Constitution of the United States, and must have the same meaning. This was decided in *Kepner v. United States*, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, 1 A. & E. Ann. Cas. 655, and *Serra v. Mortiga*, 204 U. S. 477, 51 L. ed. 574, 27 Sup. Ct. Rep. 343. In *Kepner v. United States* this court considered the instructions of the President to the Philippine Commission, and quoted from them the admonition to the commission that the government that we were establishing was not designed "for our satisfaction or for the expression of our theoretical views, but for the happiness . . . of the people of the Philippine Islands; and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government." But, it was pointed out, a qualification accompanied the admonition, and the commission was instructed "to bear in mind" and the people of the islands "made plainly to understand" that certain great principles of government had been made the basis of our governmental system, which were deemed "essential to the rule of law and the maintenance of individual freedom." And the president further declared that there were "certain practical rules of government which we have found to be essential to the preservation of those great principles of lib-

erty and law." These he admonished the commission to establish and maintain in the islands "for the sake of their liberty and happiness," however they might conflict with the customs or laws of procedure with which they were familiar. In view of the importance of these principles and rules, which the President said the "enlightened **368**]"*thought of the Philippine Islands" would come to appreciate, he imposed their observance "upon every division and branch of the government of the Philippines."

Among those rules was that which prohibited the infliction of cruel and unusual punishment. It was repeated in the act of July 1, 1902 [32 Stat. at L. 691, chap. 1369], providing for the administration of the affairs of the civil government in the islands, and this court said of it and of the instructions of the President that they were "intended to carry to the Philippine Islands those principles of our government which the President declared to be established as rules of law for the maintenance of individual freedom." The instructions of the President and the act of Congress found in nominal existence in the islands the Penal Code of Spain, its continuance having been declared by military order. It may be there was not and could not be a careful consideration of its provisions and a determination to what extent they accorded with or were repugnant to the "great principles of liberty and law" which had been "made the basis of our governmental system." Upon the institution of the government of the commission, if not before, that consideration and determination necessarily came to the courts and are presented by this record.

What constitute a cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous,—torture and the like. *McDonald v. Com.* 173 Mass. 322, 73 Am. St. Rep. 293, 53 N. E. 874. The court, however, in that case, conceded the possibility "that punishment in the state prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment." Other cases have selected certain tyrannical acts of the English monarchs as illustrating the meaning of the clause and the extent of its prohibition.

The provision received very little debate in Congress. We find from the Congressional Register, p. 225, that Mr. Smith, of South Carolina, "objected to the words 'nor **369**]' cruel and *unusual punishment,' the import of them being too indefinite." Mr. Livermore opposed the adoption of the clause, saying:

"The clause seems to express a great deal of humanity, on which account I have no
54 L. ed.

objection to it; but, as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms 'excessive bail?' Who are to be the judges? What is understood by 'excessive fines?' It lays with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind."

The question was put on the clause, and it was agreed to by a considerable majority.

No case has occurred in this court which has called for an exhaustive definition. In *Pervear v. Massachusetts*, 5 Wall. 475, 18 L. ed. 608, it was decided that the clause did not apply to state but to national legislation. But we went further, and said that we perceive nothing excessive, or cruel, or unusual in a fine of \$50 and imprisonment at hard labor in the house of correction for three months, which was imposed for keeping and maintaining, without a license, a tenement for the illegal sale and illegal keeping of intoxicating liquors. A decision from which no one will dissent.

In *Wilkerson v. Utah*, 99 U. S. 130, 25 L. ed. 345, the clause came up again for consideration. A statute of Utah provided that "a person convicted of a capital offense should suffer death by being shot, hanged, or beheaded," as the court might direct, or he should "have his option as to the manner of his execution." The statute was sustained. The court pointed out that death was a usual punishment for murder, that it prevailed *in the territory for many years, [**370**] and was inflicted by shooting; also that that mode of execution was usual under military law. It was hence concluded that it was not forbidden by the Constitution of the United States as cruel or unusual. The court quoted Blackstone as saying that the sentence of death was generally executed by hanging, but also that circumstances of terror, pain, or disgrace were sometimes superadded. "Cases mentioned by the author," the court said, "are where the person was drawn or dragged to the place of execution, in treason; or where he was disemboweled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder and burning alive in treason committed by a female." And it was further

said: "Examples of such legislation in the early history of the parent country are given by the annotator of the last edition of Archbold's treatise. Archbold, *Crim. Pr. & Pl.* 8th ed. 584."

This court's final commentary was that "difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that Amendment to the Constitution. Cooley, *Const. Lim.* 4th ed. 408; Wharton, *Crim. Law*, 7th ed. § 3405."

That passage was quoted in *Re Kemmler*, 136 U. S. 436, 447, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930 and this comment was made: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, and something more than the mere extinguishment of life." The case was an application for habeas corpus, and went off on a question of jurisdiction, this court holding that the 8th Amendment did not apply to state legislation. It was not meant in the language we have quoted to give a comprehensive definition of cruel [371] and unusual *punishment, but only to explain the application of the provision to the punishment of death. In other words, to describe what might make the punishment of death cruel and unusual, though of itself it is not so. It was found as a fact by the state court that death by electricity was more humane than death by hanging.

In *O'Neil v. Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693, the question was raised, but not decided. The reasons given for this were that because it was not as a Federal question assigned as error, and, so far as it arose under the Constitution of Vermont, it was not within the province of the court to decide. Moreover, it was said, as a Federal question, it had always been ruled that the 8th Amendment of the Constitution of the United States did not apply to the states. Mr. Justice Field, Mr. Justice Harlan, and Mr. Justice Brewer were of opinion that the question was presented, and Mr. Justice Field, construing the clause of the Constitution prohibiting the infliction of cruel and unusual punishment, said, the other two justices concurring, that the inhibition was directed not only against punishments which inflict torture, "but against all punishments which, by their excessive length or severity, are greatly disproportioned to the offenses charged." He said

further: "The whole inhibition is against that which is excessive in the bail required or fine imposed or punishment inflicted."

The law writers are indefinite. Story, in his work on the Constitution, vol. 2, 5th ed. § 1903, says that the provision "is an exact transcript of a clause in the Bill of Rights framed at the revolution of 1688." He expressed the view that the provision "would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct." He, however, observed that it was "adopted as an admonition to all departments of the national department, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts." For this he cites 2 Elliott's Debates, 345, and refers to 2 Lloyd's *Debates, 225, 226; 3 [372 Elliott's Debates, 345. If the learned author meant by this to confine the prohibition of the provision to such penalties and punishment as were inflicted by the Stuarts, his citations do not sustain him. Indeed, the provision is not mentioned except in 2 Elliott's Debates, from which we have already quoted. The other citations are of the remarks of Patrick Henry in the Virginia convention, and of Mr. Wilson in the Pennsylvania convention. Patrick Henry said that there was danger in the adoption of the Constitution without a Bill of Rights. Mr. Wilson considered that it was unnecessary, and had been purposely omitted from the Constitution. Both, indeed, referred to the tyranny of the Stuarts. Henry said that the people of England, in the Bill of Rights, prescribed to William, Prince of Orange, upon what terms he should reign. Wilson said that "the doctrine and practice of a declaration of rights have been borrowed from the conduct of the people of England on some remarkable occasions; but the principles and maxims on which their government is constituted are widely different from those of ours." It appears, therefore, that Wilson, and those who thought like Wilson, felt sure that the spirit of liberty could be trusted, and that its ideals would be represented, not debased, by legislation. Henry and those who believed as he did would take no chances. Their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them

that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of 373] cruelty *could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say "coercive cruelty," because there was more to be considered than the ordinary criminal laws. Cruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister.

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction. There is an example of this in *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356, where the prohibition against *ex post facto* laws was given a more extensive application than what 374] a minority of this court *thought had been given in *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648. See also *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366. The construction of the 14th Amendment is also an example, 54 L. ed.

for it is one of the limitations of the Constitution. In a not unthoughtful opinion, Mr. Justice Miller expressed great doubt whether that Amendment would ever be held as being directed against any action of a state which did not discriminate "against the negroes as a class, or on account of their race." *Slaughter House Cases*, 16 Wall. 36, 81, 21 L. ed. 394, 410. To what extent the Amendment has expanded beyond that limitation need not be instanced.

There are many illustrations of resistance to narrow constructions of the grants of power to the national government. One only need be noticed, and we select it because it was made against a power which, more than any other, is kept present to our minds in visible and effective action. We mean the power over interstate commerce. This power was deduced from the eleven simple words,—"to regulate commerce with foreign nations and among the several states." The judgment which established it was pronounced by Chief Justice Marshall (*Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23), and reversed a judgment of Chancellor Kent, justified, as that celebrated jurist supposed, by a legislative practice of fourteen years, and fortified by the opinions of men familiar with the discussions which had attended the adoption of the Constitution. Persuaded by such considerations the learned chancellor confidently decided that the congressional power related to "external, not to internal, commerce," and adjudged that, under an act of the state of New York, *Livingston and Fulton* had the exclusive right of using steamboats upon all of the navigable waters of the state. The strength of the reasoning was not underrated. It was supported, it was said, "by great names, by names which have all the titles to consideration that virtue, intelligence, and office can bestow." The narrow construction, however, did not prevail, and the propriety of the arguments upon which it was based was questioned. It was said, in effect, that they supported a construction which "would cripple the government and render it [375] unequal to the objects for which it was declared to be instituted, and to which the powers given, as fairly understood, render it competent."

But general discussion we need not further pursue. We may rely on the conditions which existed when the Constitution was adopted. As we have seen, it was the thought of Story, indeed, it must come to a less trained reflection than his, that government by the people, instituted by the Constitution, would not imitate the conduct of arbitrary monarchs. The abuse of power might, indeed, be apprehended, but not that it would be manifested in provisions or

practices which would shock the sensibilities of men.

Cooley, in his "Constitutional Limitations," apparently in a struggle between the effect to be given to ancient examples and the inconsequence of a dread of them in these enlightened times, is not very clear or decisive. He hesitates to advance definite views, and expresses the "difficulty of determining precisely what is meant by cruel and unusual punishment." It was probable, however, he says, that "any punishment declared by statute for an offense which was punishable in the same way at common law could not be regarded as cruel or unusual, in a constitutional sense." And he says further that "probably any new statutory offense may be punished to the *extent* [italics ours] and in the mode permitted by the common law for offenses of a similar nature."

In the cases in the state courts, different views of the provision are taken. In *State v. Driver*, 78 N. C. 423, 427, it was said that criminal legislation and its administration are so uniformly humane that there is seldom occasion for complaint. In that case, a sentence of the defendant for assault and battery upon his wife was imprisonment in the county jail for five years, and at the expiration thereof to give security to keep the peace for five, in the sum of \$500, with surties, was held to be cruel and unusual. To sustain its judgment, the court said that the prohibition against cruel and unusual punishment was not "intended to warn against 376] merely erratic *modes of punishment or torture, but applied expressly to 'bail,' 'fines' and 'punishments.'" It was also said that "the earliest application of the provision in England was in 1689, the first year after the adoption of the Bill of Rights in 1688, to avoid an excessive pecuniary fine imposed upon Lord Devonshire by the court of King's bench. 11 How. St. Tr. 1354." Lord Devonshire was fined \$ 30,000 for an assault and battery upon Colonel Culpepper, and the House of Lords, in reviewing the case, took the opinion of the law Lords, and decided that the fine "was excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land." Other cases have given a narrower construction, feeling constrained thereto by the incidences of history.

In *Hobbs v. State*, 133 Ind. 404, 18 L.R.A. 774, 32 N. E. 1019, the supreme court of Indiana expressed the opinion that the provision did not apply to punishment by "fine or imprisonment or both, but such as that inflicted at the whipping post, in the pillory, burning at the stake, breaking on the wheel," etc.

It was further said: "The word, accord-

ing to modern interpretation, does not affect legislation providing imprisonment for life or for years, or the death penalty by hanging or electrocution. If it did, our laws for the punishment of crime would give no security to the citizen." That conclusion certainly would not follow, and its expression can only be explained by the impatience the court exhibited at the contention in that case, which attacked a sentence of two years' imprisonment in the state prison for combining to assault, beat, and bruise a man in the nighttime. Indeed, the court ventured the inquiry "whether, in this country, at the close of the nineteenth century," the provision was "not obsolete," except as an admonition to the courts "against the infliction of punishment so severe as not to 'fit the crime.'" In other words, that it had ceased to be a restraint upon legislatures, and had become an admonition only to the courts not to abuse the discretion which might be intrusted to them. Other cases might *be cited in illustration, some [377 looking backwards for examples by which to fix the meaning of the clause; others giving a more expansive and vital character to the provision, such as the President of the United States thought it possessed, and admonished the Philippine Commission that it possessed as "essential [with other rights] to the rule of law and the maintenance of individual freedom."

An extended review of the cases in the state courts, interpreting their respective constitutions, we will not make. It may be said of all of them that there was not such challenge to the import and consequence of the inhibition of cruel and unusual punishments as the law under consideration presents. It has no fellow in American legislation. Let us remember that it has come to us from a government of a different form and genius from ours. It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind. And they would have those bad attributes even if they were found in a Federal enactment, and not taken from an alien source.

Many of the state cases which have been brought to our attention require no comment. They are based upon sentences of courts, not upon the constitutional validity of laws. The contentions in other cases vary in merit and in their justification of serious consideration. We have seen what the contention was in *Hobbs v. State*, supra. In others, however, there was more inducement to an historical inquiry. In *Com. v. Wyatt*, 6 Rand. (Va.) 694, the whipping

post had to be justified and was justified. In comparison with the "barbarities of quartering, hanging in chains, castration, etc.," it was easily reduced to insignificance. The court in the latter case pronounced it "odious, but not unusual." Other cases have seen something more than odiousness in it, and have regarded it as one of the forbidden punishments. It is certainly as odious as the pillory, and the latter has been [378] pronounced *to be within the prohibitory clause. Whipping was also sustained in *Foot v. State* (1882) 59 Md. 264, as a punishment for wife beating. And, it may be, in *Aldridge v. Com.* 2 Va. Cas. 447. The law considered was one punishing free negroes and mulattoes for grand larceny. Under the law, a free person of color could be condemned to be sold as a slave, and transported and banished beyond the limits of the United States. Such was the judgment pronounced on the defendant by the trial court, and, in addition, thirty-nine stripes on his bare back. The judgment was held valid on the ground that the Bill of Rights of the state was "never designed to control the legislative right to determine *ad libitum* upon the adequacy of punishment, but is merely applicable to the modes of punishment." Cooley, in his *Constitutional Limitations*, says that it may be well doubted if the right exist "to establish the whipping post and the pillory in states where they were never recognized as instruments of punishment, or in states whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishment." [7th ed. p. 472.] The clause of the Constitution, in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice. See *Ex parte Wilson*, 114 U. S. 417, 427, 29 L. ed. 89, 92, 5 Sup. Ct. Rep. 935; *Maekin v. United States*, 117 U. S. 348, 350, 29 L. ed. 909, 910, 6 Sup. Ct. Rep. 777.

In *Hobbs v. State*, *supra*, and in other cases, prominence is given to the power of the legislature to define crimes and their punishment. We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature, of the expediency of the laws, or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment [379] of a power superior to it for the *instant. And for the proper exercise of such 54 L. ed.

power there must be a comprehension of all that the legislature did or could take into account,—that is, a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercise fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge. We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist, and punish the crimes of men according to their forms and frequency. We do not intend in this opinion to express anything that contravenes those propositions.

Our meaning may be illustrated. For instance, in *Territory v. Ketchum*, 10 N. M. 718, 55 L.R.A. 90, 65 Pac. 169, a case that has been brought to our attention as antagonistic to our views of cruel and unusual punishments, a statute was sustained which imposed the penalty of death upon any person who should make an assault upon any railroad train, car, or locomotive, for the purpose and with the intent to commit murder, robbery, or other felony upon a passenger or employee, express messenger or mail agent. The supreme court of the territory discussed the purpose of the 8th Amendment, and expressed views opposed to those we announce in this opinion, but finally rested its decision upon the conditions which existed in the territory, and the circumstances of terror and danger which accompanied the crime denounced. So, also, may we mention the legislation of some of the states, enlarging the common-law definition of burglary, and dividing it into degrees, fixing a severer punishment for that committed in the nighttime from that committed in the daytime, and for arson of buildings in which human beings may be from arson of buildings which may be *va- [380] cant. In all such cases there is something more to give character and degree to the crimes than the seeking of a felonious gain, and it may properly become an element in the measure of their punishment.

From this comment we turn back to the law in controversy. Its character and the sentence in this case may be illustrated by examples even better than it can be represented by words. There are degrees of homicide that are not punished so severely, nor are the following crimes: misprision of treason, inciting rebellion, conspiracy to destroy the government by force, recruiting soldiers,

in the United States to fight against the United States, forgery of letters patent, forgery of bonds and other instruments for the purpose of defrauding the United States, robbery, larceny, and other crimes. Section 86 of the Penal Laws of the United States, as revised and amended by the act of Congress of March 4, 1909 (35 Stat. at L. 1088, chap. 321, U. S. Comp. Stat. Supp. 1909, p. 1391), provides that any person charged with the payment of any appropriation made by Congress, who shall pay to any clerk or other employee of the United States a sum less than that provided by law, and require a receipt for a sum greater than that paid to and received by him, shall be guilty of embezzlement, and shall be fined in double the amount so withheld, and imprisoned not more than two years. The offense described has similarity to the offense for which Weems was convicted, but the punishment provided for it is in great contrast to the penalties of *cadena temporal* and its "accessories." If we turn to the legislation of the Philippine Commission we find that instead of the penalties of *cadena temporal*, medium degree (fourteen years, eight months, and one day, to seventeen years and four months, with fine and "accessories"), to *cadena perpetua*, fixed by the Spanish Penal Code for the falsification of bank notes and other instruments authorized by the law of the kingdom, it is provided that the forgery of or counterfeiting the obligations or securities of the United States or of the Philippine Islands shall be punished by a fine of not more than 10,000 pesos and [381] by imprisonment of not more than "fifteen years. In other words, the highest punishment possible for a crime which may cause the loss of many thousand of dollars, and to prevent which the duty of the state should be as eager as to prevent the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account. And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. The state thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.

It is suggested that the provision for imprisonment in the Philippine Code is separable from the accessory punishment, and that the latter may be declared illegal, leaving

the former to have application. United States v. Pridgeon, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746, is referred to. The proposition decided in that case was that "where a court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack." This proposition is not applicable to the case at bar. The imprisonment and the accessories were in accordance with the law. They were not in excess of it, but were positively required by it. It is provided in article 106, as we have seen, that those sentenced to *cadena temporal* shall labor for the benefit of the state; shall always carry a chain at the ankle, hanging from the wrist; shall be employed at hard and painful labor; shall receive no assistance whatsoever from without the penal institutions. And it is provided in article 56 that the penalty of *cadena temporal* shall include the accessory penalties.

In *Re Graham*, 138 U. S. 461, 34 L. ed. 1051, 11 Sup. Ct. Rep. 363, it was recognized to be "the *general rule that a judgment rendered by a court in a criminal case must conform strictly to the statute, and that any variation from its provisions, either in the character or the extent of punishment inflicted, renders the judgment absolutely void." In *Ex parte Karstendiek*, 93 U. S. 396, 399, 23 L. ed. 889, 890, it was said: "In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence." A similar view was expressed in *Re Mills*, 135 U. S. 263, 266, 34 L. ed. 107, 108, 10 Sup. Ct. Rep. 762. It was recognized in *United States v. Pridgeon* and the cases quoted which sustained it.

The Philippine Code unites the penalties of *cadena temporal*, principal and accessory, and it is not in our power to separate them, even if they are separable, unless their independence is such that we can say that their union was not made imperative by the legislature. *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141. This certainly cannot be said of the Philippine Code, as a Spanish enactment, and the order putting it into effect in the islands did not attempt to destroy the unity of its provisions or the effect of that unity. In other words, it was put into force as it existed, with all its provisions dependent. We cannot, therefore, declare them separable.

It follows from these views that, even if the minimum penalty of *cadena temporal* had been imposed, it would have been re-

pugnant to the Bill of Rights. In other words, the fault is in the law; and, as we are pointed to no other under which a sentence can be imposed, the judgment must be reversed, with directions to dismiss the proceedings.

So ordered.

Mr. Justice Lurton, not being a member of the court when this case was argued, took no part in its decision.

Mr. Justice White, dissenting:

The Philippine law made criminal the entry in a public record by a public official of a [383] knowingly false statement. The *punishment prescribed for violating this law was fine and imprisonment in a penal institution at hard and painful labor for a period ranging from twelve years and a day to twenty years, the prisoner being subjected, as accessories to the main punishment, to carrying during his imprisonment a chain at the ankle, hanging from the wrist, deprivation during the term of imprisonment of civil rights, and subjection, besides, to perpetual disqualification to enjoy political rights, hold office, etc., and, after discharge, to the surveillance of the authorities. The plaintiff in error, having been convicted of a violation of this law, was sentenced to pay a small fine and to undergo imprisonment for fifteen years, with the resulting accessory punishments above referred to. Neither at the trial in the court of first instance nor in the supreme court of the Philippine Islands was any question raised concerning the repugnancy of the statute defining the crime and fixing its punishment to the provision of the Philippine Bill of Rights, forbidding cruel and unusual punishment. Indeed, no question on that subject was even indirectly referred to in the assignments of error filed in the court below for the purpose of this writ of error. In the brief of counsel, however, in this court, the contention was made that the sentence was void, because the term of imprisonment was a cruel and unusual one, and therefore repugnant to the Bill of Rights. Deeming this contention to be of such supreme importance as to require it to be passed upon, although not raised below, the court now holds that the statute, because of the punishment which it prescribes, was repugnant to the Bill of Rights, and therefore void, and for this reason alone reverses and remands with directions to discharge.

The Philippine Bill of Rights, which is construed and applied, is identical with the cruel and unusual punishment clause of the 8th Amendment. Because of this identity it is now decided that it is necessary to give

to the Philippine Bill of Rights the meaning properly attributable to the provision on the same subject found in the 8th Amendment, as, in using the language of that Amendment in the statute, it is to be *presumed that Congress intended to give to the words their constitutional significance. The ruling now made, therefore, is an interpretation of the 8th Amendment, and announces the limitation which that Amendment imposes on Congress when exercising its legislative authority to define and punish crime. The great importance of the decision is hence obvious.

Of course, in every case where punishment is inflicted for the commission of crime, if the suffering of the punishment by the wrongdoer be alone regarded, the sense of compassion aroused would mislead and render the performance of judicial duty impossible. And it is to be conceded that this natural conflict between the sense of commiseration and the commands of duty is augmented when the nature of the crime defined by the Philippine law and the punishment which that law prescribes are only abstractly considered, since the impression is at once produced that the legislative authority has been severely exerted. I say only abstractly considered, because the first impression produced by the merely abstract view of the subject is met by the admonition that the duty of defining and punishing crime has never, in any civilized country, been exerted upon mere abstract considerations of the inherent nature of the crime punished, but has always involved the most practical consideration of the tendency at a particular time to commit certain crimes, of the difficulty of repressing the same, and of how far it is necessary to impose stern remedies to prevent the commission of such crimes. And, of course, as these considerations involve the necessity for a familiarity with local conditions in the Philippine Islands which I do not possess, such want of knowledge at once additionally admonishes me of the wrong to arise from forming a judgment upon insufficient *data*, or without a knowledge of the subject-matter upon which the judgment is to be exerted. Strength, indeed, is added to this last suggestion by the fact that no question concerning the subject was raised in the courts below or there considered; and therefore no opportunity was afforded those courts, presumably, at least, relatively familiar with the local *con- [385] ditions, to express their views as to the considerations which may have led to the prescribing of the punishment in question. Turning aside, therefore, from mere emotional tendencies, and guiding my judgment

alone by the aid of the reason at my command, I am unable to agree with the ruling of the court. As, in my opinion, that ruling rests upon an interpretation of the cruel and unusual punishment clause of the 8th Amendment, never before announced, which is repugnant to the natural import of the language employed in the clause, and which interpretation curtails the legislative power of Congress to define and punish crime by asserting a right of judicial supervision over the exertion of that power, in disregard of the distinction between the legislative and judicial department of the government, I deem it my duty to dissent and state my reasons.

To perform this duty requires at the outset a precise statement of the construction given by the ruling now made to the provision of the 8th Amendment. My inability to do this must, however, be confessed, because I find it impossible to fix with precision the meaning which the court gives to that provision. Not for the purpose of criticizing, but solely in order to indicate my perplexity on the subject, the reasons for my doubt are briefly given. Thus, to my mind, it appears as follows: First. That the court interprets the inhibition against cruel and unusual punishment as imposing upon Congress the duty of proportioning punishment according to the nature of the crime, and casts upon the judiciary the duty of determining whether punishments have been properly apportioned in a particular statute, and if not, to decline to enforce it. This seems to me to be the case, because of the reference made by the court to the harshness of the principal punishment (imprisonment), and its comments as to what it deems to be the severity, if not inhumanity, of the accessories which result from or accompany it, and the declaration in substance that these things offend against the just principle of proportioning punishment to the nature of the crime punished, stated to be a [386] *fundamental precept of justice and of American criminal law. That this is the view now upheld, it seems to me, is additionally demonstrated by the fact that the punishment for the crime in question, as imposed by the Philippine law, is compared with other Philippine punishments for crimes deemed to be less heinous, and the conclusion is deduced that this fact, in and of itself, serves to establish that the punishment imposed in this case is an exertion of unrestrained power, condemned by the cruel and unusual punishment clause.

Second. That this duty of apportionment compels not only that the lawmaking power should adequately apportion punishment for the crimes as to which it legislates, but

also further exacts that the performance of the duty of apportionment must be discharged by taking into view the standards, whether lenient or severe, existing in other and distinct jurisdictions; and that a failure to do so authorizes the courts to consider such standards in their discretion, and judge of the validity of the law accordingly. I say this because, although the court expressly declares in the opinion, when considering a case decided by the highest court of one of the territories of the United States, that the legislative power to define and punish crime committed in a territory, for the purpose of the 8th Amendment, is separate and distinct from the legislation of Congress, yet, in testing the validity of the punishment affixed by the law here in question, proceeds to measure it not alone by the Philippine legislation, but by the provisions of several acts of Congress punishing crime, and in substance declares such congressional laws to be a proper standard, and in effect holds that the greater proportionate punishment inflicted by the Philippine law over the more lenient punishments prescribed in the laws of Congress establishes that the Philippine law is repugnant to the 8th Amendment.

Third. That the cruel and unusual punishment clause of the 8th Amendment controls not only the exertion of legislative power as to modes of punishment, proportionate or otherwise, but addresses itself also to the mainspring of the *legisla- [387] tive motives in enacting legislation punishing crime in a particular case, and therefore confers upon courts the power to refuse to enforce a particular law defining and punishing crime, if, in their opinion, such law does not manifest that the lawmaking power, in fixing the punishment, was sufficiently impelled by a purpose to effect a reformation of the criminal. This is said because of the statements contained in the opinion of the court as to the legislative duty to shape legislation not only with a view to punish, but to reform the criminal, and the inferences which I deduce that it is conceived that the failure to do so is a violation of constitutional duty.

Fourth. That the cruel and unusual punishment clause does not merely limit the legislative power to fix the punishment for crime by excepting out of that authority the right to impose bodily punishments of a cruel kind, in the strict acceptation of those terms, but limits the legislative discretion in determining to what degree of severity an appropriate and usual mode of punishment may, in a particular case, be inflicted; and therefore endows the courts with the right to supervise the exercise of legislative discretion as to the adequacy of

punishment, even although resort is had only to authorized kinds of punishment, thereby endowing the courts with the power to refuse to enforce laws punishing crime, if, in the judicial judgment, the legislative branch of the government has prescribed a too severe punishment.

Not being able to assent to these, as it to me seems, in some respects conflicting, or, at all events, widely divergent, propositions, I shall consider them all as sanctioned by the interpretation now given to the prohibition of the 8th Amendment, and with this conception in mind shall consider the subject.

Before approaching the text of the 8th Amendment to determine its true meaning, let me briefly point out why, in my opinion, it cannot have the significance which it must receive to sustain the propositions rested upon it. In the first place, if it be that the lawmaker, in defining and punishing crime, is imperatively restrained by constitutional provisions to apportion **388]** *punishment by a consideration alone of the abstract heinousness of the offenses punished, it must result that the power is so circumscribed as to be impossible of execution; or, at all events, is so restricted as to exclude the possibility of taking into account, in defining and punishing crime, all those considerations concerning the condition of society, the tendency to commit the particular crime, the difficulty of detecting the same, the necessity for resorting to stern measures of repression, and various other subjects which have, at all times, been deemed essential to be weighed in defining and punishing crime. And certainly the paralysis of the discretion vested in the lawmaking authority which the propositions accomplish is immeasurably magnified when it is considered that this duty of proportioning punishment requires the taking into account of the standards prevailing in other or different countries or jurisdictions, thereby at once exacting that legislation on the subject of crime must be proportioned not to the conditions to which it is intended to apply, but must be based upon conditions with which the legislation, when enacted, will have no relation or concern whatever. And when it is considered that the propositions go further, and insist that, if the legislation seems to the judicial mind not to have been sufficiently impelled by motives of reformation of the criminal, such legislation defining and punishing crime is to be held repugnant to constitutional lim-

itations, the impotency of the legislative power to define and punish crime is made manifest. When to this result is added the consideration that the interpretation, by its necessary effect, does not simply cause the cruel and unusual punishment clause to carve out of the domain of legislative authority the power to resort to prohibited kinds of punishments, but subjects to judicial control the degree of severity with which authorized modes of punishment may be inflicted, it seems to me that the demonstration is conclusive that nothing will be left of the independent legislative power to punish and define crime, if the interpretation now made be pushed in future application to its logical conclusion.

*But let me come to the 8th Amend- **[389]** ment, for the purpose of stating why the clause in question does not, in my opinion, authorize the deductions drawn from it, and therefore does not sanction the ruling now made.

I shall consider the Amendment (a) as to its origin in the mother country, and the meaning there given to it prior to the American Revolution; (b) its migration and existence in the states after the Revolution, and prior to the adoption of the Constitution; (c) its incorporation into the Constitution, and the construction given to it in practice from the beginning to this time; and (d) the judicial interpretation which it has received, associated with the construction affixed, both in practice and judicially, to the same provision found in various state constitutions or Bills of Rights.

Without going into unnecessary historical detail, it is sufficient to point out, as did the court in *Re Kemmler*, 136 U. S. 436, 446, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930, 933, that "the provision in reference to cruel and unusual punishments was taken from the well-known act of Parliament of 1688 [1689?], entitled 'An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown.'" And this act, it is to be observed, was but in regular form a crystallization of the Declaration of Rights of the same year. 3 Hallam, Const. Hist. p. 106. It is also certain, as declared in the *Kemmler* Case, that "this Declaration of Rights had reference to the acts of the executive and judicial departments of the government of England," since it but embodied the grievances which it was deemed had been suffered by the usurpations of the Crown and transgressions of authority by the courts. In the recitals both of the Declaration of Rights and the

Bill of Rights, the grievances complained of were that illegal and cruel punishments had been inflicted, "which are utterly and directly contrary to the known laws and statutes and freedom of this realm;" while in both the Declaration and the Bill of Rights the remedy formulated was a declaration against the infliction of cruel and unusual punishments.

Whatever may be the difficulty, if any, in [390] fixing the meaning *of the prohibition at its origin, it may not be doubted, and indeed is not questioned by anyone, that the cruel punishments against which the Bill of Rights provided were the atrocious, sanguinary, and inhuman punishments which had been inflicted in the past upon the persons of criminals. This being certain, the difficulty of interpretation, if any, is involved in determining what was intended by the unusual punishments referred to and which were provided against. Light, however, on this subject, is at once afforded by observing that the unusual punishments provided against were responsive to and obviously considered to be the illegal punishments complained of. These complaints were, first, that customary modes of bodily punishments, such as whipping and the pillory, had, under the exercise of judicial discretion, been applied to so unusual a degree as to cause them to be illegal; and, second, that in some cases an authority to sentence to perpetual imprisonment had been exerted under the assumption that power to do so resulted from the existence of judicial discretion to sentence to imprisonment, when it was unusual, and therefore illegal, to inflict life imprisonment in the absence of express legislative authority. In other words, the prohibitions, although conjunctively stated, were really disjunctive, and embraced as follows: (a) Prohibitions against a resort to the inhuman bodily punishments of the past; (b) or, where certain bodily punishments were customary, a prohibition against their infliction to such an extent as to be unusual and consequently illegal; (c) or the infliction, under the assumption of the exercise of judicial discretion, of unusual punishments not bodily, which could not be imposed except by express statute, or which were wholly beyond the jurisdiction of the court to impose.

The scope and power of the guaranty as we have thus stated it will be found portrayed in the reasons assigned by the members of the House of Lords who dissented against two judgments for perjury entered in the King's bench against Titus Oates. [391] 10 How. St. Tr. col. 1325. *The judg-

308

ments and the dissenting reasons are copied in the margin.†

As well the dissent referred to as the report of the conferees *on the part of [392] the House of Commons, made to that body concerning a bill to set aside the judgments against Oates above referred to (5 Cobbett's Parl. History, col. 386), proceeded upon the identity of what was deemed to be the illegal practices complained of, and which were intended to be rectified by the prohibition against cruel and unusual punishments, *made in the Declaration of Rights, [393] and treated that prohibition, as already stated, as substantially disjunctive, and as forbidding the doing of the things we have above enumerated. See, for the disjunctive character of the provision, Stephen, Com. Law Eng. 15th ed. p. 379.

When the origin and purpose of the Declaration and the Bill of Rights is thus fixed it becomes clear that that Declaration is not susceptible of the meaning now attributed to the same language found in the Constitution of the United States. That in England it was nowhere deemed that any theory of proportional punishment was suggested by the Bill of Rights, or that a protest was thereby intended against the severity of punishments, speaking generally, is demonstrated by the practice which prevailed in England as to punishing crime from the time of the Bill of Rights to the time of the American Revolution. Speaking on this subject, Stephen, in his history of the criminal law of England, vol. 1, pp. 470, 471, says:

"The severity of the criminal law was greatly increased all through the eighteenth century by the creation of new felonies without benefit of clergy. . . . However, after making all deductions on these grounds, there can be no doubt that the legislation of the eighteenth century in criminal matters was severe to the highest degree, and destitute of any sort of principle or system."

For the sake of brevity a review of the practises which prevailed in the colonial period will not be referred to. Therefore, attention is at once directed to the express guaranties in certain of the state constitu-

†Judgment against Titus Oates upon conviction upon two indictments for perjury, as announced by the court (10 How. St. Tr. cols. 1316, 1317):

"First, The court does order for a fine, that you pay 1,000 marks upon each Indictment.

"Secondly, That you be stript of all your Canonical Habits.

"Thirdly, The Court does award, That you do stand upon the Pillory, and in the Pillory, here before Westminster-hall gate,

tions adopted after the Declaration of Independence, and prior to the formation of the Constitution of the United States, and the circumstances connected with the subsequent adoption of the 8th Amendment.

In 1776, Maryland, in a Bill of Rights, declared (1 Charters and Constitutions, pp. 818, 819):

"14. That sanguinary laws ought to be avoided, as far as is consistent with the safety of the state; and no law to inflict 394] *cruel and unusual pains and penalties ought to be made in any case, or at any time hereafter."

"22. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted, by the courts of law."

The Constitution of North Carolina of

upon Monday next, for an hour's time, between the hours of 10 and 12; with a paper over your head (which you must first walk with round about to all the Courts in Westminster-hall) declaring your crime.' And that is upon the first Indictment.

"Fourthly (on the second Indictment), upon Tuesday, you shall stand upon, and in the Pillory, at the Royal Exchange in London, for the space of an hour, between the hours of 12 and 2; with the same inscription.

"You shall upon the next Wednesday be whipped from Aldgate to Newgate.

"Upon Friday, you shall be whipped from Newgate to Tyburn, by the hands of the common hangman."

"But, Mr. Oates, we cannot but remember, there were several particular times you swore false about; and therefore, as annual commemorations, that it may be known to all people as long as you live, we have taken special care of you for an annual punishment.

"Upon the 24th of April every year, as long as you live, you are to stand upon the Pillory and in the Pillory, at Tyburn, just opposite to the gallows, for the space of an hour, between the hours of 10 and 12.

"You are to stand upon, and in the Pillory, here at Westminster-hall gate, every 9th of August, in every year, so long as you live. And that it may be known what we mean by it, 'tis to remember, what he swore about Mr. Ireland's being in town between the 8th and 12th of August.

"You are to stand upon, and in the Pillory, at Charing-cross, on the 10th of August, every year, during your life, for an hour, between 10 and 12.

"The like over against the Temple gate, upon the 11th.

"And upon the 2d of September (which is another notorious time, which you cannot but be remember'd of) you are to stand upon, and in the Pillory, for the space of one hour, between 12 and 2, at the Royal Exchange; and all this you are to do every year, during your life; and to be committed close prisoner, as long as you live."

54 L. ed.

1776, in general terms prohibited the infliction of "cruel or unusual punishments."

Virginia, by § 9 of the Bill of Rights adopted in 1776, provided as follows:

"That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

In the Massachusetts Declaration of Rights of 1780, a direct prohibition was placed upon the infliction by magistrates or courts of cruel or unusual punishments, the provision being as follows:

"Art. 26. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

The Declaration of Rights of New Hampshire, of 1784, was as follows:

"18. All penalties ought to be propor-

Dissenting statement of a minority of the House of Lords:

"1. For that the King's bench, being a temporal court, made it part of the judgment, that Titus Oates, being a clerk, should, for his said perjuries, be divested of his canonical and priestly habit, and to continue divested all his life; which is a matter wholly out of their power, belonging to the ecclesiastical courts only.

"2. For that the said judgments are barbarous, inhuman, and unchristian; and there is no precedents to warrant the punishments of whipping and committing to prison for life, for the crime of perjury; which yet were but part of the punishments inflicted upon him.

"3. For that the particular matters upon which the indictments were found were the points objected against Mr. Titus Oates's testimony in several of the trials, in which he was allowed to be a good and credible witness, though testified against him by most of the same persons, who witnessed against him upon those indictments.

"4. For that this will be an encouragement and allowance for giving the like cruel, barbarous, and illegal judgments hereafter, unless this judgment be reversed.

"5. Because Sir John Holt, Sir Henry Pollexfen, the two chief justices, and Sir Robert Atkins, chief baron, with six judges more (being all that were then present), for these and many other reasons, did, before us, solemnly deliver their opinions, and unanimously declare, That the said judgments were contrary to law and ancient practice, and therefore erroneous, and ought to be reversed.

"6. Because it is contrary to the declaration on the 12th of February last, which was ordered by the Lords Spiritual and Temporal and Commons then assembled, and by their declaration engrossed in parchment, and enrolled among the records of Parliament, and recorded in chancery; whereby it doth appear, that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted."

tioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye. For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind."

"33. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

The substantial identity between the provisions of these several constitutions or Bills of Rights shows beyond doubt that 395] *their meaning was understood; that is to say, that the significance attributed to them in the mother country as the result of the Bill of Rights of 1689 was appreciated, and that it was intended, in using the identical words, to give them the same well-understood meaning. It is to be observed that the New Hampshire Bill of Rights contains a clause admonishing as to the wisdom of the apportionment of punishment of crime according to the nature of the offense, but in marked contrast to the re-enactment, in express and positive terms, of the cruel and unusual punishment clause of the English Bill of Rights, the provision as to apportionment is merely advisory, additionally demonstrating the precise and accurate conception then entertained of the nature and character of the prohibition adopted from the English Bill of Rights.

Undoubtedly, in the American states, prior to the formation of the Constitution, the necessity for the protection afforded by the cruel and unusual punishment guaranty of the English Bill of Rights had ceased to be a matter of concern, because, as a rule, the cruel bodily punishments of former times were no longer imposed, and judges, where moderate bodily punishment was usual, had not, under the guise of discretion, directed the infliction of such punishments to so unusual a degree as to transcend the limits of discretion and cause the punishment to be illegal, and had also not attempted, in virtue of mere discretion, to inflict such unusual and extreme punishments as had always been deemed proper to be inflicted only as the result of express statutory authority. Despite these considerations, it is true that some of the solicitude which arose after the submission of the Constitution for ratification, and which

threatened to delay or prevent such ratification, in part, at least, was occasioned by the failure to guarantee against the infliction of cruel and unusual punishments. Thus, in the Massachusetts convention, Mr. Holmes, discussing the general result of the judicial powers conferred by the Constitution, and referring to the right of Congress to define and fix the punishment for crime, said (2 Elliot, Debates, 111):

"*They are nowhere restrained from [396 inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline."

That the opposition to the ratification in the Virginia convention was earnestly and eloquently voiced by Patrick Henry is too well known to require anything but statement. That the absence of a guaranty against cruel and unusual punishment was one of the causes of the solicitude by which Henry was possessed is shown by the debates in that convention. Thus Patrick Henry said (3 Elliot, Debates, 447):

"In this business of legislation, your members of Congress will lose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your Declaration of Rights. What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany,—of torturing to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone. And can any man think it troublesome when he can, by a small interference, prevent our rights from being lost? If you will, like the Virginian government, give them knowledge of the extent of the rights retained by the people, and the powers of themselves, they will, if they be honest men, thank you for it. Will they not wish to go on sure grounds? But, if you leave them otherwise, they will not know how to proceed; and, being in a state of uncertainty, they will assume rather than give up powers by implication."

*There observations, it is plainly to [397 be seen, were addressed to the fear of the

repetition, either by the sanction of law or by the practice of courts, of the barbarous modes of bodily punishment or torture, the protest against which was embodied in the Bill of Rights in 1689.

The ultimate recognition by Henry of the patriotic duty to ratify the Constitution and trust to the subsequent adoption of a Bill of Rights, the submission and adoption of the first ten Amendments as a Bill of Rights, which followed ratification, the connection of Mr. Madison with the drafting of the amendments, and the fact that the 8th Amendment is in the precise words of the guaranty on that subject in the Virginia Bill of Rights, would seem to make it perfectly clear that it was only intended by that Amendment to remedy the wrongs which had been provided against in the English Bill of Rights, and which were likewise provided against in the Virginia provision, and therefore was intended to guard against the evils so vividly portrayed by Henry in the debate which we have quoted. That this was the common understanding which must have existed on the subject is plainly to be inferred from the fact that the 8th Amendment was substantially submitted by Congress without any debate on the subject. 2 Lloyd's Debates, 225. Of course, in view of the nature and character of the government which the Constitution called into being, the incorporation of the 8th Amendment caused its provisions to operate a direct and controlling prohibition upon the legislative branch (as well as all other departments), restraining it from authorizing or directing the infliction of the cruel bodily punishments of the past, which was one of the evils sought to be prevented for the future by the English Bill of Rights, and also restrained the courts from exerting and Congress from empowering them to select and exert by way of discretion modes of punishment which were not usual, or usual modes of punishment to a degree not usual, and which could alone be imposed by express authority of law. 398] But this obvious result lends no support to the theory that the adoption of the Amendment operated or was intended to prevent the legislative branch of the government from prescribing, according to its conception of what public policy required, such punishments, severe or otherwise, as it deemed necessary for the prevention of crime, provided, only, resort was not had to the infliction of bodily punishments of a cruel and barbarous character, against which the Amendment expressly provided. Not to so conclude is to hold that because the Amendment, in addition to depriving the lawmaking power of the right to authorize the infliction of cruel bodily pun-

ishments, had restricted the courts, where discretion was possessed by them, from exerting the power to punish by a mode or in a manner so unusual as to require legislative sanction, it thereby deprived Congress of the power to sanction the punishments which the Amendment forbade being imposed, merely because they were not sanctioned. In other words, that because the power was denied to the judiciary to do certain things without legislative authority, thereby the right on the part of the legislature to confer the authority was taken away. And this impossible conclusion would lead to the equally impossible result that the effect of the Amendment was to deprive Congress of its legitimate authority to punish crime, by prescribing such modes of punishment, even although not before employed, as were appropriate for the purpose.

That no such meaning as is now ascribed to the Amendment was attributed to it at the time of its adoption is shown by the fact that not a single suggestion that it had such a meaning is pointed to, and that, on the other hand, the practice from the very beginning shows directly to the contrary, and demonstrates that the very Congress that adopted the Amendment construed it in practice as I have construed it. This is so, since the first crimes act of the United States prescribed punishments for crime utterly without reference to any assumed rule of proportion, or of a conception of a right in the judiciary to supervise the action of Congress in respect to the severity of punishment, excluding, always, the right to impose as a punishment the cruel bodily punishments which were prohibited. What clearer demonstration can there be of this than the statement made by this court in *Ex parte Wilson*, 114 U. S. 427, 29 L. ed. 92, 5 Sup. Ct. Rep. 935, of the nature of the first crimes act, as follows:

"By the first crimes act of the United States, forgery of public securities, or knowingly uttering forged public securities with intent to defraud, as well as treason, murder, piracy, mutiny, robbery, or rescue of a person convicted of a capital crime, was punishable with death; most other offenses were punished by fine and imprisonment; whipping was part of the punishment of stealing or falsifying records, fraudulently acknowledging bail, larceny of goods, or receiving stolen goods; disqualification to hold office was part of the punishment of bribery; and those convicted of perjury or subornation of perjury, besides being fined and imprisoned, were to stand in the pillory for one hour, and rendered incapable of testifying in any court of the United

States. Act of April 30, 1790, chap. 9, 1 Stat. at L. 112-117; Mr. Justice Wilson's Charge to the Grand Jury in 1791, 3 Wilson's Works, 380, 381."

And it is, I think, beyond power even of question that the legislation of Congress, from the date of the first crimes act to the present time, but exemplifies the truth of what has been said, since that legislation from time to time altered modes of punishment, increasing or diminishing the amount of punishment, as was deemed necessary for the public good, prescribing punishments of a new character, without reference to any assumed rule of apportionment, or the conception that a right of judicial supervision was deemed to obtain. It is impossible with any regard for brevity to demonstrate these statements by many illustrations. But let me give a sample from legislation enacted by Congress of the change of punishment. By § 14 of the first crimes act (Act April 30, 1790, chap. 9, 1 Stat. at L. 115), forgery, etc., of the public securities of the United States, 400] or the knowingly uttering *and offering for sale of forged or counterfeited securities of the United States with intent to defraud, was made punishable by death. The punishment now is a fine of not more than \$5,000, and imprisonment at hard labor for not more than fifteen years. Rev. Stat. § 5414, U. S. Comp. Stat. 1901, p. 3662.

By the first crimes act, also, as in numerous others since that time, various additional punishments for the commission of crime were imposed, prescribing disqualification to hold office, to be a witness in the courts, etc., and as late as 1865 a law was enacted by Congress which prescribed as a punishment for crime the disqualification to enjoy rights of citizenship. Rev. Stat. §§ 1996-1998, U. S. Comp. Stat. 1901, p. 1269.

Comprehensively looking at the rulings of this court,† it may be conceded that hitherto they have not definitely interpreted the precise meaning of the clause in question, because in most of the cases in which the protection of the Amendment has been invoked, the cases came from courts of last resorts of states, and the opinions leave room for the contention that they proceeded upon the implied assumption that the 8th Amendment did not govern the states, by virtue of the adoption of the 14th Amendment. However, in *Wilkerson v. Utah*, 99

U. S. 130, 25 L. ed. 345, a case coming to this court from the territory of Utah, the meaning of the clause of the 8th Amendment in question came directly under review. The question for decision was whether a sentence to death by shooting, which had been imposed by the court under the assumed exercise of a discretionary power to fix the mode of execution of the sentence, was repugnant to the clause. While the court, in deciding that it was not, did not undertake to fully interpret the meaning of the clause, it nevertheless, reasoning by exclusion, expressly negated the construction now placed upon it. It was said (pp. 135, 136):

*"Difficulty would attend the effort [401 to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that Amendment to the Constitution. Cooley, Const. Lim. 4th ed. 408; Wharton, Crim. Law, 7th ed. § 3405."

And it was doubtless this ruling which caused the court subsequently to say in *Re Kemmler*, 136 U. S. 436, 447, 34 L. ed. 513, 524, 10 Sup. Ct. Rep. 930, 933:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

Generally viewing the action of the states in their Bills of Rights as to the prohibition against inhuman or cruel and unusual punishments, it is true to say that those provisions substantially conform to the English Bill of Rights and to the provision of the 8th Amendment we are considering, some using the expression "cruel and unusual," others the more accurate expression "cruel or unusual," and some "cruel" only; and in a few instances a provision requiring punishments to be proportioned to the nature of the offense is added to the inhibition against cruel and unusual punishments. In one (Illinois) the prohibition against cruel and unusual punishments is not expressed, although proportional punishment is commanded; yet in *Kelly v. State*, 115 Ill. 583, 56 Am. Rep. 184, 4 N. E. 644, discussing the extent of punishment inflicted by a criminal statute, the supreme court of Illinois declared that "it would not be for the court to say the penalty was not proportioned to the nature of the offense." In another state (Ohio), where, in the early constitution of

†*Pervear v. Massachusetts*, 5 Wall. 475, 18 L. ed. 608; *Wilkerson v. Utah*, 99 U. S. 130, 25 L. ed. 345; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *McElvaine v. Brush*, 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. Rep. 156; *Howard v. Fleming*, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49.

the state, proportionate punishment was conjoined with the cruel and unusual punishment provision, the proportionate provision was omitted in a later constitution.

402] *Here, again, it is true to say, time forbidding my indulging in a review of the statutes, that the legislation of all the states is absolutely in conflict with and repugnant to the construction now given to the clause, since that legislation but exemplifies the exertion of legislative power to define and punish crime according to the legislative conception of the necessities of the situation, without the slightest indication of the assumed duty to proportion punishments, and without the suggestion of the existence of judicial power to control the legislative discretion, provided only that the cruel bodily punishments forbidden were not resorted to. And the decisions of the state courts of last resort, it seems to me, with absolute uniformity, and without a single exception from the beginning, proceed upon this conception. It is true that when the reasoning employed in the various cases is critically examined, a difference of conception will be manifested as to the occasion for the adoption of the English Bill of Rights and of the remedy which it provided. Generally speaking, when carefully analyzed, it will be seen that this difference was occasioned by treating the provision against cruel and unusual punishment as conjunctive instead of disjunctive, thereby overlooking the fact, which I think has been previously demonstrated to be the case, that the term "unusual," as used in the clause, was not a qualification of the provision against cruel punishments, but was simply synonymous with illegal, and was mainly intended to restrain the courts, under the guise of discretion, from indulging in an unusual and consequently illegal exertion of power. Certain it is, however, whatever may be these differences of reasoning, there stands out in bold relief in the state cases, as it is given to me to understand them, without a single exception, the clear and certain exclusion of any prohibition upon the lawmaking power to determine the adequacy with which crime shall be punished, provided only the cruel bodily punishments of the past are not resorted to. Let me briefly refer to some of the cases.

403] *In *Aldridge v. Com.* 2 Va. Cas. 447, decided about twenty years after the ratification of the 8th Amendment, speaking concerning the evils to which the guaranty of the Virginia Bill of Rights against cruel and unusual punishments was addressed, the court, after referring to the punishments usually applicable in that state to crime at
54 L. ed.

the time of the adoption of the Bill of Rights of Virginia, said (p. 450):

"We consider these sanctions as sufficiently rigorous, and we knew that the best heads and hearts of the land of our ancestors had long and loudly declaimed against the wanton cruelty of many of the punishments practised in other countries; and this section in the Bill of Rights was framed effectually to exclude these, so that no future legislature, in a moment, perhaps, of great and general excitement, should be tempted to disgrace our Code by the introduction of any of those odious modes of punishment."

And, four years later, in 1828, applying the same doctrine in *Com. v. Wyatt*, 6 Rand. (Va.) 694, where a punishment by whipping was challenged as contrary to the Virginia Bill of Rights, the court said (p. 700): "The punishment of offenses by stripes is certainly odious, but cannot be said to be unusual."

Until 1865 there was no provision in the Constitution of Georgia expressly guaranteeing against cruel and unusual punishments. The Constitution of that year, however, contained a clause identical in terms with the 8th Amendment, and the scope of the guaranty arose for decision in 1872 in *Whitten v. State*, 47 Ga. 297. The case was this: Upon a conviction for assault and battery, Whitten had been sentenced to imprisonment or the payment of a fine of \$250 and costs. The contention was that this sentence was so disproportionate to the offense committed as to be cruel and unusual and repugnant to the guaranty. In one of its immediate aspects the case involved the guaranty against excessive fines; but, as the imprisonment was the coercive means for the payment of the fine, in that aspect the case *involved the cruel and unusual [404 punishment clause, and the court so considered; and, in coming to interpret the clause, said (p. 301):

"Whether the law is unconstitutional, a violation of that article of the Constitution which declares excessive fines shall not be imposed nor cruel and unusual punishments inflicted, is another question. The latter clause was, doubtless, intended to prohibit the barbarities of quartering, hanging in chains, castration, etc. When adopted by the framers of the Constitution of the United States, larceny was generally punished by hanging; forgeries, burglaries, etc., in the same way; for, be it remembered, penitentiaries are of modern origin, and I doubt if it ever entered into the mind of men of that day that a crime such as this witness makes the defendant guilty of deserved a less penalty than the judge has inflicted. It would be an interference with matters left by the Constitution to the legis-

lative department of the government for us to undertake to weigh the propriety of this or that penalty fixed by the legislature for specific offenses. So long as they do not provide cruel and unusual punishments, such as disgraced the civilization of former ages, and made one shudder with horror to read of them, as drawing, quartering, burning, etc., the Constitution does not put any limit upon legislative discretion."

In *State v. White* (1890) 44 Kan. 514, 25 Pac. 33, it was sought to reverse a sentence of five years' imprisonment in the penitentiary, imposed upon a boy of sixteen for statutory rape. The girl was aged sixteen, and had consented. It was contended that if the statute applied, it was unconstitutional and void, "for the reason that it conflicts with § 9 of the Bill of Rights, because it inflicts cruel and unusual punishment, and is in conflict with the spirit of the Bill of Rights generally, and is in violation of common sense, common reason, and common justice."

The court severely criticized the statute. After deciding that the offense was embraced in the statute, the court said:

405] "With respect to the severity of the punishment, while we think it is true that it is a severer one than has ever before been provided for in any other state or country for such an offense, yet we cannot say that the statute is void for that reason. Imprisonment in the penitentiary at hard labor is not of itself a cruel or unusual punishment, within the meaning of § 9 of the Bill of Rights of the Constitution, for it is a kind of punishment which has been resorted to ever since Kansas has had any existence, and is a kind of punishment common in all civilized countries. That section of the Constitution probably, however, relates to the kind of punishment to be inflicted, and not to its duration. Although the punishment in this case may be considered severe, and much severer, indeed, than the punishment for offenses of much greater magnitude, as adultery, or sexual intercourse coupled with seduction, yet we cannot say that the act providing for it is unconstitutional or void."

In *State v. Hogan* (1900) 63 Ohio St. 218, 52 L.R.A. 863, 81 Am. St. Rep. 626, 58 N. E. 572, the court sustained a "tramp law," which prescribed as the punishment to be imposed on a tramp for threatening to do injury to the person of another, imprisonment in the penitentiary not more than three years nor less than one year. In the course of the opinion the court said:

"The objection that the act prescribes a cruel and unusual punishment we think not well taken. Imprisonment at hard labor is neither cruel nor unusual. It may be severe

in the given instance, but that is a question for the law-making power. *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; *Cornelison v. Com.* 84 Ky. 583, 2 S. W. 235. The punishment, to be effective, should be such as will prove a deterrent. The tramp cares nothing for a jail sentence. Often he courts it. A work-house sentence is less welcome, but there are but few workhouses in the state. A penitentiary sentence is a real punishment. There he has to work, and cannot shirk."

In Minnesota a register of deeds was convicted of misappropriating the sum of \$62.50, which should have been turned over [406] by him to the county treasurer. He was sentenced to pay a fine of \$500 and be imprisoned at hard labor for one year. The contention that the sentence was repugnant to the state constitutional guaranty against cruel and unusual punishment was considered and disposed of by the court in *State v. Borgstrom*, 69 Minn. 508, 72 N. W. 799, 975. Among other things the court said:

"It is claimed that the sentence imposed was altogether disproportionate to the offense charged, and of which the defendant was convicted, and comes within the inhibition of Const. art. 1, § 5, that no cruel or unusual punishments be inflicted. . . . We are not unmindful of the importance of this question, and have given to it that serious and thorough examination which such importance demands. . . . In England there was a time when punishment was by torture, by loading him with weights to make him confess. Traitors were condemned to be drowned, disemboweled, or burned. It was the law 'that the offender shall be drawn, or rather dragged, to the gallows; he shall be hanged and cut down alive; his entrails shall be removed and burned while he yet lives; his head shall be decapitated; his body divided into four parts.' *Browne*, Bl. Com. 617. For certain other offenses the offender was punished by cutting off the hands or ears, or boiling in oil, or putting in the pillory. By the Roman law a parricide was punished by being sewed up in a leather sack with a live dog, a cock, a viper, and an ape, and cast into the sea. These punishments may properly be termed cruel, but happily the more humane spirit of this nation does not permit such punishments to be inflicted upon criminals. Such punishments are not warranted by the laws of nature or society, and we find that they are prohibited by our Constitution. But, within this limitation or restriction, the legislature is ordinarily the judge of the expediency of creating new crimes and of prescribing the penalty. . . . While the amount of money mis-

appropriated in this instance was not great, the legislature evidently had in mind the fact [407] that the misappropriation by a *public official of the public money was destructive of the public rights and the stability of our government. But fine and imprisonment are not ordinarily cruel and unusual punishments."

In *Territory v. Ketchum*, 10 N. M. 721, 55 L.R.A. 90, 65 Pac. 169, the court considered whether a statute which had recently been put in force, and which imposed the death penalty instead of a former punishment of imprisonment, for an attempt at train robbery, was cruel and unusual. In sustaining the validity of the law, the court pointed out the conditions of society which presumably had led the lawmaking power to fix the stern penalty, and after a lengthy discussion of the subject it was held that the law did not impose punishment which was cruel or unusual.

The cases just reviewed are typical, and I therefore content myself with noting in the margin many others to the same general effect.†

In stating, as I have done, that, in my opinion, no case could be found sustaining the [408] proposition which the court now *holds, I am, of course, not unmindful that a North Carolina case (*State v. Driver*, 78 N. C. 423) is cited by the court as authority, and that a Louisiana case (*State ex rel. Garvey v. Whitaker*, 48 La. Ann. 527, 35 L.R.A. 561, 19 So. 457) is sometimes referred to as of the same general tenor. A brief analysis of the *Driver* Case will indicate why, in my opinion, it does not support the contention based upon it. In that case the accused was convicted of assault and battery, and sentenced to imprisonment for five years in the county jail. The offense was a common-law misdemeanor, and the punishment not being fixed by statute, as observed by the court (page 429), was left to the discretion of the judge. In testing whether

the term of the sentence was unusual and therefore illegal, the court held that a long term of imprisonment in the county jail was unlawful because unusual, and was a gross abuse by the lower court of its discretion. Although the court made reference to the constitutional guaranty, there is not the slightest indication in its opinion that it was deemed there would have been power to set aside the sentence had it been inflicted by virtue of an express statutory command. But this aside, it seems to me, as the test applied in the *Driver* Case to determine what was an unusual punishment in North Carolina was necessarily so local in character, that it affords no possible ground here for giving an erroneous meaning to the 8th Amendment. I say this because an examination of the opinion will disclose that it proceeded upon a consideration of the disadvantages peculiar to an imprisonment in a county jail in North Carolina, as compared with the greater advantages to arise from the imprisonment for a like term in the penitentiary, the court saying:

"Now, it is true, our terms of imprisonment are much longer, but they are in the penitentiary, where a man may live and be made useful; but a county jail is a close prison, where life is soon in jeopardy, and where the prisoner is not only useless, but a heavy public expense."

As to the Louisiana case, I content myself with saying that it, in substance, involved merely the question of error committed *by a magistrate in imposing [409] punishment for many offenses when, under the law, the offense was a continuing and single one.

From all the considerations which have been stated, I can deduce no ground whatever which, to my mind, sustains the interpretation now given to the cruel and unusual punishment clause. On the contrary, in my opinion, the review which has been made

†Cases decided in state and territorial courts of last resort, involving the question whether particular punishments were cruel and unusual: *Ex parte Mitchell*, 70 Cal. 1. 11 Pac. 488; *People v. Clark*, 106 Cal. 32, 39 Pac. 53; *Fogarty v. State*, 80 Ga. 450, 5 S. E. 782; *Kelly v. State*, 115 Ill. 683, 56 Am. Rep. 184, 4 N. E. 644; *Hobbs v. State*, 133 Ind. 404, 18 L.R.A. 774, 32 N. E. 1019; *State v. Teeters*, 97 Iowa, 458, 66 N. W. 754; *Re Tutt*, 55 Kan. 705, 41 Pac. 957; *Cornelison v. Com.* 84 Ky. 583, 608, 2 S. W. 235; *Harper v. Com.* 93 Ky. 290, 19 S. W. 737; *State ex rel. Hohn v. Baker*, 105 La. 378, 29 So. 940; *Foote v. State*, 59 Md. 264, 267; *Com. v. Hitchings*, 5 Gray, 482; *McDonald v. Com.* 173 Mass. 322, 73 Am. St. Rep. 293, 53 N. E. 874; *Lurton v. Circuit Judge*, 69 Mich. 610, 37 N. W. 701; *People v. Morris*, 80 Mich. 637, 8 L.R.A. 685, 45

N. W. 591; *People v. Smith*, 94 Mich. 644, 54 N. W. 487; *People v. Whitney*, 105 Mich. 622, 63 N. W. 765; *Dummer v. Nungesser*, 107 Mich. 481, 65 N. W. 564; *People v. Huntley*, 112 Mich. 569, 71 N. W. 178; *State v. Williams*, 77 Mo. 310; *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10; *State v. Moore*, 121 Mo. 514, 42 Am. St. Rep. 542, 26 S. W. 345; *State v. Van Wye*, 136 Mo. 227, 58 Am. St. Rep. 627, 37 S. W. 938; *State v. Gediecke*, 43 N. J. L. 86; *Garcia v. Territory*, 1 N. M. 415; *State v. Apple*, 121 N. C. 585, 28 S. E. 469; *State ex rel. Larabee v. Barnes*, 3 N. D. 319, 55 N. W. 883; *State v. Becker*, 3 S. D. 29, 51 N. W. 1018; *State v. Hodgson*, 66 Vt. 134, 28 Atl. 1089; *State v. De Lano*, 80 Wis. 259, 49 N. W. 808; *State v. Faekler*, 91 Wis. 418, 64 N. W. 1029; *Re McDonald*, 4 Wyo. 150, 33 Pac. 18.

demonstrates that the word "cruel," as used in the Amendment, forbids only the lawmaking power, in prescribing punishment for crime, and the courts in imposing punishment, from inflicting unnecessary bodily suffering through a resort to inhuman methods for causing bodily torture, like or which are of the nature of the cruel methods of bodily torture which had been made use of prior to the Bill of Rights of 1689, and against the recurrence of which the word "cruel" was used in that instrument. To illustrate. Death was a well-known method of punishment, prescribed by law, and it was, of course, painful, and in that sense was cruel. But the infliction of this punishment was clearly not prohibited by the word "cruel," although that word manifestly was intended to forbid the resort to barbarous and unnecessary methods of bodily torture in executing even the penalty of death.

In my opinion, the previous considerations also establish that the word "unusual" accomplished only three results: First, it primarily restrains the courts when acting under the authority of a general discretionary power to impose punishment, such as was possessed at common law, from inflicting lawful modes of punishment to so unusual a degree as to cause the punishment to be illegal, because to that degree it cannot be inflicted without express statutory authority; second, it restrains the courts in the exercise of the same discretion from inflicting a mode of punishment so unusual as to be impliedly not within its discretion, and to be consequently illegal in the absence of express statutory authority; and, third, as to both the foregoing, it operated to restrain the lawmaking power from endowing the judiciary with the right to exert an [410] illegal *discretion as to the kind and extent of punishment to be inflicted.

Nor is it given to me to see in what respect the construction thus stated minimizes the constitutional guaranty by causing it to become obsolete or ineffective in securing the purposes which led to its adoption. Of course, it may not be doubted that the provision against cruel bodily punishment is not restricted to the mere means used in the past to accomplish the prohibited result. The prohibition, being generic, embraces all methods within its intendment. Thus, if it could be conceived that to-morrow the lawmaking power, instead of providing for the infliction of the death penalty by hanging, should command its infliction by burying alive, who could doubt that the law would be repugnant to the constitutional inhibition against cruel punishment? But while this consideration is obvious, it must be equally apparent that the prohibition against

the infliction of cruel bodily torture cannot be extended so as to limit legislative discretion in prescribing punishment for crime by modes and methods which are not embraced within the prohibition against cruel bodily punishment, considered even in their most generic sense, without disregarding the elementary rules of construction which have prevailed from the beginning. Of course, the beneficent application of the Constitution to the ever-changing requirements of our national life has, in a great measure, resulted from the simple and general terms by which the powers created by the Constitution are conferred, or in which the limitations which it provides are expressed. But this beneficent result has also essentially depended upon the fact that this court, while never hesitating to bring within the powers granted or to restrain by the limitations created all things generically within their embrace, has also incessantly declined to allow general words to be construed so as to include subjects not within their intendment. That these great results have been accomplished through the application by the court of the familiar rule that what is generically included in the words *employed in the Constitution is to [411] be ascertained by considering their origin and their significance at the time of their adoption in the instrument may not be denied,—*Boyd v. United States*, 116 U. S. 616, 624, 29 L. ed. 746, 748, 6 Sup. Ct. Rep. 524; *Kepner v. United States*, 195 U. S. 100, 124, 125, 49 L. ed. 114, 122, 123, 24 Sup. Ct. Rep. 797, 1 A. & E. Ann. Cas. 655,—rulings which are directly repugnant to the conception that by judicial construction constitutional limitations may be made to progress so as to ultimately include that which they were not intended to embrace,—a principle with which it seems to me the ruling now made is in direct conflict, since, by the interpretation now adopted, two results are accomplished: (a) the clause against cruel punishments, which was intended to prohibit inhumane and barbarous bodily punishments, is so construed as to limit the discretion of the lawmaking power in determining the mere severity with which punishments not of the prohibited character may be prescribed, and (b) by interpreting the word "unusual," adopted for the sole purpose of limiting judicial discretion in order thereby to maintain the supremacy of the lawmaking power, so as to cause the prohibition to bring about the directly contrary result; that is, to expand the judicial power by endowing it with a vast authority to control the legislative department in the exercise of its discretion to define and punish crime.

But further than this, assuming, for the

sake of argument, that I am wrong in my view of the 8th Amendment, and that it endows the courts with the power to review the discretion of the lawmaking body in prescribing sentence of imprisonment for crime, I yet cannot agree with the conclusion reached in this case, that, because of the mere term of imprisonment, it is within the rule. True, the imprisonment is at hard and painful labor. But certainly the mere qualification of painful in addition to hard cannot be the basis upon which it is now decided that the legislative discretion was abused, since to understand the meaning of the term requires a knowledge of the discipline prevailing in the prisons in the Philippine Islands. The division of hard labor into classes, one more irksome, and, it may be said, more painful than the other [412] in the *sense of severity, is well known. English prisons act of 1865, Pub. Gen. Stat. § 19, p. 835. I do not assume that the mere fact that a chain is to be carried by the prisoner causes the punishment to be repugnant to the Bill of Rights, since, while the chain may be irksome, it is evidently not intended to prevent the performance of the penalty of hard labor. Such a provision may well be part of the ordinary prison discipline, particularly in communities where the jails are insecure, and it may be a precaution applied, as it is commonly applied in this country, as a means of preventing the escape of prisoners; for instance, where the sentence imposed is to work on the roads or other work where escape might be likely. I am brought, then, to the conclusion that the accessory punishments are the basis of the ruling now made, that the legislative discretion was so abused as to cause it to be necessary to declare the law prescribing the punishment for the crime invalid. But I can see no foundation for this ruling, as, to my mind, these accessory punishments, even under the assumption, for the sake of argument, that they amounted to an abuse of legislative discretion, are clearly separable from the main punishment,—imprisonment. Where a sentence is legal in one part and illegal in another, it is not open to controversy that the illegal, if separable, may be disregarded and the legal enforced. *United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746. But it is said here the illegality is not merely in the sentence, but in the law which authorizes the sentence. Grant the premise. The illegal is capable of separation from the legal in the law as well as in the sentence; and because this is a criminal case, it is none the less subject to the rule that where a statute is unconstitutional in part and in part not, the unconstitutional part, if separable, may be rejected and the constitution-
54 L. ed.

tional part maintained. Of course it is true that that can only be done provided it can be assumed that the legislature would have enacted the legal part separate from the illegal. The ruling now made must therefore rest upon the proposition that because the law has provided an illegal in addition to a legal punishment, *it must be [413 assumed that the legislature would not have defined and punished the crime to the legal extent, because to some extent the legislature was mistaken as to its powers. But this I contend is to indulge in an assumption which is unwarranted and has been directly decided to the contrary at this term in *United States v. Union Supply Co.* 215 U. S. 50, ante, 87, 30 Sup. Ct. Rep. 15. In that case a corporation was proceeded against criminally for an offense punishable by imprisonment and fine. The corporation clearly could not be subjected to the imprisonment, and the contention was that the lawmaker must be presumed to have intended that both the punishments should be inflicted upon the person violating the law, and therefore it could not be intended to include a corporation within its terms. In overruling the contention, it was said:

"And if we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that if one of them is impossible, it does not mean, on that account, to let the defendant escape."

I am authorized to say that Mr. Justice Holmes concurs in this dissent.

STANDARD OIL COMPANY OF KENTUCKY, Plff. in Err.,

v.

STATE OF TENNESSEE, UPON THE RELATION OF CHARLES T. CATES, Jr., Attorney General of the State of Tennessee.

(See S. C. Reporter's ed. 413-422.)

Constitutional law — equal protection of the laws — procedure.

1. Corporations are not denied the equal protection of the laws because corporate violators of the Tennessee anti-trust act of March 16, 1903, may be proceeded against by bill in equity on relation of the attorney general, while natural persons offending against its provisions cannot be tried without a preliminary investigation by a grand jury, and indictment or presentment,

NOTE.—On illegal trusts under modern anti-trust laws—see note to *Whitwell v. Continental Tobacco Co.* 61 L.R.A. 689.

and a trial by jury, with the right to an acquittal unless their guilt is established beyond a reasonable doubt, and to the benefit of a statute of limitations of one year. [For other cases, see Constitutional Law, 371-401, in Digest Sup. Ct. 1908.]

Commerce — state regulation — foreign oil company — congressional inaction.

2. Interstate commerce is not unlawfully regulated, at least, in the absence of congressional action, by the Tennessee anti-trust act of March 16, 1903, under which, as construed by the state court, a foreign oil company may be excluded from doing domestic business in the state because it has induced merchants in that state, by a gift of oil, to revoke orders on a rival company for oil to be shipped into the state.

[For other cases, see Commerce, 68-80, 376-401, in Digest Sup. Ct. 1908.]

[No. 160.]

Argued April 20, 1910. Decided May 2, 1910.

IN ERROR to the Supreme Court of the State of Tennessee to review a decree which affirmed a decree of the Chancery Court of Sumner County, in that state, forbidding a foreign corporation to do business other than interstate commerce in that state. Affirmed.

See same case below, 120 Tenn. 86, 110 S. W. 565.

The facts are stated in the opinion.

Mr. John J. Vertrees argued the cause and filed a brief for plaintiff in error:

The anti-trust act of Tennessee, upon which the present proceeding is based, is not a statute prescribing the conditions on which foreign corporations are admitted to do business in Tennessee, neither is it a statute prescribing the procedure to be employed against corporations to punish them for corporate wrongdoing. It is a general criminal law denouncing combinations, agreements, and conspiracies against trade, as crimes, and prescribing the punishment to be inflicted for committing those crimes.

Carroll v. Greenwich Ins. Co. 199 U. S. 409, 50 L. ed. 249, 26 Sup. Ct. Rep. 66; W. W. Cargill Co. v. Minnesota, 180 U. S. 468, 45 L. ed. 626, 21 Sup. Ct. Rep. 423; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 332, 46 L. ed. 935, 22 Sup. Ct. Rep. 662; American Smelting & Ref. Co. v. Colorado, 204

U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198, 9 A. & E. Ann. Cas. 978.

A violation of the provisions of this anti-trust act of Tennessee is a conspiracy against trade.

The offense, when committed by a corporation, is a misdemeanor.

Corporations may be punished for crime, although they are not capable of having a guilty or criminal intent. Upon grounds of public policy, the guilty intent of the agents who act for them may, and, indeed, oftentimes should, be imputed to the corporations, and the corporations be punished accordingly.

New York C. & H. R. R. Co. v. United States, 212 U. S. 495, 53 L. ed. 622, 29 Sup. Ct. Rep. 304.

The anti-trust act of Tennessee, as construed and applied in the present case, is void, because it is a regulation of interstate commerce.

General Oil Co. v. Crain, 209 U. S. 228, 52 L. ed. 764, 28 Sup. Ct. Rep. 475; Rea-riek v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; People v. Hawkins, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; Jerver v. The Carolina, 66 Fed. 1013; Knop v. Monongahela River Consol. Coal & Coke Co. 211 U. S. 485, 53 L. ed. 294, 29 Sup. Ct. Rep. 188; Adams Exp. Co. v. Kentucky, 214 U. S. 221, 53 L. ed. 973, 29 Sup. Ct. Rep. 633.

The anti-trust act of Tennessee upon which the present proceeding is based, as construed and applied, is unconstitutional and void, because it denies to the defendant the equal protection of the laws, and in these respects, namely: It accords to natural persons accused of violating its provisions: (1) The right to a preliminary inquiry by a grand jury; and (2) the right to be put to answer the charge by indictment or presentment; and (3) the right to a trial by a jury; and (4) the right to an acquittal unless guilt be established by evidence beyond a reasonable doubt; and (5) the right to interpose the statute of limitations (when it has run) as a defense.

All these defensive rights are accorded to natural persons, but denied to corporations. That denial is capricious, arbitrary, and unreasonable, and therefore a denial of the equal protection of the laws.

As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna &

F. Co. v. Citizens' Trust & Surety Co. 24, C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On exclusion of foreign corporation as interference with interstate commerce—see notes to Kindel v. Beck & P. Lithographing Co. 24 L.R.A. 311; Western U. Teleg. Co. v. Taggart, 60 L.R.A. 677; and McCanna & F. Co. v. Citizens' Trust & Surety Co. supra.

Crowley v. United States, 194 U. S. 473, 48 L. ed. 1081, 24 Sup. Ct. Rep. 731; 23 Am. & Eng. Enc. Law, 2d ed. p. 948; *Turley v. State*, 3 Heisk. 11.

The transaction at Gallatin, Tennessee, alleged in the present proceedings to be a conspiracy against trade, if an unlawful conspiracy at all, is a conspiracy against interstate trade,—a violation of the act of Congress, the Sherman act, and not a violation of the anti-trust act of Tennessee.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 229, 230, 44 L. ed. 136, 143, 20 Sup. Ct. Rep. 96; *Northern Securities Co. v. United States*, 193 U. S. 344, 48 L. ed. 703, 24 Sup. Ct. Rep. 436; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *United States v. Swift & Co.* 122 Fed. 534.

Mr. Charles T. Cates, Jr., argued the cause and filed a brief for defendant in error:

The Tennessee anti-trust act of 1903 has been sustained as a valid constitutional enactment, applicable only to domestic or intrastate commerce, by the supreme court of Tennessee, not only in the case at bar, but practically upon the same facts in the criminal prosecution against plaintiff in error and its agent Holt.

Standard Oil Co. v. State, 117 Tenn. 618, 10 L.R.A. (N.S.) 1015, 100 S. W. 705.

The state of Tennessee had the right to deal with the subject-matters of said act of 1903, and to denounce as unlawful agreements and arrangements in restraint of trade within the state, or which are designed or tend to prevent competition in the sale of commodities or products within the state, and to prohibit and punish such unlawful agreements or contracts.

National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; *Smiley v. Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86-107, 53 L. ed. 417-428, 29 Sup. Ct. Rep. 220.

The proper construction to be given to the act of 1903, and what is to be regarded as among its terms,—that is, its meaning and application,—presents no Federal question, but is conclusively determined by the decision of the supreme court of Tennessee.

Phoenix Ins. Co. v. The Treasurer (Phoenix Ins. Co. v. Gardiner) 11 Wall. 204, 20 L. ed. 112; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *New York v. Roberts*, 171 U. S. 658-661, 43 L. ed. 323-325, 19 Sup. Ct. Rep. 58; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28-42, 43, 44 L. ed. 657-663, 664, 20 Sup. Ct. Rep. 518; *Western U. Teleg. Co. v. Missouri*, 190 U. S. 412-425, 47 L. ed. 1116-54 L. ed.

1121, 23 Sup. Ct. Rep. 730; *Smiley v. Kansas*, 196 U. S. 447-455, 49 L. ed. 546-551, 25 Sup. Ct. Rep. 289.

This court will not review the findings of fact made by the state court, but will accept such findings upon matters of fact as conclusive.

Quimby v. Boyd, 128 U. S. 489, 32 L. ed. 503, 9 Sup. Ct. Rep. 147; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Thayer v. Spratt*, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; *Western U. Teleg. Co. v. Missouri*, 190 U. S. 412-422, 47 L. ed. 1116-1120, 23 Sup. Ct. Rep. 730; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86-97, 53 L. ed. 417-425, 29 Sup. Ct. Rep. 220.

The application of the act of 1903 to the acts and doings of plaintiff in error and others, designed solely to prevent, and effectually preventing, competition with its purely local business and sales of oil at Gallatin, was a valid exercise of the police power of the state, and not a regulation of interstate commerce.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211-247, 44 L. ed. 136-149, 20 Sup. Ct. Rep. 96.

When men act in concert, and their several acts—though lawful if done alone, and not as a part of a combination—form part of a common plan, all are unlawful.

Aikens v. Wisconsin, 195 U. S. 194-206, 49 L. ed. 154-160, 25 Sup. Ct. Rep. 3; *Swift & Co. v. United States*, 196 U. S. 396, 49 L. ed. 524, 25 Sup. Ct. Rep. 276; *Standard Oil Co. v. State*, 117 Tenn. 677, 10 L.R.A. (N.S.) 1015, 100 S. W. 705.

The plaintiff in error, having refused to avail itself of its right to a trial by jury in the chancery court of Sumner county, where it could have had every issue of fact passed upon and determined by the jury, is now in no position to complain to this court that it has been denied the equal protection of the law, or deprived of its property without due process of law.

Connor v. Frierson, 98 Tenn. 188, 38 S. W. 1031; *James v. Brooks*, 6 Heisk. 156; *Ragsdale v. Gossett*, 2 Lea, 739; *First Nat. Bank v. Oldham*, 6 Lea, 729; *State v. Hawkins*, 91 Tenn. 144, 18 S. W. 114; *Morris v. Swaney*, 7 Heisk. 593; *Jackson v. Nimmo*, 3 Lea. 614.

The holding of the supreme court of Tennessee, that this is a civil action to enforce a civil right, is not only conclusive, but is in harmony with the doctrine repeatedly announced by this court.

Ames v. Kansas, 111 U. S. 455-462, 28 L. ed. 486, 487, 4 Sup. Ct. Rep. 437; *Foster v. Kansas*, 112 U. S. 205, 206, 28 L. ed. 630, 697, 5 Sup. Ct. Rep. 8, 97; *National Cotton*

Oil Co. v. Texas, 197 U. S. 133, 49 L. ed. 695, 25 Sup. Ct. Rep. 379; *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936, affirmed in 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518.

The state of Tennessee, having full power and authority to pass an act regulating and controlling intrastate commerce within her borders, is vested with equal power and authority to provide proceedings to enforce the same; and, keeping within constitutional limitations, may provide its own method of procedure, and determine the methods and means by which such laws may be effectual.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 107, 53 L. ed. 417, 428, 29 Sup. Ct. Rep. 220, 212 U. S. 118, 53 L. ed. 434, 29 Sup. Ct. Rep. 227; *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; *Hovey v. Elliott*, 167 U. S. 409, 443, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478; *West v. Louisiana*, 194 U. S. 258, 263, 48 L. ed. 965, 969, 24 Sup. Ct. Rep. 650; *Leeper v. Texas*, 139 U. S. 462, 468, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. 577; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344; *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 236, 44 L. ed. 750, 20 Sup. Ct. Rep. 620; *Hooker v. Los Angeles*, 188 U. S. 314, 318, 47 L. ed. 487, 491, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; *Rogers v. Peck*, 199 U. S. 425, 50 L. ed. 256, 26 Sup. Ct. Rep. 87; *Rawlins v. Georgia*, 201 U. S. 638, 50 L. ed. 899, 26 Sup. Ct. Rep. 560, 5 A. & E. Ann. Cas. 783; *Felts v. Murphy*, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366; *Ilagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Northern Securities Co. v. United States*, 193 U. S. 197, 360, 48 L. ed. 679, 709, 24 Sup. Ct. Rep. 436.

There was no unlawful discrimination, only reasonable and natural classification.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989, approved in *Maxwell v. Dow*, 176 U. S. 598, 599, 44 L. ed. 603, 604, 20 Sup. Ct. Rep. 448, 494.

Mr. Justice Holmes delivered the opinion of the court:

The plaintiff in error is a Kentucky corporation, and seeks to reverse a decree of the supreme court of Tennessee, forbidding it to do business, other than interstate commerce, in the latter state. 120 Tenn. 86, 110 S. W. 565. The ground of the decree is that the corporation and certain named agents entered into an arrangement for the

purpose and with the effect of lessening competition in the sale of oil at Gallatin, Tennessee, and with the further result of advancing the price of oil there. The acts proved against the corporation were held to entail the ouster under a statute of Tennessee. Act of March 16, 1903. The corporation brings the case here on the contentions that the statute, as construed by the court, is contrary to the 14th Amendment, and also is an unconstitutional interference with commerce among the states.

*The basis of the former contention [420 is that, by § 3 of the act, any violation of it is made a crime, punishable by fine, imprisonment, or both, and that this section has been construed as applicable only to natural persons. *Standard Oil Co. v. State*, 117 Tenn. 618, 10 L.R.A.(N.S.) 1015, 100 S. W. 705. Hence, it is said, this statute denies to corporations the equal protection of the laws. For although it is addressed generally to the prevention of a certain kind of conduct, whether on the part of corporations or unincorporated men, the latter cannot be tried without a preliminary investigation by a grand jury, an indictment or presentment, a trial by jury, the right to an acquittal unless their guilt is established beyond a reasonable doubt, and the benefit of a statute of limitations of one year. Corporations, on the other hand, are proceeded against by bill in equity on relation of the attorney general, without any of these advantages, except, perhaps, the right to a jury. Complaint is not made of the difference between fine or imprisonment and ouster, but it is insisted that this is a general criminal statute, that ouster is a punishment as much as a fine, and that it is not a condition attached to the doing of business by foreign corporations (*Carroll v. Greenwich Ins. Co.* 199 U. S. 401, 409, 50 L. ed. 246, 249, 26 Sup. Ct. Rep. 66), or, indeed, a regulation of the conduct of corporations, as such, at all. Therefore the plaintiff in error complains that it is given a wrongful immunity from the procedure of the criminal law. This suit is for the same transaction for which, in the earlier case cited above, an agent of the company was indicted and fined.

The foregoing argument is one of the many attempts to construe the 14th Amendment as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment. The law of Tennessee sees fit to seek to prevent a certain kind of conduct. To prevent it the threat of fine and imprisonment is likely to be efficient for men, while the latter is impossible and the former less serious to corporations. On the other hand, the threat of extinction or ouster is

421] not *monstrous, and yet is likely to achieve the result with corporations, while it would be extravagant as applied to men. Hence, this difference is admitted to be justifiable. But the admission goes far to destroy the argument that is made. For if a fundamental distinction may be made in the evils that different delinquents are forced to suffer, surely the less important and ancient distinction between the modes of establishing the delinquency, according to the nature of the evil inflicted, even more easily may be justified. The supreme court of the state says that the present proceeding is of a civil nature; but assuming that nevertheless it ends in punishment, there is nothing novel or unusual about it. We are of opinion that subjection to it, with its concomitant advantages and disadvantages, is not an inequality of which the plaintiff in error can complain, although natural persons are given the benefit of the rules to which we have referred before incurring the possible sentence to prison, which the plaintiff in error escapes.

The second objection to the statute is that, although construed by the court to apply to domestic business only, nevertheless it is held to warrant turning the defendant out of the state for an interference with interstate trade. The transaction complained of was inducing merchants in Galatin to revoke orders on a rival company for oil to be shipped from Pennsylvania, by an agreement to give them 300 gallons of oil. It is said that as the only illegal purpose that can be attributed to this agreement is that of protecting the defendants' oil against interstate competition, it could not be made the subject of punishment by the state; that the offense, if any, is against interstate commerce alone.

The cases that have gone as far as any in favor of this proposition are those that hold invalid taxes upon sales by traveling salesmen, so far as they affect commerce among the states. *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Rearick v. Pennsylvania*, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159. These cases fall short of the conclusion to which they are 422] supposed to *point. Regulations of the kind that they deal with concern the commerce itself, the conduct of the men engaged in it, and as so engaged. The present statute deals with the conduct of third persons, strangers to the business. It does not regulate the business at all. It is not even directed against interference with that business specifically, but against acts of a certain kind that the state disapproves in whatever connection. The mere fact that it 54 L. ed.

may happen to remove an interference with commerce among the states as well with the rest does not invalidate it. It hardly would be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery, that the person assaulted was engaged in peddling goods from another state. How far Congress could deal with such cases we need not consider, but certainly there is nothing in the present state of the law, at least, that excludes the states from a familiar exercise of their power. See *Field v. Barber Asphalt Paving Co.* 194 U. S. 618, 623, 48 L. ed. 1142, 1154, 24 Sup. Ct. Rep. 784.

There is an attempt, also, to bring this case within the statute of limitations. It was permissible for the corporation to contend that it was discriminated against unconstitutionally by being excluded from that defense, and we have dealt with the argument that it was so. But the scope of the state statutes was for the state court to determine, and is not open here.

Decree affirmed.

*CHARLES R. HEIKE, Plff. in Err., [423
v.

UNITED STATES.

(See S. C. Reporter's ed. 423-433.)

Error to circuit court — final judgment — ruling on plea in bar.

1. A judgment of a Federal circuit court, entered upon a verdict directed in favor of the government on the issues raised by a special plea in bar, by which the accused claimed immunity from prosecution under the act of February 25, 1903 (32 Stat. at L. 904, chap. 755, U. S. Comp. Stat. Supp. 1909, p. 1142), as amended by the act of June 30, 1906 (34 Stat. at L. 798, chap. 3920, U. S. Comp. Stat. Supp. 1909, p. 1168), because of his testimony before the grand jury, is not a final judgment, reviewable under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488). § 5, by a direct writ of error from the Federal Supreme Court, where leave was given to plead over, and a plea of not guilty was entered, upon which no trial has been had.

[For other cases, see *Appeal and Error*, I. f, in Digest Sup. Ct. 1908.]

NOTE. — As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 28 C. C. A. 482; *Gibbons v. Ogden*, 5 L. ed. U. S. 302; and *Schlosser v. Hemphill*, 49 L. ed. U. S. 1001.

Witnesses — self-crimination — statutory immunity from prosecution.

2. A shield against successful prosecution, available to the accused as a defense, and not immunity from the prosecution itself, is what was secured by the act of February 25, 1903, as amended by the act of June 30, 1906, providing that no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under the Sherman anti-trust and interstate commerce acts.

[For other cases, see Witnesses, 192-203; in Digest Sup. Ct. 1908.]

[No. 849.]

Submitted April 11, 1910. Decided May 2, 1910.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment entered upon a directed verdict in favor of the government on the issues raised by a special plea in bar, leave having been given to plead over, and a plea of not guilty having been entered, upon which no trial has been had. Dismissed for lack of final judgment.

See same case below, 175 Fed. 852.

The facts are stated in the opinion.

Messrs. **John B. Stanchfield**, **George S. Graham**, and **John C. Spooner** submitted the cause for plaintiff in error:

Unless this court entertains this writ of error, the defendant will be denied an immunity from prosecution, given to him under the statute in lieu of the constitutional privilege and safeguard against self-accusation, embodied in the 5th Amendment; and no subsequent action of this court, after either conviction or acquittal, can repair the wrong thus done. His right to immunity from prosecution must be vindicated under this writ of error, or immunity from prosecution will be forever lost.

Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195.

Whenever in a cause there is a determination of some question of right, a decision is final in the sense in which an appeal from it is permitted, if it decides and disposes of the whole merits of the case as between the parties on that issue.

Forgay v. Conrad, 6 How. 201, 12 L. ed. 404; Brush Electric Co. v. Electric Improv. Co. 2 C. C. A. 373, 7 U. S. App. 208, 51 Fed. 557; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170; Williams v. Morgan, 111 U. S. 684, 698, 28 L. ed. 559, 564, 4 Sup. Ct. Rep. 638.

822

Solicitor General **Bowers** and Messrs. **Henry L. Stimson** and **Felix Frankfurter** submitted the cause for defendant in error:

Appeals direct to the Supreme Court, under the provisions of § 5 of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), may be taken only from a final judgment.

McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; Bowker v. United States, 186 U. S. 135, 138, 46 L. ed. 1090, 1091, 22 Sup. Ct. Rep. 802; Lewis v. United States, 216 U. S. 611, ante, 637, 30 Sup. Ct. Rep. 438.

The face of a judgment is the test of its finality.

Haseltine v. Central Nat. Bank, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; Schlosser v. Hemphill, 198 U. S. 173, 175, 49 L. ed. 1000, 1002, 25 Sup. Ct. Rep. 654.

The face of this judgment shows that it does not finally determine the cause. On its face, it gives to the defendant the right to plead over. On the issue raised by the new plea, he may be acquitted, a *nolle prosequi* may be entered, or other causes intervene to stop the prosecution and to render consideration of the question of immunity purely academic.

California v. San Pablo & T. R. Co. 149 U. S. 308, 314, 37 L. ed. 747, 748, 13 Sup. Ct. Rep. 876; Mills v. Green, 159 U. S. 651, 653, 40 L. ed. 293, 294, 16 Sup. Ct. Rep. 132; Kimball v. Kimball, 174 U. S. 158, 43 L. ed. 932, 19 Sup. Ct. Rep. 639.

A judgment of *respondeat ouster* is not a final judgment, and does not give the right to review to this court.

Rankin v. Tennessee, 11 Wall. 380, 20 L. ed. 175.

The immunity statute merely furnishes a defense to a defendant when put on trial. It does not give him freedom from actually being put on trial before a court of competent jurisdiction, and according to due process of law.

Rebstock v. Superior Court, 146 Cal. 308, 80 Pac. 65; Murphy v. State, 124 Wis. 635, 102 N. W. 1087; State v. Murphy, 128 Wis. 201, 107 N. W. 470; Rudolph v. State, 128 Wis. 222, 116 Am. St. Rep. 32, 107 N. W. 466; R. v. Skeen, 8 Cox, C. C. 153.

In sustaining the constitutionality of the criminal appeals act (act of March 2, 1907, 34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1909, p. 220), this court has expressly recognized the nonappealability of such interlocutory judgments as those overruling special pleas in bar.

United States v. Bitty, 208 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396.

Neither in fact nor when judged by the traditional rights of defendants in the Fed-

217 U. S.

eral courts is any hardship done to the plaintiff in error by making him await final judgment of conviction before his right of review.

McKane v. Durston, 153 U. S. 684, 687, 38 L. ed. 867, 868, 14 Sup. Ct. Rep. 913; *Reetz v. Michigan*, 188 U. S. 505, 508, 47 L. ed. 563, 566, 23 Sup. Ct. Rep. 390; 18 Am. Bar Asso. Rep. 448.

Mr. Justice Day delivered the opinion of the court:

The plaintiff in error, Charles R. Heike, was indicted with others on January 10, 1910, for alleged violations of the customs laws of the United States in connection with the fraudulent importation of sugar, and also for conspiracy under § 5440 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3676), to defraud the United States of its revenues. Heike appeared and filed a special plea in bar, claiming immunity from prosecution under the act of February 25, 1903 (32 Stat. at L. 1904, chap. 755, U. S. Comp. Stat. Supp. 1909, p. 1142), as amended June 30, 1906 (34 Stat. at L. 798, chap. 3920, U. S. Comp. Stat. Supp. 1909, p. 1168). The plea set up in substance that Heike had been called 427] upon to *testify before the grand jury in matters concerning the prosecution against him, and had thereby become immune from prosecution under the law. The government filed a replication, taking issue upon the matters set up in the plea. The issues thus raised were brought to trial before a jury in the circuit court of the United States for the southern district of New York, and at the conclusion of the testimony, the government and the defendant each moved for direction of a verdict, and the court thereupon instructed the jury to find the issues joined in favor of the government. Upon application by Heike, he was granted the privilege of pleading over, and he thereupon entered a plea of not guilty, and the case was set for trial on March 1, 1910. No judgment having been entered in the case, mandamus proceedings were brought in this court, and in pursuance of its order a judgment *nunc pro tunc* was entered as of February 14, 1910, as follows: "Judgment be and is hereby entered for the United States upon the verdict, with leave to the defendant to plead over."

On February 25, 1910, a writ of error was allowed to the circuit court from this court by one of its justices. The government then moved to vacate the order allowing the writ. That motion was overruled, and the government made the present motion to dismiss the writ of error, upon the ground that the judgment entered as of February 14, 1910, 54 L. ed.

is not a final judgment within the meaning of the court of appeals act.

The motion to dismiss brings to the attention of the court the important question of practice as to whether, after a judgment has been entered upon a verdict setting up the plea of immunity under the act of February 25, 1903, as amended June 30, 1906, finding the issues against the defendant, with leave given to plead over, and a plea of not guilty entered, on which no trial has been had, such judgment is, or is not, a final judgment, reviewable by writ of error *from this court where a constitution- [428 al question is involved, under § 5 of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488).

The appellate jurisdiction in the Federal system of procedure is purely statutory. *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 378, 37 L. ed. 486, 489, 13 Sup. Ct. Rep. 758. For many years it did not exist in criminal cases. It has been granted by statute in certain cases; and criminal cases in which is involved a deprivation of constitutional rights may be brought to this court by writ of error under § 5 of the court of appeals act. *Burton v. United States*, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243.

In the case at bar, it is the contention of the plaintiff in error that he was deprived of the constitutional right of trial by jury in the direction by the court that the jury find a verdict against him upon his plea in bar. The question, then, is, Is the judgment entered *nunc pro tunc* as of February 14, 1910, a reviewable one under the statute? That judgment in effect denied the validity of the plea in bar, and left the defendant to plead over, which he did, putting in issue the averments of the indictment.

The construction of § 5 of the court of appeals act was before this court in the case of *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118, and it was there held that the allowance of appeals or writs of error under that section must be understood to have the meaning which those terms had always had under acts of Congress relating to the appellate jurisdiction of this court, and that, taken in that sense, appeals or writs of error could only be allowed in cases in which there had been a final judgment. Mr. Justice Lamar, who spoke for the court in that case, pointed out that under the judiciary act of 1789 [1 Stat. at L. 73, chap. 20] no appeal would lie to this court except from final judgments or decrees; and further stated that this was only declaratory of the settled practice of England, where no writ of error would lie except from a final judgment; and

if the writ was made returnable before such judgment, it would be quashed; and in this connection, speaking for the court, the learned justice said:

"From the very foundation of our judicial system, the object and policy of the acts of Congress in relation to appeals and writs of error . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal."

McLish v. Roff, *supra*, has been followed and approved in this court. *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758; *Kirwan v. Murphy*, 170 U. S. 205, 209, 42 L. ed. 1009, 18 Sup. Ct. Rep. 592; *Ex parte National Enameling & Stamping Co.* 201 U. S. 156, 50 L. ed. 707, 26 Sup. Ct. Rep. 404.

It may, therefore, be regarded as the settled practice of this court that a case cannot be brought here by piecemeal, and is only to be reviewed here after final judgment by direct appeal or writ of error in a limited class of cases under § 5 of the court of appeals act.

It is unnecessary to enter upon a full consideration of what constitutes a final judgment,—a subject of much discussion. The definition of a final judgment or decree was tersely stated by Mr. Chief Justice Waite in *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.* 108 U. S. 24, 28, 27 L. ed. 638, 639, 2 Sup. Ct. Rep. 6, in these terms: "A decree is final for the purposes of an appeal to this court when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined."

If we apply the definition herein contained of a final judgment or decree, it appears certain that the judgment of *respondent ouster*, leaving the case with issue joined upon the plea of not guilty, does not dispose of the whole matter litigated in this proceeding, leaving nothing to be done except the ministerial act of executing the judgment. The thing litigated in this case is the right to convict the accused of the crime charged in the indictment. Certainly that issue has not been disposed of, much less has a final order been made concerning it, leaving nothing but an execution of it yet undone. The defendant was indicted for the crime alleged, and, being apprehended, he had a right to raise an issue of law upon the indictment by demurrer, to plead in bar, [430] or to plead the general issue. He chose to plead in bar immunity from prosecution by reason of the statute referred to. That issue was, by direction

of the court, whether properly or improperly, held against him, and the verdict of the jury and the judgment of *respondent ouster* duly entered. At the common law, upon the failure of such plea in a case of misdemeanor, it was usual at once to sentence the defendant as upon conviction of guilt of the offense charged. In cases of felony it was usual to permit a plea of not guilty after judgment over. In the case at bar, the record shows after the return of the verdict, the plaintiff in error's counsel asked to be permitted to plead, and was allowed that privilege. As the case now stands, upon the plea of not guilty, upon which the issue raised must be tried to a jury, certainly the whole matter has not been disposed of. It may be that upon trial the defendant will be acquitted on the merits. It may happen that, for some reason, the trial will never take place. In either of these events there can be no conclusive judgment against the defendant in the case. It is true that, in a certain sense, an order concerning a controlling question of law made in a case is, as to that question, final. Many interlocutory rulings and orders effectually dispose of some matters in controversy, but that is not the test of finality for the purposes of appeal or writ of error. The purpose of the statute is to give a review in one proceeding after final judgment of matters in controversy in any given case. Any contrary construction of the court of appeals act may involve the necessity of examining successive appeals or writs of error in the same case, instead of awaiting, as has been the practice since the beginning of the government, for one review after a final judgment, disposing of all controversies in that case between the parties.

But it is urged by the learned counsel for the plaintiff in error that this judgment must be held to be final for the purpose of review, otherwise the government cannot keep the contract of immunity which it has made with the accused, by virtue of the terms of the immunity statute, which provides:

"No person shall be prosecuted or [431] be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding; suit, or prosecution under said acts [Sherman anti-trust and interstate commerce acts] . . . " [32 Stat. at L. 904, chap. 755, U. S. Comp. Stat. Supp. 1909, p. 1142.]

By the amendatory act of June 30, 1906 (34 Stat. at L. 798, chap. 3920, U. S. Comp. Stat. Supp. 1909, p. 1168), it was provided that the above immunity shall extend only

to a natural person who, in obedience to a subpoena, gives testimony under oath, or produces evidence, documentary or otherwise, under oath.

In view of the provisions of this act, it is argued that the complete immunity promised is not given unless the person entitled to the benefits of the act is saved from prosecution, for it is contended that if the act is to be effective, it means not only immunity from punishment, but from prosecution as well. It is admitted in the brief of the learned counsel for the plaintiff in error that prosecution must necessarily proceed so far as an indictment and apprehension are concerned, but when the plea of immunity under this act is entered, if well taken, the prosecution must be ended, as the statutes provide that no person shall be prosecuted, etc. But we are of opinion that the statute does not intend to secure to a person making such a plea immunity from prosecution, but to provide him with a shield against successful prosecution, available to him as a defense; and that when this defense is improperly overruled, it may be a basis for the reversal of a final judgment against him. Such promise of immunity has not changed the Federal system of appellate procedure, which is not affected by the immunity statute, nor does the immunity operate to give a right of review upon any other than final judgments.

A question very analogous to the one before us was made and decided in the case of *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644, in which the constitutionality of an immunity statute was sustained. The statute undertook to give immunity after testimony before the Interstate Commerce [32] Commission, and to "provide that no person shall be prosecuted nor subject to any penalty, etc., concerning matters which he testified to by the production of documents or otherwise before the Commission. In that case, as in this, the contention was made that the immunity was not perfect, because the witness might still be prosecuted, and therefore the promised immunity was insufficient to afford constitutional protection. Answering that contention, this court said (161 U. S. 608):

"The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen,

however innocent, may be subjected to a civil or criminal prosecution and put to the expense of defending himself, but, unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him."

The Constitution of the United States provides that no person shall be twice placed in jeopardy of life and limb for the same offense, yet the overruling of a plea of former conviction or acquittal has never been held, so far as we know, to give a right of review before final judgment. In the case of *Rankin v. Tennessee*, 11 Wall. 380, 20 L. ed. 175, an attempt was made to bring to this court a judgment of a state court, upon a plea in bar of former conviction in a capital case. But this court, speaking by Mr. Justice Bradley, said:

"It is a rule in criminal law *in favorem vite*, in capital cases, that when a special plea in bar is found against the prisoner, either upon issue tried by a jury or upon a point of law decided by the court, he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, 'not guilty.' 4 Bl. Com. 338. And this is the effect of the judgment of reversal rendered by the supreme court of Tennessee in this case, so that in no sense can that judgment be deemed a final [433] one. The case must go back and be tried upon its merits, and final judgment must be rendered before this court can take jurisdiction. If, after that, it should be brought here for review, we can then examine the defendant's plea and decide upon its sufficiency."

It may thus be seen that a plea of former conviction under the constitutional provision that no person shall be twice put in jeopardy for the same offense does not have the effect to prevent a prosecution to final judgment, although the former conviction or acquittal may be finally held to be a complete bar to any right of prosecution; and this notwithstanding the person is in jeopardy a second time, if, after one conviction or acquittal, the jury is impaneled to try him again. We think, then, that the effect of the immunity statute in question is not to change the system of appellate procedure in the Federal courts, and give a right of review before final judgment in a criminal case, but was intended to provide an effectual defense against further prosecution, which, if denied, may be brought up for review after a final judgment in the case.

We therefore reach the conclusion that the motion to dismiss the present writ be sustained, and it is so ordered.

Writ of error dismissed.

GRENADA LUMBER COMPANY et al.,
Plffs. in Err.,
v.
STATE OF MISSISSIPPI.

(See S. C. Reporter's ed. 433-443.)

Constitutional law — freedom to contract — combination in restraint of trade.

1. The freedom of contract is not unreasonably abridged, in violation of U. S. Const., 14th Amend., by Miss. Code, § 5002, which, as construed by the state court, condemns as a combination in restraint of trade an agreement between retail lumber dealers not to deal with any manufacturer or wholesale dealer who sells direct to consumers in localities in which such retail dealers conduct their business and keep a sufficient stock to meet demands, and to inform each other of any such sales.

[For other cases, see Constitutional Law, 598-600, in Digest Sup. Ct. 1908.]

Statutes — when validity may be assailed.

2. The validity of the penalties prescribed by the Mississippi anti-trust laws cannot be challenged in a suit in which the state contents itself with a bill in equity to dissolve an association which those laws condemn as a combination in restraint of trade.

[For other cases, see Statutes, 53-60, in Digest Sup. Ct. 1908.]

[No. 403.]

Submitted January 10, 1910. Decided May 2, 1910.

IN ERROR to the Supreme Court of the State of Mississippi to review a decree which affirmed a decree of the Chancery Court of Hinds County, in that state, dissolving a voluntary association of retail lumber dealers as a combination in restraint of trade. Affirmed.

See same case below (Miss.) 48 So. 1021.

Statement by Mr. Justice Lurton:

This is a writ of error to the supreme [435] court of the state *of Mississippi to review a decree dissolving a voluntary association of retail lumber dealers as a com-

bination in restraint of trade, under a statute of the state.

So much of the Mississippi act as is here involved is set out in the margin, being part of § 5002, Mississippi Code.†

The proceeding under this statute was by a bill filed in a chancery court of the state, by the state, upon relation of its attorney general. The bill averred that the defendants, some seventy-seven individuals and corporations, were retail dealers in lumber, sash, doors, etc., doing business, some of them, in the state of Mississippi, and others in the state of Louisiana, and were competitors in business, each engaged in buying and selling again for profit, and in competition with each other for the business of consumers; that the defendants had entered into an agreement, compact, or combination for the purpose and with the intent to destroy, prevent, or suppress *all competition between themselves, as [436] retail dealers in the materials mentioned, and manufacturers, wholesale dealers, brokers or commission men, keeping no stock, from selling the like articles or commodities directly to consumers in competition with retailers. To accomplish this suppression of competition for the trade of consumers it was in substance averred that they had organized an association, and had obligated themselves not to purchase any of their stock or commodities from any wholesale dealer or manufacturer who sold such prod-

†5002. (4437) Definition of term; criminal conspiracy (Laws 1900, chap. 88).—A trust and combine is a combination, contract, understanding, or agreement, expressed or implied, between two or more persons, corporations, or firms, or associations of persons, or between one or more of either with one or more of the others:

(a) In restraint of trade.

(b) To limit, increase, or reduce the price of a commodity.

(c) To limit, increase, or reduce the production or output of a commodity.

(d) Intended to hinder competition in the production, importation, manufacture, transportation, sale, or purchase of a commodity.

(e) To engross or forestall a commodity.

(f) To issue, own, or hold the certificates of stock of any trust or combine.

(g) To place the control, to any extent, of business, or of the products and earnings thereof, in the power of trustees, by whatever name called.

(h) By which any other person than themselves, their proper officers, agents, and employees, shall, or shall have the power to, dictate or control the management of business; or,

(i) To unite or pool interests in the importation, manufacture, production, transportation, or price of a commodity; and is inimical to the public welfare, unlawful and a criminal conspiracy.

NOTE.—On constitutionality of statute restricting contracts and business—see notes to State v. Loomis, 21 L.R.A. 789.

On the legality under modern anti-trust acts of combinations or agreements which restrict the class of persons to whom or from whom commodities shall be sold or bought—see note to Cleland v. Anderson, 5 L.R.A. (N.S.) 136.

On illegal trusts generally under modern anti-trust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

ucts direct to the consumers in competition with the members of their combination, and to carry out this end had adopted articles of agreement, called a constitution, and appointed a secretary to ascertain such sales and to see that the obligation of the members was respected. The material parts of the agreement under which the defendants combined consist of a preamble, called "Declaration of Purpose," the relevant part of which, together with articles 2, 3, and 7, are set out in the margin.†

It was then averred that the necessary effect of such agreement among the defendants, who, it was said, composed a majority of all the retail lumber dealers in the states covered by their compact, was to limit or de-
[437]stroy competition between *the retail-

ers and the wholesalers or manufacturers for the trade or business of the consumer, and that they constituted a combination or conspiracy in restraint of trade, etc.

*The answer admitted the substantial [438] facts, but denied that the object or purpose was to restrain trade or to suppress competition, or that such a result has ensued or would or *could follow, or that the [439] agreement had any other object than to "conserve and advance their business interests as retailers." That their agreement is defensive of, and not injurious to, public interests, is asserted by many paragraphs of the answer, upon economic considerations.

The chancery court, upon the pleadings and exhibits, held that the association and agreement among the members was "a com-

†Declaration of Purpose.

We recognize the right of the manufacturer and wholesale dealer in lumber products to sell lumber in whatever market, to whatever purchaser, and at whatever price, they may see fit.

We also recognize the disastrous consequences which result to the retail dealer from direct competition with wholesalers and manufacturers, and appreciate the importance to the retail dealer of accurate information as to the nature and extent of such competition, where any exists.

And recognizing that we, as retail dealers in lumber, sash, doors, and blinds, cannot meet competition from those from whom we buy, we are pledged as members of this association to buy only from manufacturers and wholesalers who do not sell direct to consumers, where there are retail lumber dealers who carry stock commensurate with the demands of their communities, and we are pledged not to buy from lumber commission merchants, agents, and brokers who sell to consumers, but do not carry stocks, nor from a manufacturer who sells to such lumber commission merchants, agent, or broker.

Article Two.

The Object.

The object of this association is and shall be to secure and disseminate among its members any and all legal and proper information which may be of interest or value to any member or members thereof in his or their business as retail lumber dealers, and to carry into actual effect our "Declaration of Purpose."

Article Three.

Limitation and Restriction.

Sec. 1. No rules, regulations, or by-laws shall be adopted in any manner stifling competition, limiting production, restraining trade, regulating prices, or pooling profits.

Sec. 2. No coercive measures of any kind shall be practised or adopted toward any retailer, either to induce him to join the
54 L. ed.

association, or to buy or refrain from buying of any particular manufacturer or wholesaler. Nor shall any discriminatory practices on the part of this association be used or allowed against any retailer for the reason that he may not be a member of the association, or to induce or persuade him to become such member.

Sec. 3. No promises or agreements shall be requisite to membership in this association, save those provided in these "Articles of Association and Declaration of Purpose," nor shall any members be restricted to any particular territory, but may compete any and everywhere.

Article Seven.

Sec. 1. Report of secretary.—Any member of this association having cause of complaint against a manufacturer or wholesale dealer, or his agents, because of shipment to a consumer, shall notify the secretary of this association in writing, giving as full information in reference thereto as practicable, such as date or dates of shipment and arrival, car number and initials, original point of shipment, names of consignor and consignee, the purpose for which the material was or is to be used, and such other particulars as may be obtainable.

Such notice must be sent with or without information in detail, within thirty days after the receipt of shipment at point of destination, and no notice shall be filed of any such sale or shipment occurring within fifteen days after the first issue of membership list succeeding the acceptance of his application.

Upon the receipt of such notice, the secretary shall first ascertain whether or not the complaining member carries a stock commensurate with the demands of his community; and if he finds that such stock is not carried, he shall ignore the complaint, unless, upon application of such complaining member, the executive committee shall reverse his finding; but if he find that such stock is carried, he shall then notify the manufacturer or wholesaler that the rules of this association do not allow its members to

bination in restraint of trade, and intended to hinder competition in the sale and purchase of a commodity, and was inimical to the public welfare, and unlawful." The dissolution of the association was adjudged, and an injunction against further operations granted. This decree was affirmed upon appeal to the supreme court of the state.

Mr. Edward Mayes submitted the cause for plaintiffs in error. Mr. E. L. Brown was on the brief:

The statute condemns every combination coming within its literal terms, regardless of results, regardless of common-law rules and definitions.

Barataria Canning Co. v. Jouliau, 80 Miss. 555, 31 So. 961; *Yazoo & M. Valley R. Co. v. Searles*, 85 Miss. 520, 68 L.R.A. 715, 37 So. 939; *Kosciusko Oil Mill & Fertilizer Co. v. Wilson Cotton Oil Co.* 90 Miss. 551, 8 L.R.A. (N.S.) 1053, 43 So. 435.

The Mississippi legislature forbids what all courts have held a legitimate protective and defensive measure.

Jackson v. Stanfield, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14; *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; *Cleland v. Anderson*, 66 Neb. 252, 5 L.R.A. (N.S.) 136, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 105 N. W. 1092; *Bailey v. Master Plumbers' Asso.* 103 Tenn. 99, 46 L.R.A. 561, 52 S. W. 853; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307.

The agreement does not restrain trade, restrict competition, or create monopoly.

Anderson v. United States, *supra*.

buy from those manufacturers and wholesalers who sell to consumers, and unless such manufacturer or wholesaler shall satisfy the secretary that the complaint is not well founded, the secretary shall report the facts to the executive committee, and upon the approval of his finding by a majority of the executive committee, the secretary shall then notify the members of this association of such sale, and they shall discontinue to buy from such manufacturer or wholesaler until notified by the secretary that such wholesaler or manufacturer does not sell to consumers where there is a retail dealer who carries a stock commensurate with the demands of his community; but this section shall not apply in cases where the business methods or financial condition of such retailer will not justify a manufacturer or wholesaler in dealing with him.

Under no circumstances shall the secretary enter into any agreement with a manu-

There is some line at which legislative restriction of the liberty of contract must end.

Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, *supra*; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Northern Securities Co. v. United States*, 193 U. S. 331, 48 L. ed. 697, 24 Sup. Ct. Rep. 436; *Smiley v. Kansas*, 196 U. S. 453, 49 L. ed. 550, 25 Sup. Ct. Rep. 289.

There is no justification for the statutory interference with the liberty of the defendants.

Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; *Tiedeman, State & Federal Control of Persons & Property*, p. 5; *Hundley v. Louisville & N. R. Co.* 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429; *Boyer v. Western U. Teleg. Co.* 124 Fed. 246; *Atkins v. W. A. Fletcher Co.* 65 N. J. Eq. 658, 55 Atl. 1074; *Missouri P. R. Co. v. Richmond*, 73 Tex. 568, 4 L.R.A. 280, 15 Am. St. Rep. 794, 11 S. W. 555; *Worthington v. Waring*, 157 Mass. 421, 20 L.R.A. 342, 34 Am. St. Rep. 294, 32 N. E. 744; *McDonald v. Illinois C. R. Co.* 187 Ill. 529, 58 N. E. 463; *State ex rel. Scheffer v. Justus*, 85 Minn. 279, 56 L.R.A. 757, 89 Am. St. Rep. 550, 88 N. W. 759; *State ex rel. Durner v. Huegin*, 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046; *Aikens v. Wisconsin*, 195 U. S.

facturer or wholesaler that any one of the association members will deal with him, nor shall he in any case exact a promise from the wholesaler or manufacturer that he will not sell to consumers, nor shall any result other than that of the members refusing to buy from any such manufacturer or wholesaler follow from the steps taken as hereby provided for.

Sec. 2. The foregoing provisions shall apply in reported cases of lumber commission merchants, agents, and brokers, who sell to consumers, but do not carry stock, and as against the manufacturers who sell to such commission merchants, agents, or brokers.

Sec. 3. Each member, when he joins this association, and once each year thereafter, and oftener, if the secretary shall request it, shall furnish the secretary a list of those manufacturers and wholesalers and their agents from whom he makes purchases of lumber and other building material.

194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; Cleland v. Anderson and Jackson v. Stanfield, supra.

The rights of the individual are not to be denied nor seriously impaired by any merely apprehended or conjectural conflict with the public welfare; but only in those cases where there is a necessary effect which is inimical.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Loelmer v. New York and Adair v. United States, supra; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764; State ex rel. Scheffer v. Justus; Aikens v. Wisconsin; Addyston Pipe & Steel Co. v. United States; and United States v. Joint Traffic Assn.,—supra.

Mr. C. D. Joslyn also submitted the cause for plaintiffs in error:

An agreement to do something which is not inimical to the public is not invalid merely because the legislature has declared it so, and in no event can the legislature by such declaration preclude the courts from inquiring into the matter.

Lawton v. Steele, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

The exercise of the police power must always have due regard to freedom of contract as well as of personal liberty.

United States v. Joint Traffic Assn. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25.

The plaintiffs in error, in making the agreement under consideration, were exercising a right of contract guaranteed by the 14th Amendment to the Federal Constitution, which no state, by legislation or judicial decision, can take away.

Reynolds v. Davis, 198 Mass. 294, 17 L.R.A. (N.S.) 162, 84 N. E. 457; L. D. Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 23 L.R.A. (N.S.) 1236, 85 N. E. 897; Heim v. New York Stock Exchange, 64 Misc. 529, 118 N. Y. Supp. 591; Doremus v. Hennessy, 176 Ill. 615, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; Aikens v. Wisconsin, 195 U. S. 194, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764.

Mr. J. B. Stirling submitted the cause for defendant in error:

It is a violation of law to combine for the 54 L. ed.

purpose of depriving the wholesalers of the state of a large percentage of their business, unless they will conduct their business in accordance with the wishes of the retailers, and allow them thus to dictate to whom sales of lumber shall be made.

Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 23 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; Compers v. Buck's Stove & Range Co. 215 U. S. 605, ante, 346, 30 Sup. Ct. Rep. 406; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 A. & E. Ann. Cas. 645; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; State ex rel. Hadley v. Standard Oil Co. 218 Mo. 1, 116 S. W. 902; United States v. Standard Oil Co. 173 Fed. 177; Ertz v. Produce Exchange, 79 Minn. 140, 48 L.R.A. 90, 79 Am. St. Rep. 433, 81 N. W. 737; Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 A. & E. Ann. Cas. 172; Jackson v. Stanfield, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14; Cleland v. Anderson, 66 Neb. 252, 5 L.R.A. (N.S.) 136, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 105 N. W. 1092; More v. Bennett, 140 Ill. 69, 15 L.R.A. 361, 33 Am. St. Rep. 216, 29 N. E. 888; Lovejoy v. Michels, 88 Mich. 15, 13 L.R.A. 770, 49 N. W. 901; Buffalo Lubricating Oil Co. v. Standard Oil Co. 106 N. Y. 669, 12 N. E. 825; Delz v. Winfree, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; United States v. Jellico Coal & Coke Co. 12 L.R.A. 753, 5 Inters. Com. Rep. 626, 46 Fed. 432; Brown v. Jacobs's Pharmacy Co. 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; Bailey v. Master Plumbers' Assn. 103 Tenn. 99, 46 L.R.A. 561, 52 S. W. 853; 1 Eddy, Combinations, § 560, p. 476, note; Anderson v. Jett, 89 Ky. 375, 6 L.R.A. 390, 12 S. W. 670.

At common law, all contracts in restraint of trade were illegal; so our statute says all contracts in restraint of trade are illegal; but the courts, in construing these statutes as they did at common law, will determine what contracts are reasonable, what contracts are unreasonable, what contracts are inimical to public welfare or not inimical to public welfare, what contracts were made with the intent of restraining trade, and what contracts have a tendency to restrain trade; and those contracts that are found unreasonably to restrain trade, those entered into with the intent of restraining trade to an unreasonable extent, and those having a tendency to restrain trade to an unreasonable extent, will be declared illegal.

24 Am. & Eng. Enc. Law, 2d ed. p. 842; 2 Eddy, Combinations, 719.

Unquestionably, the contract was entered into for the purpose of hindering competi-

tion, and even if not in restraint of trade, certainly the courts will not hold a contract legal, reasonable, and uninimical to the public welfare, entered into in an effort to, and with intent to, hinder competition. The contract itself will be looked to, and all the surrounding circumstances, to determine the purposes of its execution.

2 Eddy, Combinations, § 719.

The supreme court of Missouri, in construing a statute of that state, similar to ours, sustained the constitutionality of the statute, although the statute did not provide that those combinations only should be illegal which were unreasonable and inimical to public welfare. The court held further that the statute did not take away the constitutional right of the individual to enter freely into contracts for legitimate business purposes, but did make illegal contracts intended to destroy competition.

State ex rel. Crow v. Armour Packing Co. 173 Mo. 392, 61 L.R.A. 464, 96 Am. St. Rep. 515, 73 S. W. 645. See also United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; Bailey v. Master Plumbers' Asso. supra; 20 Am. & Eng. Enc. Law, 2d ed. p. 850; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; Waters-Pierce Oil Co. v. Texas and Hammond Packing Co. v. Arkansas, supra; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

The grant of power to the United States to regulate interstate and international commerce comes from the states themselves; and certainly they would not grant to the United States a power over interstate or international commerce greater than the power reserved for themselves over intrastate trade.

Northern Securities Co. v. United States, 193 U. S. 331-336, 48 L. ed. 697-700, 24 Sup. Ct. Rep. 436.

Mr. Justice Lurton, after making the above statement, delivered the opinion of the court:

The agreement and combination which offends against the Mississippi anti-trust statute is one between a large majority of the independent and competitive merchants engaged in the retail lumber trade in the territory covered by their articles of association, whereby they have obligated themselves not to deal with any manufacturer or wholesale dealer in lumber, sash, or doors, etc., who sells to consumers in localities in which they conduct their business and keep a sufficient stock to meet demands,

and to inform each other of any sale made by manufacturers or wholesalers who sell to consumers.

That such an agreement and combination was, within the meaning of the Mississippi statute, a conspiracy "in restraint of trade," "intended to hinder competition in the production, *importation, manufacture, [440] transportation, sale, or purchase of a commodity," is the express decision of the supreme court of Mississippi. That the object and purpose of the compact was to suppress competition between the plaintiffs in error and another class of dealers in or producers of the same commodity and the consumer is avowed in the "Declaration of Purpose," set out heretofore, in which it is stated that the members of the association, as retailers, "cannot meet competition from those from whom they buy." This concession means, if it means anything, that those against whom the plaintiffs in error are acting in concert will undersell them in the competition for the trade of the consuming public, and must therefore be stopped by concerted refusal to deal with them if they should persist in such competition. This constitutes, under the interpretation of the Mississippi statute by the Mississippi court, a "restraint of trade," and a hindrance to competitors in the sale of a commodity. Accepting, as we must, this interpretation and application of a state statute by the highest court of the state, there is no question for our consideration other than the insistence that the statute is in conflict with the 14th Amendment to the Constitution of the United States. The contention is that this statute abridges unreasonably the freedom of contract, which is as much within the protection of that Amendment as is liberty of person.

That any one of the persons engaged in the retail lumber business might have made a fixed rule of conduct not to buy his stock from a producer or wholesaler who should sell to consumers in competition with himself is plain. No law which would infringe his freedom of contract in that particular would stand. But when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many, acting in concert, for it then *takes on the form of [441] a conspiracy, and may be prohibited or punished, if the result be hurtful to the public, or to the individual against whom the concerted action is directed. Callan v. Wilson, 127 U. S. 555, 556, 32 L. ed. 228, 8 Sup. Ct. Rep. 1301.

But the plaintiffs in error say that the action which they have taken is purely defensive, and that they cannot maintain themselves as independent dealers, supplying the consumer, if the producers or wholesalers from whom they buy may not be prevented from competing with them for the direct trade of the consumer.

For the purpose of suppressing this competition, they have not stopped with an individual obligation to refrain from dealing with one who sells within his own circle, and thereby deprives him of a possible customer, but have agreed not to deal with anyone who makes sales to consumers, which sales might have been made by any one of the seventy-seven independent members of the association. Thus they have stripped themselves of all freedom of contract in order to compel those against whom they have combined to elect between their combined trade and that of consumers. That such an agreement is one in restraint of trade is undeniable, whatever the motive or necessity which has induced the compact. Whether it would be an illegal restraint at common law is not now for our determination. It is an illegal combination and conspiracy under the Mississippi statute. That is enough if the statute does not infringe the 14th Amendment.

The argument that the situation is one which justified the defensive measures taken by the plaintiffs in error is one which we need neither refute nor concede. Neither are we required to consider any mere question of the expediency of such a law. It is a regulation of commerce purely intrastate,—a subject as entirely under the control of the state as is the delegated control over interstate commerce exercised by the United States. The power exercised is the police power reserved to the states. The limitation upon its exercise, contained in the Federal Constitution, is found in the 14th Amendment, whereby no state may pass any law by which a citizen is deprived of life, liberty, or property without due process of law. A like limitation upon the legislative power will be found in the Constitution of each state. That legislation might be so arbitrary or so irrational in depriving a citizen of freedom of contract as to come under the condemnation of the Amendment may be conceded.

In dealing with certain Kansas legislation in regulation of state commerce, which was claimed to be so extreme as to be an unwarranted infringement of liberty of contract, this court, in *Smiley v. Kansas*, 196 U. S. 447, 457, 49 L. ed. 546, 551, 25 Sup. Ct. Rep. 289, 291, said:

"Undoubtedly there is a certain freedom

of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom, parties may seek to further their business interests, and it may not be always easy to draw the line between those contracts which are beyond the reach of the police power, and those which are subject to prohibition or restraint. But a secret arrangement, by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessities of life is substantially destroyed, without any merging of interests through partnership or incorporation, is one to which the police power extends. That is as far as we need to go in sustaining the judgment in this case."

We confine ourselves to so much of the act assailed as was construed and applied in the present case. If there should arise a case in which this legislation is sought to be applied where any interference with freedom of contract would be beyond legislative restraint, it will be time enough for interference by the courts.

As observed in *Smiley v. Kansas*, where the breadth of the act was criticized, "Unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint." The same principle has been often announced by this court in many cases, the last instance being in *Citizens' Nat. Bank v. Kentucky*, an opinion handed down with this. [217 U. S. 443, post 832, 30 Sup. Ct. Rep. 532.]

The excessive penalties provided by the Mississippi statutes have been urged as making the act unconstitutional under *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441. No penalties were demanded in the present case, the state contenting itself with a bill in equity to dissolve the association. The penalty provisions are plainly separable from the section under which such a combination is declared illegal. The penalty section not being invoked, we are not called upon to give any opinion in respect to it. *United States ex rel. Atty. Gen. v. Delaware & H. Co.* 213 U. S. 366, 417, 53 L. ed. 836, 852, 29 Sup. Ct. Rep. 527; *Southwestern Oil Co. v. Texas*, handed down April 4. [217 U. S. 114, ante, 688, 30 Sup. Ct. Rep. 496.]

It is enough to say that the act, as construed and applied to the facts of this case by the Supreme Court of Mississippi, exhibits no such restraint upon liberty of contract as to violate the Federal Constitution. The decree must therefore be affirmed.

CITIZENS NATIONAL BANK et al., Plffs.
in Err.,
v.
COMMONWEALTH OF KENTUCKY, FOR
THE USE AND BENEFIT OF BOYLE
COUNTY, et al.

(See S. C. Reporter's ed. 443-455.)

Taxes — national banks — discrimination — due process of law — omitted property.

1. The retroactive features of Ky. act of March 21, 1900, making it the duty of certain officers of each national bank to list its shares of stock for taxation, and requiring the bank to pay the tax and a penalty for delinquency, subject to a deduction on account of taxes paid by the bank under other legislation, do not, so far as the shares of resident shareholders are concerned, operate to discriminate against the bank, contrary to U. S. Rev. Stat. § 5219, U. S. Comp. Stat. 1901, p. 3502, nor to deny due process of law, although the shareholders and the number of shares may not be the same as when the liability to taxation arose, where such statute is construed by the state courts as not imposing any new liability either upon domestic shareholders or the bank, but as simply providing another method for the assessment of shares which have escaped assessment because not listed for taxation. [For other cases, see Taxes, 72-125, 582-586; Constitutional Law, 731-742, in Digest Sup. Ct. 1908.]

Statutes — who may challenge validity.

2. Only nonresident shareholders in a national bank can complain of the supposed invalidity, as to them, of the retroactive features of Ky. act of March 21, 1900, making it the duty of certain officers of the bank to list its shares of stock for taxation, and requiring the bank to pay the tax, and a penalty for delinquency. [For other cases, see Statutes, 53-60, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligation — reserved power to repeal or amend.

3. An irrevocable contract was not created between the state and a national bank accepting the provisions of Ky. Acts 1885-86, p. 144, known as the Hewitt act, fixing the rate of taxation, since that act expressly provided that it should be subject to a gen-

eral law reserving the right to repeal, alter, or amend all grants to corporations. [For other cases, see Constitutional Law, 1177-1197, in Digest Sup. Ct. 1908.]

[No. 135.]

Argued March 10, 1910. Decided May 2, 1910.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed, on a second appeal, a judgment of the Boyle Circuit Court of that state, assessing for taxation the shares of stock of a national bank. Affirmed.

The facts are stated in the opinion.

Mr. Robert Taylor Quisenberry argued the cause and filed a brief for plaintiffs in error:

The words of a statute ought not to have retrospective operation unless they are so clear, strong, and impressive that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.

Watts v. Com. 78 Ky. 331; Lawrence v. Louisville, 96 Ky. 598, 27 L.R.A. 560, 49 Am. St. Rep. 309, 29 S. W. 450; Ohio Valley Teleph. Co. v. Louisville, 123 Ky. 193, 94 S. W. 17; United States v. American Sugar Ref. Co. 202 U. S. 577, 50 L. ed. 1152, 26 Sup. Ct. Rep. 717; United States v. Burr, 159 U. S. 78, 40 L. ed. 82, 15 Sup. Ct. Rep. 1002.

To tax national bank shares according to "general law," as defined by the court of appeals of Kentucky in Owen County Ct. v. Farmers' Nat. Bank, 22 Ky. L. Rep. 916, 59 S. W. 7; Scobee v. Bean, 109 Ky. 526, 59 S. W. 860, would result in taxing only those shares which were owned by the residents and citizens of Kentucky, and omitting all shares of stock of the Citizens National Bank which were owned by nonresidents of the state.

Lexington v. Fishback, 109 Ky. 770, 60 S. W. 727; Frankfort v. Fidelity Trust & S. V. Co. 111 Ky. 667, 64 S. W. 470.

The right given to a state to tax shares of

NOTE.—On state taxation of national banks—see notes to McHenry v. Downer, 45 L.R.A. 737; Providence Bank v. Billings, 7 L. ed. U. S. 939; and Citizens' Nat. Bank v. Burton, 10 L.R.A. (N.S.) 947.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Cannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 12 L. ed. U. S. 865.

On due process of law in revenue pro-

ceedings—see note to Read v. Dingess, 8 C. C. A. 398.

On impairing obligation of contract for exemption from taxation—see note to Wisconsin County v. Bancroft, 70 C. C. A. 294.

As to reserved power to alter, amend, or repeal corporate charters—see notes to Greenwood v. Union Freight R. Co. 26 L. ed. U. S. 961, and Omaha Water Co. v. Omaha, 77 C. C. A. 281.

On corporate taxation as affected by the contract clause in the Federal Constitution—see note to Adams v. Yazoo & M. Valley R. Co. 60 L.R.A. 33.

stock in national banks cannot be delegated to counties, cities, towns, and taxing districts, except in the case of shares owned by nonresidents of the state, which must be taxed by the city or town wherein the bank is located.

As this proceeding is instituted against the Citizens National Bank, M. J. Farris, president, and J. A. Quisenberry, cashier, for the purpose of enforcing the act of March 21, 1900, by compelling them to comply with its terms and provisions, it therefore becomes their duty to raise and urge every ground upon which said act is conceived to be repugnant to the Constitution and laws of the United States. The aforesaid defenses are not confined solely to shareholders.

Hills v. National Albany Exch. Bank, 105 U. S. 319, 26 L. ed. 1052; *Boyer v. Boyer*, 113 U. S. 689, 28 L. ed. 1089, 5 Sup. Ct. Rep. 706; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903; *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. ed. 901.

The act of March 21, 1900, permits an illegal discrimination against shares of stock in national banks and in favor of moneyed capital in the hands of individual citizens of the state by requiring these shares to be assessed as real estate, while no tax whatever is placed upon shares of stock in state banks.

Citizens' Nat. Bank v. Burton, 121 Ky. 876, 10 L.R.A.(N.S.) 947, 90 S. W. 945.

We must inquire whether the law really imposes a tax upon the shares of stock as the property of their owners, or merely adopts the value of those shares as the measure of valuation of the property of the corporation, and by that standard taxes that property itself.

Home Sav. Bank v. Des Moines, 205 U. S. 510, 51 L. ed. 906, 27 Sup. Ct. Rep. 571.

The act of March 21, 1900, while nominally taxing the shares of stock of national banks, in reality imposes a tax upon the assets of the bank, and not upon said shares.

Home Sav. Bank v. Des Moines, 205 U. S. 503, 51 L. ed. 901, 27 Sup. Ct. Rep. 571; *Com. v. Citizens' Nat. Bank*, 117 Ky. 946, 80 S. W. 158; *Van Allen v. Assessors (Churchill v. Utica)* 3 Wall. 581, 18 L. ed. 233; *Hager v. Citizens' Nat. Bank*, 127 Ky. 192, 105 S. W. 403; *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. ed. 701; *Lionberger v. Rouse*, 9 Wall. 468, 19 L. ed. 721; *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *New Orleans v. Houston*, 119 U. S. 278, 30 L. ed. 415, 7 Sup. Ct. Rep. 198; *Cleveland Trust Co. v. Lander*, 184 U. S. 54 L. ed.

S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394; *Covington v. First Nat. Bank*, 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. Rep. 562.

The bank faithfully followed the law during the years 1894, 1895, and 1896, as declared by the court of appeals of Kentucky, and paid taxes for all of those years, as directed by the court, and no more should be required of it, certainly, for those years.

Franklin County Ct. v. Louisville & N. R. Co. 84 Ky. 59; *Louisiana v. Pilsbury*, 105 U. S. 295, 26 L. ed. 1096.

Mr. John W. Yerkes argued the cause and filed a brief for defendants in error:

The construction of a state statute by the highest court of the state will be followed by this court if no Federal question be involved.

Cass County v. Johnston, 95 U. S. 364, 24 L. ed. 416; *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; *Elmwood Twp. v. Marey*, 92 U. S. 289, 23 L. ed. 710.

The bank can, under the Federal statutes, be made liable for the tax of its local shareholders.

Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; *Anstin v. Boston*, 7 Wall. 694, 19 L. ed. 224; *Lionberger v. Rouse*, 9 Wall. 468, 477, 19 L. ed. 721, 725; *Van Slyke v. Wisconsin*, 154 U. S. 581, and 20 L. ed. 240, 14 Sup. Ct. Rep. 1168; *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629.

If the Kentucky statutes provide a legal method for collecting the tax and penalties due by the local shareholders in national banks where the property has not been listed for taxation, as required by state law, this court has indicated clearly a method that can be adopted to collect taxes due by nonresident shareholders.

First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701.

The bank is not exempt from payment of the taxes claimed herein by reason of its acceptance of the provisions contained in what is commonly called the Hewitt act.

Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 641, 43 L. ed. 840, 842, 19 Sup. Ct. Rep. 530, 571.

Mr. Justice Lurton delivered the opinion of the court:

This was a proceeding under the law of Kentucky to back-assess the shares of stock in the Citizens National Bank as property omitted from the tax list. After much petitioning, pleading, and demurring, and two appeals to the court of appeals of the state of Kentucky, 1,473 shares were assessed for the taxes of 1896, 1897, and 1898, and 990 shares for the taxes of 1899, with

a penalty of 20 per cent added to the tax each year. The proceeding under which this result has been reached was started in the county court of Boyle county, Kentucky, in March, 1901, by a petition filed by the sheriff of the county for the purpose of causing the shares of the bank to be assessed as property omitted by the assessor. The authority under which the petition was filed is found in § 4241, Kentucky Statutes, and the Kentucky act of March 21, 1900. As the validity of this later act is challenged, we set it out in the margin.†

[448] *In the case of the Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537, this court held invalid certain legislation of the state of Kentucky, providing for the taxation of national banks, as laying a tax, not upon shares, which was permissible, but upon the property and franchises of such [449] banks, which was *inadmissible under the restrictions of § 5219, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3502). In consequence of this decision, this act of March 21, 1900, was passed, as shown both by its subject-matter and the recital in the preamble. The act is both prospective and retrospective. Of its prospective features, we need say nothing. The

3d section is retrospective, in that provides for the return of shares in national banks which, during the years of the operation of the legislation held invalid by this court, had not been returned for taxation, by making it the duty of certain officers of such banks to list for taxation for the years between 1892 and 1899, all shares in such banks which had not been returned, and by requiring all such banks to pay the tax and penalty upon all such omitted shares, subject, however, to certain deductions and credits on account of taxes paid by such banks under the act held invalid, as well as under the prior Hewitt act.

In Covington v. First Nat. Bank, 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. Rep. 562, this court was required to consider the effect of the 3d section of the act in imposing upon national banks a liability for the taxes and penalties upon such omitted shares, which, during the years covered by this section, had been held by persons not domiciled within the state of Kentucky. The question arose under a bill filed in a circuit court of the United States *to en- [450] join the imposition of liability upon a national bank for taxes and penalties upon shares held between 1892 and 1900 by persons who were not domiciled in Kentucky,

†Whereas the Supreme Court of the United States has lately decided that article three (3), chapter 103, of the Acts of 1891-1892-1893, is void and of no effect in so far as the same provides for taxation of the franchise of national banks, in consequence of which decision there is not now and has not been, since the adoption of said article in 1892, any adequate mode of taxing national banks, while state banks are now, and have been, ever since 1892, taxable for all purposes, state and local, therefore

Be it enacted by the general assembly of the commonwealth of Kentucky:

Sec. 1. That the shares of stock in each national bank of this state shall be subject to taxation for all state purposes, and shall be subject to taxation for the purposes of each county, city, town, and taxing district in which the bank is located.

Sec. 2. For the purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the state, county, city, town, and district for the taxes upon said shares of stock.

Sec. 3. When any of said shares of stock have not been listed for taxation for any of said purposes, under levy or levies of any year since the adoption of the revenue law of 1892, it shall be the duty of the president and the cashier to list the same for taxation under said levy or levies: Provided, That where any national bank has heretofore, for any year or years, paid taxes upon its fran-

chise, as provided in article three (3) of the revenue law of 1892, said bank shall be excepted from the operation of this section as to said year or years: And provided further, That where any national bank has heretofore, for any year or years, paid state taxes under the Hewitt bill in excess of the state taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its state taxes required by this act.

Sec. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, verified and reported by the officers as assessments of real estate are entered, certified, and reported, and the same shall be certified to the proper collecting officer for collection as assessments of real estate are certified for collection of taxes thereon.

Sec. 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessments of real estate and collection of taxes thereon may be enforced.

Sec. 6. The purpose of this act is to place national banks of this state, with respect to taxation, upon the same footing as state banks, as nearly as may be, consistently with said article three (3) of the revenue law and said decision of the Supreme Court.

Sec. 7. Whereas, it is important that state banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage.

Approved March 21, 1900.

it being alleged that the purpose of the proceeding against the bank was to charge the bank, without discrimination between domestic and foreign-held shares. Prior to this act of March 21, 1900, there was no law requiring a return for taxation of bank shares held by owners not domiciled within the state, either by such holder or by the bank in which such shares were held. For this reason we held in the case referred to that this act imposed, for the years prior to its passage, a liability upon national banks for taxes upon shareholders domiciled outside of the state, which was not borne by other incorporated moneyed institutions. Upon this subject, the court, speaking by Mr. Justice Day, said:

"Without considering the question of constitutional power to tax nonresident shareholders by means of this retroactive law, it seems to us that, in imposing upon the bank the liability for the past years, for taxes and penalty, upon stock held without the state, and which, before the taking effect of the act under consideration, it was not required to return, there has been imposed upon national banks in this retroactive feature of the law a burden not borne by other moneyed capital in the state. This law makes a bank liable for taxes upon property beyond the jurisdiction of the state, not required to be returned by the bank as agent for the shareholders, by a statute passed in pursuance of the authority delegated in § 5219, thus imposing a burden not borne by other moneyed capital within the state."

In the case now before us for consideration, a liability has been imposed upon the Citizens Bank, the plaintiff in error, not for taxes and penalties upon shares of the bank held by shareholders domiciled beyond the state,—as was attempted in *Covington v. First Nat. Bank*, supra,—but exclusively upon shareholders domiciled within the state. The liability is limited to the tax and penalty upon shares owned 451] *by shareholders domiciled within the state, the name, residence, and amount due from each such shareholders being distinctly set down in the decree.

Neither is the act lacking in due process if, as we shall assume for the moment is the case, the procedure under the 3d section is but a new remedy for a tax liability imposed by prior law of the state upon resident holders of shares of the bank.

Sec. 5210, Rev. Stat., requires every such bank to keep a correct list of its shareholders accessible to taxing officers, and by § 5219, Rev. Stat., the legislature of each state may, for itself, determine the manner and method for taxing shares in such banks, subject only to the restrictions named there- 54 L. ed.

in. In making the bank the agent for its own shareholders in proceedings brought to compel a return and secure an assessment, and in imposing upon the bank a liability for the tax so assessed against the shareholders, the act only follows the well-settled procedure sanctioned in *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. ed. 701; *Van Slyke v. Wisconsin*, 154 U. S. 581, and 20 L. ed. 240, 14 Sup. Ct. Rep. 1168; and *First Nat. Bank v. Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629.

That the 3d section does not impose a liability upon either the domestic shareholders or the bank which did not exist before, under the prior law of the state, was settled by the case of *Scobee v. Bean*, 109 Ky. 526, 59 S. W. 860. In that case the shares of certain resident shareholders had been assessed for taxes laid for years prior to this act of 1900, and it was urged that since the special legislation for the taxation of such shares had been held void by this court in *Owensboro Nat. Bank v. Owensboro* that there was no law of the state under which these shares could be assessed. But the Kentucky court, after an elaborate review of the general taxing law of the state, held that there was full prior statutory authority for the taxation of such shares, and that under that law, if the bank failed to return and pay the tax upon such shares, it was the duty of the shareholders to do so. That case has been followed in a number of other cases by the same court, and it is the basis upon *which the 3d section of this act [452 of March 21, 1900, was upheld in the present case as not imposing a new liability, but as simply providing another method for the assessment of shares which had escaped assessment under the prior law, because neither the shareholders nor the bank had returned them for taxation. In *Covington v. First Nat. Bank*, 198 U. S. 100, 111, 49 L. ed. 963, 968, 25 Sup. Ct. Rep. 562, 565, this court, speaking by Mr. Justice Day, accepted this as the interpretation of the statutory law of Kentucky by the highest court of the state, saying:

"Following the state court in the interpretation of its own statutes, it may be said that, as to shareholders residing in Kentucky and over whom the state has jurisdiction, the supreme court of that state has construed its statutes as requiring shareholders in national banks for the years 1893 to 1900, inclusive, to return their shares for taxation; and if they did not make the return, the duty was required of the corporation. In this view of the law it may be that, as to local shareholders, the

act of March 21, 1900, as held by the supreme court of Kentucky, created no new right of taxation, but gave simply a new remedy, which, by the law, is operative to enforce pre-existing obligations. It may be admitted that § 5219 permits the state to require the bank to pay the tax for the shareholders. *First Nat. Bank v. Kentucky*; *Van Slyke v. Wisconsin*; and *First Nat. Bank v. Chehalis County*,—*supra*.

This construction of the prior law and of the act of 1900 was reaffirmed upon the first appeal of the present case, where the court said:

"The act of March 21, 1900, did not, therefore, make that taxable which was not taxable before, but simply provided another mode for the assessment of the shares of stock and the payment of the taxes. It was the duty of the assessor to make the assessment. It was also the duty of the president and cashier of the bank to list the shares of stock with the assessor; but when the assessment was not made, the property was simply omitted from the tax list, and 453] the sheriff is authorized *by § 4241, Ky. Stat. 1903, to institute the proceeding to have any omitted property assessed. A penalty may be properly imposed in the proceeding because the property was not listed with the assessor, as required by law, and stood as any other property for the assessment of which a proceeding under § 4241 may be instituted. While neither the bank nor its president nor its cashier is the owner of the shares of stock, the bank is made by the act the agent of the shareholders, and the notice to it is notice to his agent, within the meaning of § 4241. The president and cashier were properly made defendants because it is made their duty by the statute to list the stock. The bank is required to keep a list of its shareholders, and therefore knows who they are. Notice to the agent in an assessment of property is sufficient notice to his principal." *Com. v. Citizens' Nat. Bank*, 117 Ky. 946, 957, 80 S. W. 158.

But it is said that in *Covington v. First Nat. Bank* this court held the 3d section broad enough to include liability for omitted returns of shares held by nonresident shareholders, and for that reason discriminated against national banks. But in that case the proceeding enjoined was one for the purpose of fixing liability upon the bank without discriminating between resident and nonresident shareholders. But in the present case the state court has not imposed liability upon the bank for taxes or penalties upon shareholders who were nonresidents, but has applied it as affording a valid remedy for the collection of taxes and penalties upon residents who had not

made return, as required under the prior law. As thus applied, the bank has neither been deprived of any rights nor compelled to bear any burden in conflict with § 5219, Rev. Stat., upon which it relies for protection. But if it be assumed—an assumption not sustained by any decision of the Kentucky court of appeals—that the 3d section is broad enough to include liability for delinquent taxes claimed from both resident and nonresident stockholders, none of the latter class are here complaining, and such an objection cannot be *made by [454 one unaffected by the alleged invalid feature. *Austin v. Boston*, 7 Wall. 694, 19 L. ed. 224; *Albany County v. Stanley*, 105 U. S. 305, 26 L. ed. 1044; *The Winnebago (Iroquois Transp. Co. v. De Laney Forge & Iron Co.)* 205 U. S. 354, 51 L. ed. 836, 27 Sup. Ct. Rep. 509.

That the body of shareholders in 1901, when the proceeding was started, was not composed of the same individuals as the body during the years for which the taxes were due, is doubtless true. But the shares pass from one holder to another, subject to the burden of taxes; and if not returned by either the shareholder or the bank, as required by the prior law, the liability remains to be enforced until barred by limitation of time. The liability of the bank is that of the shareholder, and its reimbursement must come from those who hold the shares when the bank liability is enforced. In *Seattle v. Kelleher*, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44, it is said that liability for a tax is not subject to the rules applicable to the vendor's equity. "A man cannot get rid of his liability to a tax by buying without notice." The liability of the purchaser of shares for taxes not paid, and of the bank, as agent for its shareholders, is one of the notorious and necessary consequences of the long-sanctioned right of the states to compel such banks to return their shares for taxation, and to pay the assessment thereon if the shareholder does not. The legality of this method was reasoned out in *First Nat. Bank v. Kentucky*, *supra*,—a case arising under the Kentucky law imposing liability upon banks for the tax upon shareholders. This answers the objection that in 1898 a reduction in the number of shares had occurred. That only means that each share of \$1,000 was reduced to a share of \$666.66; the shareholders remained the same, the proportion held by each in the capital being the same as before the reduction. The tax upon the share before it was reduced rested upon the same share after it had been reduced. None of the shares taxed had in fact gone out of existence before the proceeding to compel returns for purposes

of taxation. The original 1,500 shares were represented by the outstanding 1,000 shares, and were in the hands of the same general body of shareholders.

455] *The objection made that the act violates the supposed contract under the Hewitt act is answered by *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530, 571, and *Covington v. First Nat. Bank*, 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. Rep. 562.

The other assignments present no question which need be more particularly answered.

Judgment affirmed.

Mr. Justice White, dissenting:

I am constrained to dissent because I think, in substance and effect, the retroactive tax now upheld is a tax on the bank and its assets, and is therefore void. The power to tax is controlled by § 5219, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3502), and as, in my judgment, the tax which is now sustained is in conflict with that section, in my opinion there should be a judgment of reversal.

WILLIAM T. FAY and Eliza T. Fay, His Wife, Plffs. in Err.,
v.

SAMUEL A. CROZER, John P. Crozer, and Mary Crozer Page, Trustees of the Crozer Land Association, et al.

(Sec S. C. Reporter's ed. 455, 456.)

Error to circuit court — Federal question — settled by prior decisions.

Any question respecting the invalidity of the provisions of the West Virginia Constitution for the forfeiture of lands to the state for five years' neglect to pay taxes is too clearly foreclosed by prior decisions of the Federal Supreme Court to serve as the basis of a writ of error to a circuit court. [For other cases, see *Appeal and Error*, 938-989, in *Digest Sup. Ct.* 1908.]

[No. 165.]

Argued April 21, 22, 1910. Decided May 2, 1910.

IN ERROR to the Circuit Court of the United States for the Southern District of West Virginia to review a judgment for

NOTE. — On direct review in Federal Supreme Court of judgments of district or circuit courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

On due process of law in revenue proceedings—see note to *Read v. Dingess*, 8 C. C. A. 398.

54 L. ed.

defendants in an action of ejectment. Dismissed for want of jurisdiction.

See same case below, 156 Fed. 486.

The facts are stated in the opinion.

Mr. George E. Price argued the cause and filed a brief for plaintiffs in error.

Messrs. James F. Brown, W. W. Hughes, and D. J. F. Strother argued the cause and filed a brief for defendants in error.

Per Curiam:

This is a writ of error to the circuit court of the United States for the southern district of West Virginia, brought directly to this court, and as such falls within the rule that the controversy must be substantial and the question open to discussion. Tested by that rule, we think the writ of error must be dismissed on the authority of *King v. Mullins*, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; *King v. West Virginia*, 216 U. S. 92, ante, 396, 30 Sup. Ct. Rep. 225. And see *King v. Panther Lumber Co.* 171 U. S. 437, 43 L. ed. 227, 18 Sup. Ct. Rep. 573; *Swann v. West Virginia*, 188 U. S. 739, 47 L. ed. 677, 23 Sup. Ct. Rep. 848. It is contended that the question of the forfeiture of plaintiffs' title under the Constitution of West Virginia was not ruled in those cases, because they also involved the statute of the state referred to, while this case presents the validity of the forfeiture provision of the state Constitution alone. But it was pointed out in *King v. West Virginia*, 216 U. S. 92, ante, 396, 30 Sup. Ct. Rep. 225, that the right to redeem, given by the statute, was not coextensive with the forfeiture under the state Constitution, and yet the Constitution was upheld, as it was in *King v. Mullins*, supra. It follows, therefore, that the state Constitution must be upheld in the present case. The only hearing that could be necessary would be whether the facts constitute a forfeiture; and that question, when it arises between a former owner and a claimant under the state, can be tried in a case between those parties, as it was here. There is no greater objection under the Constitution of the United States to the forfeiture of land for five years' neglect to pay taxes than there is to a similar forfeiture by the statute of limitations for neglect to assert title against one by whom the former owner has been disseised. We think that the question suggested is so plainly covered by the preceding cases that the writ of error must be dismissed.

It is so ordered.

457] *HUTCHINSON, PIERCE, & COMPANY, Appt.,
v.
JOSEPH LOEWY.

(See S. C. Reporter's ed. 457-461.)

Appeal—from circuit court of appeals—in trademark case—when certiorari proper remedy.

A final decree of a circuit court of appeals in a suit to enjoin the infringement of a trademark registered under the act of February 20, 1905 (33 Stat. at L. 728, chap. 592, U. S. Comp. Stat. Supp. 1909, p. 1283), cannot be reviewed by the Federal Supreme Court by appeal, but only upon certiorari, in view of § 18 of that act, placing suits brought under its provisions within the scope of the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 6, which makes decisions of the circuit courts of appeals final "in all cases under the patent laws, under the revenue laws, under the criminal laws, and in admiralty cases," with power in the Supreme Court to require any such case to be certified thereto for review and determination, with the same power and authority in the case as if it had been carried up by appeal or writ of error.

[For other cases, see Appeal and Error, III. d. 2; Certiorari, 40, 41, in Digest Sup. Ct. 1908.]

[No. 182.]

Argued April 29, 1910. Decided May 16, 1910.

APPPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of New York, in favor of defendant, in a suit to enjoin the infringement of a registered trademark. Dismissed for want of jurisdiction.

See same case below, 90 C. C. A. 1, 163 Fed. 42.

The facts are stated in the opinion.

Mr. Archibald Cox argued the cause and filed a brief for appellant:

The judiciary act of March 3, 1891, provides for the distribution of the entire appellate jurisdiction of our national judiciary system.

McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; Macfadden v.

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

On certiorari from Federal Supreme Court to circuit courts of appeals—see note to United States v. Dickinson, 53 L. ed. U. S. 711.

United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

The act and the decisions of this court interpreting it seem to make it plain that an appeal lies from the court of appeals to this court in all those cases wherein an appeal lies to this court direct from the court of first instance, and those wherein the decision of the court of appeals is expressly made final. That right of appeal is not to be defeated by implication, but exists unless the decisions of the court of appeals are "made final in terms."

Lau Ow Bew v. United States, 144 U. S. 47, 57, 36 L. ed. 340, 343, 12 Sup. Ct. Rep. 517; Press Pub. Co. v. Monroe, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; Warner v. Searle & H. Co. 191 U. S. 195, 205, 48 L. ed. 145, 147, 24 Sup. Ct. Rep. 79.

The judiciary act of March 3, 1891, applies equally to laws of the United States enacted before and after March 3, 1891.

Spreekels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517.

The provision as to the jurisdiction of courts in the trademark act was enacted following the judiciary act, which contained words manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away, except when expressly so provided. Implied repeals were intended to be thereby guarded against.

Lau Ow Bew v. United States, 144 U. S. 56, 36 L. ed. 340, 12 Sup. Ct. Rep. 517.

Messrs. L. L. Morrill and E. T. Fenwick argued the cause and filed a brief for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court:

This was a bill in equity for an injunction and accounting, the complainant alleging the defendant had infringed its technical trademark applied to shirts, and also was guilty of unfair competition. As complainant is a corporation of the state of New York and defendant is a citizen of the same state, the court's jurisdiction extends only to the use of the registered trademark in commerce between the states, with foreign nations, and the Indian tribes.

There was no attempt to prove that defendant had passed off, or intended to pass off, his goods for complainant's, or had made profits, or that complainant had sustained damage. The cause proceeded solely on complainant's ownership of its technical trademark.

The circuit court held that defendant's

trademark or brand was clearly distinguishable from that of complainant, and said:

"There is no reasonable probability of the ordinary purchaser being deceived into buying the defendant's manufacture as that of complainant. The rule is well established that a trademark, word, or symbol has the elements of a property right, and may not be unlawfully used by a rival in business, either alone or as an accessory to such prior appropriation; and in such cases a right to injunctive relief follows without proof of confusion of proprietorship, or that buyers have been actually misled by such use. But if a defendant's design or symbol is essentially different and distinguishable in appearance, so *that by no possibility can his article be taken for complainant's genuine production, a cause of unlawful appropriation is not maintainable." 90 C. C. A. 3, note; 163 Fed. 44, note.

The bill was thereupon dismissed, and having been taken by appeal to the United States circuit court of appeals for the second circuit, the decree below was affirmed. 90 C. C. A. 1, 163 Fed. 42.

Appellants thereupon petitioned for an appeal to this court, which was allowed.

Sections 17 and 18 of the act of Congress approved February 20, 1905, in respect to trademarks, read as follows:

"Section 17. That the circuit and territorial courts of the United States and the supreme court of the District of Columbia shall have original jurisdiction, and the circuit courts of appeal of the United States and the court of appeals of the District of Columbia shall have appellate jurisdiction, of all suits at law or in equity respecting trademarks registered in accordance with the provisions of this act, arising under the present act, without regard to the amount in controversy.

"Section 18. That writs of certiorari may be granted by the Supreme Court of the United States for the review of cases arising under this act in the same manner as provided for patent cases by the act creating the circuit court of appeals." [33 Stat. at L. 728, chap. 592, U. S. Comp. Stat. Supp. 1909, p. 1283.]

We are of opinion that this appeal will not lie, and that the remedy by certiorari is exclusive. By the 6th section of the judiciary act of March 3, 1891, the final decisions of the circuit courts of appeal are made final "in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases," with power in this court to require any such cases to be certified thereto for its review and determination, "with the same power and authority in the case as if it had been carried by appeal or writ of

error to the Supreme Court." [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549.]

We think that the language of § 18 places suits brought under the trademark act plainly within the scope of the act *establishing the court of appeals, and that a final decision of that court can be reviewed in this court only upon certiorari, and that therefore the pending appeal must be dismissed. And this conclusion is sustained by *Atkins v. Moore*, 212 U. S. 285, 291, 53 L. ed. 515, 517, 29 Sup. Ct. Rep. 390.

Appeal dismissed.

KIDD, DATER, & PRICE COMPANY, Plff.
in Err.,
v.

MUSSELMAN GROCER COMPANY.

(See S. C. Reporter's ed. 461-474.)

Constitutional law — regulating sales in bulk — due process of law — equal protection of the laws — police power.

The Michigan sales-in-bulk act (Pub. Acts 1905, No. 223), avoiding, as against creditors, sales in bulk otherwise than in the regular course of business, unless an inventory is made at least five days before the sale, and the purchaser receives a list of the seller's creditors, and notifies them of the proposed sale personally, or by registered mail, at least five days before its consummation, and making a purchaser not conforming to the statute a receiver for the benefit of the seller's creditors, is a valid exercise of the police power, and does not deny due process or the equal protection of the laws.

[For other cases, see Constitutional Law, IV. a, 5; IV. b, 7; IV. c, in Digest Sup. Ct. 1908.]

[No. 149.]

Argued April 13, 14, 1910. Decided May 16, 1910.

NOTE. — On the validity of statutes regulating sales in bulk—see notes to *Lemieux v. Young*, 53 L. ed. U. S. 295, and *Young v. Lemieux*, 20 L.R.A. (N.S.) 160.

As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; and *Pearson v. Yewdall*, 24 L. ed. U. S. 436; *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621, and *State v. Loomis*, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which affirmed a judgment of the Circuit Court of Berrien County, in that state, avoiding, as to creditors, a sale in bulk, because of noncompliance with a state statute regulating such sales. Affirmed.

See same case below, 151 Mich. 478, 115 N. W. 409.

The facts are stated in the opinion.

Mr. G. M. Valentine argued the cause, and, with Messrs. E. L. Hamilton, G. W. Bridgman, and E. B. Valentine, filed a brief for plaintiff in error:

The property rights guaranteed by the 14th Amendment to the Federal Constitution consist not merely in the title or right to the possession of property; they include the right to make any lawful use of the property and the right to pledge or mortgage it, to sell or transfer it, and the right to buy it, so long as the sale or transfer is not made for fraudulent purposes.

Kuhn v. Detroit, 70 Mich. 534, 38 N. W. 470.

Nothing less than an opportunity to be heard in court upon the question of the honesty of a purchase and sale can be due process of law. Where life and liberty, or the title and possession of property, are involved, due process of law requires that there be a regular course of judicial proceedings, and that the party to be affected shall have notice and an opportunity to be heard.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

The act does not merely make sales without compliance with the statute presumptively void, but absolutely void, and proof of honesty and good faith is no defense whatever. Every citizen, under our Constitution, is entitled to the presumption of honesty in his daily transactions, and if his honesty be attacked, his dishonesty and his fraud must be proved before he can be deprived either of his liberty, his property, or his good name.

Kuhn v. Detroit, *supra*.

The statute is not of the slightest use as a protection to creditors, for it may always be evaded.

Hannah v. Richter Brewing Co. 149 Mich. 220, 12 L.R.A. (N.S.) 178, 119 Am. St. Rep. 674, 112 N. W. 713, 12 A. & E. Ann. Cas. 344.

The power of a state or of Congress to establish or alter statutes of limitation is subject always to the condition that a reasonable time for bringing suit shall be allowed, not only as to causes of action subsequently arising, but as to those which have already accrued. To prescribe an unreasonably short

period of limitation would be as much an impairment of the obligation of contracts, or a taking of property without due process of law, as if plaintiff's rights were directly destroyed, although the statute might be under the guise of one affecting the remedy merely.

19 Am. & Eng. Enc. Law, 2d ed. pp. 169, 170.

It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought; and a statute that fails to do this cannot possibly be sustained as a law of limitations, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law.

Price v. Hopkin, 13 Mich. 324.

Legislation similar to the act here involved, and for the same general purpose, has been enacted in many states. Such acts have been held violative of both the state and United States Constitutions, in the states of New York, Ohio, Indiana, Illinois, Utah, and Virginia, on the ground that the effect of such statutes is to cause the deprivation of property without due process of law, and that the same does not afford to persons interested the equal protection of the laws.

Wright v. Hart, 182 N. Y. 330, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263; Miller v. Crawford, 70 Ohio St. 207, 71 N. E. 631, 1 A. & E. Ann. Cas. 558; McKinster v. Sager, 163 Ind. 671, 68 L.R.A. 273, 106 Am. St. Rep. 268, 72 N. E. 854; Block v. Schwartz, 27 Utah, 387, 65 L.R.A. 308, 101 Am. St. Rep. 971, 72 Pac. 22, 1 A. & E. Ann. Cas. 550; Charles J. Off & Co. v. Morehead, 235 Ill. 40, 20 L.R.A. (N.S.) 167, 126 Am. St. Rep. 184, 85 N. E. 264, 14 A. & E. Ann. Cas. 434.

Statutes for the same general purpose have been held valid in Massachusetts, Tennessee, Washington, and Oklahoma; but the statutes of all those states are easily differentiated from the Michigan statute.

John P. Squire & Co. v. Tellier, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; Neas v. Borches, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; McDaniels v. J. J. Connelly Shoe Co. 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37; Williams v. Fourth Nat. Bank, 15 Okla. 477, 2 L.R.A. (N.S.) 334, 82 Pac. 496, 6 A. & E. Ann. Cas. 970.

In Wisconsin and Maryland such statutes have been before the court, but the question of their constitutionality does not seem to have been raised.

Fisher v. Herrmann, 118 Wis. 424, 95 N. W. 392; Hart v. Roney, 93 Md. 432, 49 Atl. 661.

Liberty of a citizen includes the right to
217 U. S.

acquire property, to own it, use it, buy it, or sell it, so long as his acts are without intent to defraud. When the owner is deprived of the right to sell property, he is deprived of the property itself, within the meaning of the Constitution, by having one of the incidents of ownership taken away from him. Where a person is deprived of the right to buy property, he is deprived of the liberty guaranteed by the Constitution. The liberty mentioned in the 14th Amendment means not only the right of the citizen to be free from mere physical restraint, as by unlawful incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any calling or vocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to a successful conclusion of the purposes aforesaid.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Lochner v. New York*, 198 U. S. 53, 49 L. ed. 940, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Braceville Coal Co. v. People*, 147 Ill. 71, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *Ritchie v. People*, 155 Ill. 104, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Frorer v. People*, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; *Com. v. Perry*, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 219, 59 L.R.A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; *Third Nat. Bank v. Divine Grocery Co.* 97 Tenn. 611, 34 L.R.A. 445, 37 S. W. 390; *Gilman v. Tucker*, 128 N. Y. 190, 13 L.R.A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040.

The terms "law of the land" and "due process of law" do not mean merely an act of the legislature.

Board of Education v. Bakewell, 122 Ill. 339, 10 N. E. 378; *Clark v. Mitchell*, 64 Mo. 578; *Calhoun v. Fletcher*, 63 Ala. 574; *Saco v. Wentworth*, 37 Me. 165, 58 Am. Dec. 786; 10 Am. & Eng. Enc. Law, 2d ed. pp. 291, 292; *Cooley*, Const. Lim. 6th ed. 431; *Taylor v. Porter*, 4 Hill, 145, 40 Am. Dec. 274; *Re Ziebold*, 23 Fed. 791; *Moore v. State*, 43 N. J. L. 203, 39 Am. Rep. 558; *Dorman v. State*, 34 Ala. 216.

The statute has no such effect as the preservation of the public safety or welfare, but, under the guise of police regulation, is an
54 L. ed.

invasion of the property rights of the individual.

Chaddock v. Day, 75 Mich. 527, 4 L.R.A. 809, 13 Am. St. Rep. 468, 42 N. W. 977; *Re Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; *People v. Gillson* and *Re Jacobs*, supra; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Frank L. Fisher Co. v. Woods*, 187 N. Y. 90, 12 L.R.A. (N.S.) 707, 79 N. E. 836; *Gilman v. Tucker*, supra; *People ex rel. Tyroler v. Warden*, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Richmond v. Southern Bell Teleph. & Teleg. Co.* 28 C. C. A. 659, 42 U. S. App. 686, 85 Fed. 19; *Chicago v. Netcher*, 183 Ill. 104, 48 L.R.A. 261, 55 N. E. 707; *Miller v. Crawford*; *McKiuster v. Sager*; *Charles J. Off & Co. v. Morehead*; and *Wright v. Hart*,—supra.

The decisions cited from the state court do not differ from the law as laid down by this court.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Hennington v. Georgia*, 163 U. S. 299, 303, 304, 41 L. ed. 166, 168, 169, 16 Sup. Ct. Rep. 1086; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 322, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Lawton v. Steele*, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499.

The act in question is substantially an insolvency law, and therefore of no effect when a national bankruptcy law is in force.

Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Tua v. Carriere*, 117 U. S. 201, 29 L. ed. 855, 6 Sup. Ct. Rep. 565; *Brandenburg, Bankr.* 3d ed. § 16.

Mr. Swagar Sherley argued the cause, and, with Messrs. Benn M. Corwin and Henry C. Quinby, filed a brief for defendant in error:

The subject dealt with is within the police power of the state.

Lemicux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; *John P. Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *Spurr v. Travis*, 145 Mich. 721, 116 Am. St. Rep. 330, 108 N. W. 1090, 9 A. & E. Ann. Cas. 250; *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; *McDaniels v. J. J. Connelly Shoe Co.* 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37.

The act does not abridge the privileges or immunities of citizens of the United States.

Slaughter-House Cases, 16 Wall. 36-74, 21 L. ed. 394-408; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

The act does not deprive any person of liberty or property without due process of law.

Dent v. West Virginia, 129 U. S. 124, 32 L. ed. 626, 9 Sup. Ct. Rep. 231; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Mugler v. Kansas*, *supra*; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281.

The act is not in restraint of trade.

John P. Squire & Co. v. Tellier, 185 Mass. 20, 102 Am. St. Rep. 322, 69 N. E. 312; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Nutting v. Massachusetts*, 183 U. S. 533, 46 L. ed. 324, 22 Sup. Ct. Rep. 238; *Soon Hing v. Crowley*, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; *Booth v. Illinois*, 184 U. S. 429, 46 L. ed. 626, 22 Sup. Ct. Rep. 425; *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; *Jacobson v. Massachusetts*, 197 U. S. 27, 49 L. ed. 650, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; *Ah Sin v. Wittman*, 198 U. S. 500, 49 L. ed. 1142, 25 Sup. Ct. Rep. 756; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 318, 50 L. ed. 209, 26 Sup. Ct. Rep. 100.

The act is not a denial of the equal protection of the laws.

Barbier v. Connolly, *supra*; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Powell v. Pennsylvania*, 127 U. S. 678, 683, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Moore v. Missouri*, 159 U. S. 673, 677, 40 L. ed. 301, 303, 16 Sup. Ct. Rep. 179; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 103, 43 L. ed. 909, 912, 19 Sup. Ct. Rep. 609; *Frisbie v. United States*, 157 U. S. 160-165, 39 L. ed. 657-659, 15 Sup. Ct. Rep. 586; *United States v. Joint Traffic Asso.* 171 U. S. 505-571, 43 L. ed. 259-288, 19 Sup. Ct. Rep. 25; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207.

Mr. **Benn M. Corwin** also argued the cause and filed a brief for defendant in error:

The provisions of the 1st section of the 14th Amendment do not guarantee to the individual citizen the unqualified right to do as he chooses with his property, regardless of the rights of others; but such rights are subject to such reasonable restraint, under the police power of the state, as the law-

making power may prescribe for the benefit of all the people.

Crowley v. Christensen, 137 U. S. 86, 89, 90, 34 L. ed. 620-623, 11 Sup. Ct. Rep. 13; *Corfield v. Coryell*, 4 Wash. C. C. 381, Fed. Cas. No. 3,230; *Slaughter-House Cases*, 16 Wall. 36, 76, 21 L. ed. 394, 408; *Cooley*, Const. Lim. 6th ed. 739-743. *Pool v. Trexler*, 76 N. C. 297; *State v. Heinemann*, 80 Wis. 256; *Porter v. Ritch*, 70 Conn. 254, 39 L.R.A. 353, 39 Atl. 169; *Com. v. Alger*, 7 Cush. 85; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25-32, 24 L. ed. 989-991; *Mugler v. Kansas*, 123 U. S. 623-665, 31 L. ed. 205-211, 8 Sup. Ct. Rep. 273; *Ward v. Farwell*, 97 Ill. 609; *St. Louis & S. F. R. Co. v. Matthews*, 165 U. S. 1-23, 41 L. ed. 611-619, 17 Sup. Ct. Rep. 243; *Jacobson v. Massachusetts*, 197 U. S. 11-27, 49 L. ed. 643-650, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 520; *Cooley Const. Lim.* 6th ed. p. 743.

The prevention of fraud is the benefit sought to be secured to the people in the enactment of "sales-in-bulk" statutes.

Sampson v. Brandon Grocery Co. 127 Ga. 454, 56 S. E. 483, 9 A. & E. Ann. Cas. 331; *McDaniels v. J. J. Connelly Shoe Co.* 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37; *Lemieux v. Young*, 211 U. S. 489, 493, 53 L. ed. 295, 299, 29 Sup. Ct. Rep. 174.

The prevention of fraud being the acknowledged purpose of this statute, a few decisions sustaining the validity of analogous legislation for the prevention of fraud in the sale of food and other articles may not be inappropriate.

Com. v. Waite, 11 Allen, 265, 87 Am. Dec. 711; *State v. Campbell*, 64 N. H. 403, 10 Am. St. Rep. 419, 13 Atl. 585; *Booth v. Illinois*, 184 U. S. 425, 428, 429, 46 L. ed. 623, 625, 626, 22 Sup. Ct. Rep. 425; *Munn v. Illinois*, 94 U. S. 113, 125, 24 L. ed. 77, 84; *Otis v. Parker*, 187 U. S. 606, 608, 609, 47 L. ed. 323, 327, 328, 23 Sup. Ct. Rep. 168; *Jacobson v. Massachusetts*, *supra*; *Plumley v. Massachusetts*, 155 U. S. 461, 468, 39 L. ed. 223, 225, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

This statute affects all persons in Michigan, whether wholesalers or retailers of any and every class of merchandise or merchandise and fixtures, in exactly the same manner and degree; imposing restrictions upon the sale, in the exercise of the police power of the state, for the prevention of fraud. Plaintiff in error was not arbitrarily deprived of its property nor denied the equal protection of the laws.

Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 579.

Due process of law, within the meaning of the Amendment, is secured if the laws operate on all alike, and do not subject the

individual to any arbitrary exercise of the power of the government.

Giozza v. Tiernan, 148 U. S. 657, 662, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; *Hurtado v. California*, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292; *Lemieux v. Young*, 211 U. S. 489, 496, 53 L. ed. 295, 300, 29 Sup. Ct. Rep. 174.

The statute places under the same restrictions, and subjects to like penalties and burdens, all who attempt to sell or purchase a stock of merchandise or merchandise and fixtures in bulk, or otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller, thus recognizing and preserving the principle of equity among all those engaged in the same business.

Leeper v. Texas, 139 U. S. 462, 468, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. 579; *Powell v. Pennsylvania*, 127 U. S. 678, 687, 32 L. ed. 253, 257, 8 Sup. Ct. Rep. 992, 1257; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 708, 709, 28 L. ed. 1145-1147, 5 Sup. Ct. Rep. 730; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 523, 29 L. ed. 463, 466, 6 Sup. Ct. Rep. 110; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 209, 32 L. ed. 107, 109, 8 Sup. Ct. Rep. 1161; *Spurr v. Travis*, 145 Mich. 723, 116 Am. St. Rep. 330, 108 N. W. 1090, 9 A. & E. Ann. Cas. 250; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 29-33, 32 L. ed. 585-587, 9 Sup. Ct. Rep. 207; *Lemieux v. Young*, supra; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243.

The "unreasonableness of a law" is not a subject for judicial cognizance.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 208, 32 L. ed. 107, 108, 8 Sup. Ct. Rep. 1161; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 520, 29 L. ed. 463, 465, 6 Sup. Ct. Rep. 110; *Mugler v. Kansas*, 123 U. S. 632, 660, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Powell v. Pennsylvania*, 127 U. S. 678, 686, 32 L. ed. 253, 257, 8 Sup. Ct. Rep. 992, 1257; *People v. Snowberger*, 113 Mich. 86, 67 Am. St. Rep. 449, 71 N. W. 497; *People v. Worden Grocer Co.* 118 Mich. 608, 77 N. W. 315; *Barton v. McWhinney*, 85 Ind. 488; *Bertholf v. O'Reilly*, 74 N. Y. 516, 30 Am. Rep. 323; *Reeves v. Corning*, 51 Fed. 787; *Territory ex rel. McMahon v. O'Connor*, 5 Dak. 412, 3 L.R.A. 355, 41 N. W. 746.

As the subject to which the statute relates was clearly within the police powers of the state, the statute cannot be held to be repugnant to the due process clause of the 54 L. ed.

14th Amendment, because of the nature or character of the regulations which the statute embodies, unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power.

Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Booth v. Illinois*, 184 U. S. 425, 429, 46 L. ed. 623, 626, 22 Sup. Ct. Rep. 425; *Holden v. Hardy*, 169 U. S. 366, 392, 42 L. ed. 780, 791, 18 Sup. Ct. Rep. 383; *Lemieux v. Young*, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174.

The objection that the statute is void because, by its terms, it makes ordinary business transactions which, by the law, are presumably valid, conclusively dishonest, fraudulent, and void, is equally untenable.

People v. West, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; *Lawton v. Steele*, 152 U. S. 143, 38 L. ed. 391, 14 Sup. Ct. Rep. 499, 119 N. Y. 233, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878; *Com. v. Huntley*, 156 Mass. 241, 15 L.R.A. 839, 30 N. E. 1127; *Com. v. Waite*, 11 Allen, 265, 87 Am. Dec. 711.

The great weight of authority sustains the validity of statutes containing provisions like those in the statute in question.

Calkins v. Howard, 2 Cal. App. 233, 83 Pac. 280; *Walp v. Moor*, 76 Conn. 515, 57 Atl. 277; *Spencer v. Broughton*, 77 Conn. 38, 58 Atl. 236; *Re Paulis*, 144 Fed. 472; *Young v. Lemieux*, 79 Conn. 434, 20 L.R.A. (N.S.) 160, 129 Am. St. Rep. 193, 65 Atl. 436, 600, 8 A. & E. Ann. Cas. 452, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; *Hart v. Roney*, 93 Md. 432, 49 Atl. 661; *Wilson v. Edwards*, 32 Pa. Super. Ct. 295; *Feingold v. Steinberg*, 33 Pa. Super. Ct. 39; *Fisher v. Herrmann*, 118 Wis. 424, 95 N. W. 392; *Spurr v. Travis*, 145 Mich. 721, 116 Am. St. Rep. 330, 108 N. W. 1090, 9 A. & E. Ann. Cas. 250; *Musselman Grocer Co. v. Kidd, D. & P. Co.* 151 Mich. 478, 115 N. W. 409; *John P. Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *Thorpe v. Pennoek Mercantile Co.* 99 Minn. 22, 108 N. W. 940, 9 A. & E. Ann. Cas. 229; *Jaques & T. Co. v. Carstarphen Warehouse Co.* 131 Ga. 1, 62 S. E. 82; *Williams v. Fourth Nat. Bank*, 15 Okla. 477, 2 L.R.A. (N.S.) 334, 82 Pac. 496, 6 A. & E. Ann. Cas. 970; *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; *Wasserman v. McDonnell*, 190 Mass. 326, 76 N. E. 959; *Kelly-Buckley Co. v. Cohen*, 195 Mass. 585, 81 N. E. 297; *Hart v. Brierley*, 189 Mass. 598, 76 N. E. 286; *Hannah v. Richter Brewing Co.* 149 Mich. 220, 12 L.R.A. (N.S.) 178, 119 Am. St. Rep. 674, 112 N. W. 713, 12 A. & E. Ann. Cas. 344; *Farrar v. Lonsby Lumber & Coal Co.* 149 Mich. 118, 112 N. W. 726;

Pierson & H. Co. v. Noret, 154 Mich. 268, 117 N. W. 644; Bixler v. Fry, 157 Mich. 314, 122 N. W. 119; Carstarphen Warehouse Co. v. Fried, 124 Ga. 544, 52 S. E. 598; Parham & Co. v. Potts-Thompson Liquor Co. 127 Ga. 303, 56 S. E. 460; Sampson v. Brandon Grocery Co. 127 Ga. 454, 56 S. E. 488, 9 A. & E. Ann. Cas. 331; Taylor v. Folds, 2 Ga. App. 453, 58 S. E. 683; Gilbert v. Gonyea, 103 Minn. 459, 115 N. W. 640; Kolander v. Dunn, 95 Minn. 422, 104 N. W. 371, 483; Medaniels v. J. J. Connelly Shoe Co. 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37; Re Gaskill, 130 Fed. 235; Fitz Henry v. Munter, 33 Wash. 629, 74 Pac. 1003; Kohn v. Fishbaeh, 36 Wash. 69, 104 Am. St. Rep. 941, 78 Pac. 199; Plass v. Morgan, 36 Wash. 160, 78 Pac. 784; Holford v. Trewella, 36 Wash. 654, 79 Pac. 308; Seattle Brewing & Malting Co. v. Donofrio, 34 Wash. 18, 74 Pac. 823; Albrecht v. Cudihee, 37 Wash. 206, 79 Pac. 628; Everett Produce Co. v. Smith Bros. 40 Wash. 566, 2 L.R.A. (N.S.) 331, 111 Am. St. Rep. 979, 82 Pac. 905, 5 A. & E. Ann. Cas. 798; State v. Artus, 110 La. 441, 34 So. 596.

Mr. Justice White delivered the opinion of the court:

This case involves the inquiry whether act No. 223 of the Public Acts of the state of Michigan of the year 1905, commonly known as the "sales-in-bulk act," is repugnant to the 14th Amendment. The act is copied in the margin.†

†Sec. 1. The sale, transfer, or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller, transferrer, or assignor, shall be void as against the creditors of the seller, transferrer, assignor, unless the seller, transferrer, assignor, and purchaser, transferee, and assignee, shall, at least five days before the sale, make a full, detailed inventory, showing the quantity, and, so far as possible, with the exercise of reasonable diligence, the cost price to the seller, transferrer, and assignor, of each article to be included in the sale; and unless the purchaser, transferee, and assignee demand and receive from the seller, transferrer, and assignor a written list of names and addresses of the creditors of the seller, transferrer, and assignor, with the amount of the indebtedness due or owing to each, and certified by the seller, transferrer, and assignor, under oath, to be a full, accurate, and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee, and assignee shall, at least five days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally or by registered mail, every

*The controversy thus arose: Early [470 in the year 1906, Frank B. Ford operated a store in the village of Berrien Springs, Michigan, consisting of various departments,—hardware, grocery, meat market, and furniture department, and buggies and machinery department. Prior to May 23, 1906, Ford made sale of the stock included in the buggies and machinery department. On the day mentioned, plaintiff in error, after taking an inventory of the stock in the grocery department, valuing it at cost, less 10 per cent, purchased the same for \$2,100, deducting an indebtedness due from Ford of \$415.45, and paying the balance in cash. In making purchase, the requirements of the sales-in-bulk act referred to were not complied with in any particular. After the sale, Ford still owned the meat market, worth between eight hundred and a thousand dollars, and the stock of hardware, worth between five and six thousand dollars. He afterwards sold the stock of hardware for about forty-one hundred dollars, and on such *sale the requirements of the [471 sales-in-bulk act were complied with. The meat market was also disposed of, and in February, 1907, bankruptcy proceedings were commenced against Ford, with what result the record does not disclose.

After the sale of the stock of the grocery department to Kidd, Dater, & Price Company, plaintiff in error, the Musselman Grocer Company, defendant in error, sued Ford upon an account, and joined as gar-

creditor whose name and address are stated in said list, or of which he has knowledge, of the proposed sale, and of the price, terms, and conditions thereof.

Sec. 2. Sellers, transferrers, and assignors, purchasers, transferees, and assignees, under this act, shall include corporations, associations, copartnerships, and individuals. But nothing contained in this act shall apply to sales by executors, administrators, receivers, trustees in bankruptcy, or any public officer under judicial process.

Sec. 3. Any purchaser, transferee, or assignee who shall not conform to the provisions of this act, shall, upon application of any of the creditors of the seller, transferrer, or assignor, become a receiver, and be held accountable to such creditors for all the goods, wares, merchandise, and fixtures that have come into his possession by virtue of such sale, transfer, or assignment: Provided, however, that any purchaser, transferee, or assignee, who shall conform to the provisions of this act, shall not be held in any way accountable to any creditor of the seller, transferrer, or assignor, or to the seller, transferrer, or assignor, for any of the goods, wares, merchandise, or fixtures that have come into the possession of said purchaser, transferee, or assignee by virtue of such sale, transfer, or assignment.

nishee the Kidd, Dater, & Price Company, upon the theory that the latter company incurred a liability to respond as garnishees for the property acquired from Ford, because of noncompliance with the requirements of the act in question. Upon the trial it was contended by counsel for Kidd, Dater, & Price Company that, if valid, the statute did not authorize garnishment proceedings for its enforcement, and that the act was invalid because repugnant both to the Constitution of the state and to the Constitution of the United States. The last contention, with which alone we are concerned, was thus expressed:

"The act violates § 1 of the 14th Amendment to the Federal Constitution, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The trial court held the contentions as to the proper construction of the statute and its constitutionality to be without merit, and, by direction, a verdict was returned for the plaintiff, upon which judgment was duly entered. Upon appeal, the supreme court of Michigan affirmed the judgment. 151 Mich. 478, 115 N. W. 409. It held the sales-in-bulk act to be constitutional, without discussion, upon the authority of a previous decision (*Spurr v. Travis*, 145 Mich. 721, 116 Am. St. Rep. 330, 108 N. W. 1090, 9 A. & E. Ann. Cas. 250), and further decided that the failure to comply with the act made the sale by Ford to Kidd, Dater, & Price Company void as to creditors, and that the plaintiff in garnishment was entitled to avail of the garnishment provisions of the compiled laws of the state. This writ of error was then prosecuted.

The errors assigned embody the proposition that the sales-in-bulk act in question was not a valid exercise of the police powers of the state, and is hence repugnant to the 14th Amendment, because wanting in due process of law and denying the equal protection of the laws. Substantially the same arguments are urged as were presented in *Lemieux v. Young*, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174, decided after this writ of error was sued out. In the *Lemieux* Case the validity of legislation of the general character of that embodied in the Michigan statute was passed on. The Connecticut law, the constitutionality of which was particularly involved, was held to be a valid exercise of the police power of the state, and not to be repugnant to the due process or equal protection clauses of the

14th Amendment, although it avoided, as against creditors, sales by retail dealers in commodities of their entire stock at a single transaction, and not in the regular course of business, unless notice of intention to make such sale was recorded seven days before its consummation. The opinion in that case thus concluded:

"As the subject to which the statute relates was clearly within the police powers of the state, the statute cannot be held to be repugnant to the due-process clause of the 14th Amendment, because of the nature or character of the regulations which the statute embodies, unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power. *Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425. This, we think, is clearly not the case. So, also, as the statute makes a classification based upon a reasonable distinction, and one which, as we have seen, has been generally applied in the exertion of the police power over the subject, there is no foundation for the proposition that the result of the enforcement of the statute will be to deny the equal protection of the laws."

These principles are decisive against the contentions made *in this case, as [473 we do not find in the provisions of the Michigan statute, when compared with the Connecticut statute, such differences as would warrant us in holding that the regulations of the Michigan statute are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power. The purpose of both statutes is the same; *viz.*, to prevent the defrauding of creditors by the secret sale of substantially all of a merchant's stock of goods in bulk, and both require notice of such sale, and make void as to creditors a sale without notice. The differences between the two statutes are pointed out by counsel in a summary which we excerpt in the margin.†

*It is apparent, we think, from this [474 summary, that the statutes are alike funda-

†1. The Connecticut law relates only to retail merchants; the Michigan law relates to wholesale and retail merchants.

2. The Connecticut law requires notice to be filed in the town clerk's office; the Michigan law requires notice, either personally or by registered mail, to the creditors, and to this end requires that the seller, transferor, or assignor shall, under oath, certify to a full, accurate, and complete list of his creditors and of his indebtedness, and that the purchaser shall notify, personally or by registered mail, every creditor so certified.

mentally, and differ only in minor and incidental provisions. In some respects the Michigan law is more comprehensive than the Connecticut law, as the latter law was limited to retail merchants, while the Michigan law affects wholesalers as well as retailers. The requirement of the Michigan law, that a full and detailed inventory shall be made, does not seem to us to be oppressive and arbitrary, as, in bona fide purchases of stocks of goods in bulk, a careful purchaser is solicitous to demand such an inventory, and in the purchase in question an inventory was in fact made. Nor can we say, in view of the ruling in the Lemieux Case, to the effect that a state may, without violating the Constitution of the United States, require that creditors be constructively notified of the proposed sale of a stock of goods in bulk, that a requirement for what is in effect actual notice to each creditor is so unreasonable as to be a mere arbitrary exertion of power, beyond the authority of the legislature to exert. We do not deem it necessary to further pursue the subject, as we think it clearly results, from the ruling in Lemieux v. Young, that the Michigan statute in no way offends against the Constitution of the United States, and therefore that the court below was right in so deciding.

Affirmed.

475] *MARIA MARGARITA VOLCEY SOUFFRONT, Widow of Fleurian, Maria Elizabeth Odette Fleurian, and Maria Antoinette Ema Fleurian, Widow of Souffront, Plffs. in Err.,

v.

LA COMPAGNIE DES SUCRERIES DE PORTO RICO and Erneste Maurice.

(See S. C. Reporter's ed. 475-487.)

Judgment — res judicata — parties and privies.

1. Judgments of Porto Rican courts in

NOTE. — On the right to trial by jury—see notes to Justices of Supreme Ct. v. United States, 19 L. ed. U. S. 658; Eilenbecker v.

of the proposed sale and the conditions thereof.

3. The Connecticut law requires notice to be filed seven days prior to the sale, and the Michigan law requires five days before completion of sale, the purchaser shall notify, personally or by registered mail, every creditor, etc.

4. The Connecticut law requires a description in general terms of the property to be sold; the Michigan law requires a full and detailed inventory, showing the quantity, and, so far as possible with the exercise of reasonable diligence, the cost price to the seller, transferor, and assignor, of each article to be included in the sale.

846

favor of the vendors of real property in actions begun by them for the benefit of their vendees after parting with title, to make effective proceedings in French tribunals by annulling a prior "private contract of sale" and a mortgage made by the person claiming under such contract, operate as *res judicata* in favor of such vendees and those deraining title through them, as fully as if they had been parties to the record.

[For other cases, see Judgment, III. k, in Digest Sup. Ct. 1908.]

Jury — denying right to — judgment on pleadings.

2. The court does not usurp the province of the jury in rendering judgment upon the pleadings, which present the questions whether, upon the facts appearing in certain judgments pleaded as *res judicata* or averred in the answer, the defendants were, as a matter of law, in privity with the complainants in the cause in which the judgments were rendered, or whether the judgments could be collaterally attacked for the alleged insanity of the defendant when entered.

[Denial or infringement of right to jury, see Jury. I. d, in Digest Sup. Ct. 1908.]

[No. 155.]

Argued April 15, 1910. Decided May 16, 1910.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment dismissing an action to recover the possession of real property, and damages for its detention. Affirmed.

See same case below, 3 Porto Rico Fed. Rep. 88.

The facts are stated in the opinion.

Mr. Hannis Taylor argued the cause and filed a brief for plaintiffs in error:

The case must be reversed in order that the contested issues of fact in this action of ejectment may be tried by jury.

Baylis v. Travellers' Ins. Co. 113 U. S. 316, 28 L. ed. 989, 5 Sup. Ct. Rep. 494; Idaho &

District Ct. 33 L. ed. U. S. 801; Gulf, C. & S. F. R. Co. v. Shane, 39 L. ed. U. S. 727; and Perego v. Dodge, 41 L. ed. U. S. 113.

5. The Michigan law provides that any purchaser not conforming to the provisions of the act shall, on application of any creditor of the seller, become a receiver, and be held accountable to such creditors for all goods, etc.; the Connecticut law simply states that failure to comply with the act shall make the sale void as against the creditors.

6. The Michigan law provides that, upon compliance with the provisions of the act, a purchaser shall not in any way be held accountable to any creditor of the seller or to the seller for any of the goods so purchased; the Connecticut law is without any such provision.

217 U. S.

O. Land Improv. Co. v. Bradbury, 132 U. S. 515, 33 L. ed. 433, 10 Sup. Ct. Rep. 177; Morgan v. Gay, 19 Wall. 81, 22 L. ed. 100.

Defendants, by their failure or refusal to demur to the replication, admitted its sufficiency in law as a complete answer to all of their pleas.

6 Enc. Pl. & Pr. p. 379; Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233; Evans v. Gee, 11 Pet. 85, 9 L. ed. 641; Bell v. Mobile & O. R. Co. 4 Wall. 598, 18 L. ed. 338; Stanton v. Embrey, 93 U. S. 553, 23 L. ed. 984.

Mr. Charles M. Boerman also filed a brief for plaintiffs in error:

Those who acquire a title before any suit brought by the vendors or former owners are not to be considered as privies to such suit or a judgment thereon.

Freeman, Judgm. 1st ed. § 162; Dull v. Blackman, 169 U. S. 248, 42 L. ed. 734, 18 Sup. Ct. Rep. 333; Kerr v. Watts, 6 Wheat. 560, 5 L. ed. 330; Cannon River Mfrs. Asso. v. Rogers, 42 Minn. 123, 18 Am. St. Rep. 497, 43 N. W. 792; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 579, note; Sessions v. Johnson, 95 U. S. 347, 24 L. ed. 596; Graham v. Chamberlain, 3 Wall. 704, 18 L. ed. 247; Keokuk & W. R. Co. v. Scotland County Ct. 152 U. S. 326, 38 L. ed. 462, 14 Sup. Ct. Rep. 605; Bedon v. Davie, 144 U. S. 143, 36 L. ed. 380, 12 Sup. Ct. Rep. 665; Keokuk & W. R. Co. v. Missouri, 152 U. S. 317, 38 L. ed. 457, 14 Sup. Ct. Rep. 592.

The judgment of a foreign court, and especially a French court, upon the right or title to real estate situated in this country, has not the effect of *res judicata*.

Dull v. Blackman, 169 U. S. 246, 42 L. ed. 734, 18 Sup. Ct. Rep. 333; Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; Carpenter v. Strange, 141 U. S. 105, 35 L. ed. 647, 11 Sup. Ct. Rep. 960.

A decree in equity, rendered upon a demurrer to the bill, without considering the merits of the case, has not the effect of *res judicata*.

Walden v. Bodley, 14 Pet. 156, 10 L. ed. 398; 1 Greenl. Ev. §§ 529, 530; Hiekey v. Stewart, 3 How. 758, 11 L. ed. 817; Freeman, Judgm. § 270; Hughes v. United States, 4 Wall. 237, 18 L. ed. 305.

Besides, as the action in the case at bar is in the nature of the trial of the title, it is not barred even by a former judgment in ejectment.

Mallett v. Foxcroft, 1 Story, 477, Fed. Cas. No. 8,989, 4 How. 378, 11 L. ed. 1019; Strother v. Lucas, 12 Pet. 434, 9 L. ed. 1146; Merryman v. Bourne, 9 Wall. 599, 19 L. ed. 685.

A United States court in an action at law cannot render judgment without a jury up-
54 L. ed.

on the pleadings, where the facts alleged by one party are controverted by the other party.

United States v. La Vengeance, 3 Dall. 297, 1 L. ed. 610; Bank of Columbia v. Okeley, 4 Wheat. 235, 4 L. ed. 559; Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487.

Mr. Charles Hartzell argued the cause, and, with Mr. Manuel Rodriguez Serra, filed a brief for defendants in error:

A nation acquiring territory, whether by purchase, conquest, or otherwise, is not nor are its courts bound to pass upon or correct wrongs which may have been inflicted or permitted by the ceding nation to one of its subjects, or affecting property within the ceded or acquired jurisdiction.

Cessna v. United States, 169 U. S. 165, 42 L. ed. 702, 18 Sup. Ct. Rep. 304.

If the necessary identity of action and parties existed in the bill in equity, which is the foundation of the fifth defense, then that decision would be final and binding for all time as to the matters therein and thereby presented.

Alley v. Nott, 111 U. S. 473, 28 L. ed. 491, 4 Sup. Ct. Rep. 495; Bissell v. Spring Valley Twp. 124 U. S. 232, 31 L. ed. 414, 8 Sup. Ct. Rep. 495; Gould v. Evansville & C. R. Co. 91 U. S. 533, 23 L. ed. 418.

Mr. Justice White delivered the opinion of the court:

In July, 1906, plaintiffs in error commenced this action in the district court of the United States for the district of Porto Rico, to recover, from the defendants in error, the possession of certain described real estate, and damages from April 12, 1904, for unlawfully withholding possession thereof. *The right to the relief [478 sought was based upon the averment that one Clemente De Fleurian, at his death, on February 24, 1892, was seised in fee and entitled to the possession of the premises, and that he died intestate, leaving the plaintiffs—his widow and two children—"as his legal succession." A demurrer to the complaint was overruled, except as to the necessity of furnishing certain information in regard to rents and profits, which was afterwards done through the medium of a bill of particulars. The defendants filed a joint answer. In addition to a general denial, they pleaded title by adverse possession of twenty years, and that plaintiffs' right to recover was barred by reason of certain judgments obtained by the predecessors in title of defendants, in actions prosecuted by them in the courts of France and in the courts of Porto Rico during the Spanish régime, and by reason of a judgment of dismissal entered in favor of

predecessors in title of defendants, and against the plaintiffs, in a suit in equity, brought by the latter in the trial court below, in the year 1904, to quiet the title to the premises in controversy. A motion was filed to strike out portions of the answer as alleging mere evidentiary matter, and a demurrer was also filed to the special defenses of *res judicata*. The motion and demurrer were overruled, the court filing an opinion, in which it detailed the substance of the matters set up in the answer, and, in effect, held that the decrees or judgments of the French and Porto Rican courts prior to the cession from Spain were *res judicata* as to the claims of the plaintiffs, unless their rights had subsequently arisen. After setting forth its reasons for such conclusion, the court called upon the plaintiffs "to file a replication within ten days or such longer period as they may, if at all, be entitled to, setting up the fact whether or not the answer is true in so far as it sets out the source of plaintiffs' title, and describes or recites these proceedings in other courts regarding this property." This requirement was followed by the statement that "if it shall transpire that the answer has set up the real facts in the case, then, on the application of *defendants, the action will be immediately dismissed at the cost of the plaintiffs." Thereafter a replication was filed on the part of the plaintiffs, which, omitting the title and the signatures of the attorneys, is as follows:

"Replication.

"Now come the plaintiffs herein, in conformity with the order of the court, entered herein, and make reply to the answer of the defendants, as follows:

"First. They deny that the defendants have ever had any just title to the premises, or that those from whom they derived title have possessed the premises in good faith or with just title.

"Second. The plaintiffs impugn the alleged prescription either of ten years or of twenty years.

"Third. The plaintiffs deny the allegations in the answer that the ancestor, Clemente De Fleurian, has obtained the deed to the properties described in the complaint through fraud, and they allege that he purchased the said properties in good faith and for valuable consideration, and always was ready, and the plaintiffs are ready, to comply with all the conditions of the said deed of sale, and that said deed was delivered to him by the vendors and their agents.

"Fourth. The plaintiffs admit that the judgments mentioned in the answer as a third defense to the complaint have been rendered, but the suits in which said judgments were rendered have been instituted

against Clemente De Fleurian while he was insane and out of his mind, and without any curator or guardian or committee of his person being named by the court; and that the defendants herein were neither parties nor privies to the said judgments and suits and appeals, and therefore said judgments cannot bar this action.

"Fifth. The plaintiffs admit that the judgment mentioned in the answer as a fourth defense to the complaint has been rendered, but the plaintiffs state that the court which rendered said judgment had no jurisdiction in the subject-matter, *and said judgment, being of a foreign court without jurisdiction, is not binding; and the plaintiffs further allege that the defendants herein were neither parties nor privies to the said judgment and suit, and therefore said judgment is not a bar to this action.

"Sixth. The plaintiffs, further replying, say that the judgment or decree mentioned in the answer as a fifth defense to the complaint was rendered not upon the merits of the case, and without any proof being taken, but only upon a demurrer to the complaint for want of equity and for laches,—both purely equitable defenses, available only in suits in equity, and the plaintiffs state that this decree is not a bar to this action.

"Wherefore the plaintiffs pray judgment thereon."

Thereupon the following entry of dismissal was made:

"Now come the plaintiffs, by their attorneys, Boerman & Llorens, and file a replication to the answer in this cause, and upon consideration thereof it appears to come within the rule laid down in the court's opinion on the demurrer to the answer of the defendants, filed June 1st. Now, upon application by Hartzell & Rodriguez, the attorneys of said defendants, the cause is dismissed at the cost of the plaintiffs, to be taxed by the clerk, for which execution may issue.

"Plaintiffs except to the dismissal hereof."

From this judgment of dismissal the appeal now before us was taken. In addition to assigning as error the overruling of the demurrers to the respective defenses of *res judicata*, it is set up that "the court erred in rendering judgment against the plaintiffs in said cause, upon the pleadings in said cause, and that said judgment is contrary to the law and facts as stated in the pleadings in said court."

As upon the overruling of the demurrer, the court in substance made it a condition for granting leave to reply to the answer, that such reply should disclose that the answer had not set up the real facts in the case, which condition was manifestly not

complied with in the replication, we shall 481] review the *action of the court upon the hypothesis that the order overruling the demurrer had also absolutely decreed a dismissal of the complaint. On this assumption we proceed to examine the defense setting up as *res judicata* the judgments of the Porto Rican courts, rendered during the spanish régime, to determine whether the court properly held that they barred recovery.

The defense in question covers twenty-six pages of the printed record, the judgment of the court of first instance embracing seventeen, and that of the supreme court of Porto Rico seven pages. The judgments establish the following, among other, facts: The real estate, the subject of controversy, was a sugar plantation known by the name of Serrano. The plantation was owned in 1879 and prior thereto by David Laporte and others, and Clemente De Fleurian, through whom plaintiffs claim title, was the manager of the plantation. On October 9, 1879, what is termed a "private contract of sale" of the plantation to De Fleurian was executed in France. In November following, the owners of the property brought suit in the civil court of Nimes, France, to annul the contract. On February 18, 1880,—the day after the return of De Fleurian to Porto Rico,—although the contract of sale was not of record in Porto Rico, De Fleurian mortgaged the plantation to one Labastide, to secure the payment of 36,811 pesos. The civil court of Nimes, on May 10, 1880, entered a decree of nullity in the suit brought by the Laportes, and this decree, upon the appeal of De Fleurian, was affirmed by the court of appeals of Nimes on March 24, 1885, and by the court of cassation on May 17, 1886.

Pending the litigation just referred to, the Laportes, in the proper district in Porto Rico, "instituted possessory proceedings for the said property," in which Labastide and his wife were summoned "as abutting owners," and, they not making opposition, the title of the Laportes was duly registered. Thereafter, the Laportes, by public instrument of October 16, 1883, "sold the property 482] erty to Don Juan Forgas and *to Don José Gallart, free of all encumbrances, the vendors binding themselves to guarantee the title to the same, as well as to answer for all obligations for which the said property might be liable."

In the defense we are considering, it was averred that title to the premises came to the defendants through Forgas and Gallart. It is also averred as follows:

"That these defendants are the successors and privies in the ownership of said property to said original owners and to the said 54 L. ed.

Gallart and Forgas, and the succession of Gallart, by virtue of the said sale to the said Forgas and Gallart. That in the deed selling and conveying said premises by the said owner to the said Forgas and Gallart, it was expressly contracted and agreed that the said owners should conduct the litigation necessary to free the title of said premises from any lien, cloud, or encumbrance whatsoever, and the same was made the express condition of the payment of a large portion of the purchase price of said premises. And that, in pursuance of said obligation resting upon the said owners of said property, in addition to the proceedings in the courts of France, hereinbefore referred to, the said owners of the said property commenced their action in the court of first instance in the judicial district of Ponce, Porto Rico, the district where the said lands were located, the said court having full jurisdiction over the said property and over the said defendants. The object of said suit being to cancel and have declared null and void, or for the rescission, as the case might be, of the private contract of sale of the said plantation described in plaintiffs' complaint and known as 'Serrano,' and also to have declared null and void, and for the rescission and cancellation of, the said mortgage executed by the said Fleurian in favor of the said Labastide."

As above mentioned, the litigation in France was commenced by the Laportes before the sale to Forgas and Gallart, and continued after such sale, terminating in May, 1886. The action against De Fleurian and Labastide in the Porto Rican courts, [483 referred to in the excerpt just made, was commenced on May 9, 1887, and the final judgment of the trial court, relied upon as *res judicata*, was entered therein on October 26, 1889. In that judgment, after referring to the proceedings had in the litigation in France, as shown by the records of the judgments of the French courts which were in evidence, the court of first instance, after making certain statements as to the effect, as *res judicata*, of the French judgments, which statements are copied in the margin,† proceeded *to reinvestigate the merits [484 of the controversy, and determine the questions arising as matters of first impression, concluding by giving to the plaintiffs the

†9. Whereas there is not any treaty between France and Spain providing special rules as to the force and efficacy of the contracts executed, and of judgments rendered in civil matters, in any one of said nations as regards the other, and therefore the general principles of international law are applicable to the case, among which of said principles there is the principle of reciprocity, specially expressed as to the exe-

full relief demanded, the judgment reading as follows:

"I adjudge that Don Clemente De Fleurian is held to have confessed to the questions propounded at folios 340 and 341 of the second record of the roll of evidence of the plaintiffs. I should declare and do declare also the nullity of the instrument of sale and of the instrument of mortgage of the sugar cane plantation called 'El Serano,' the first of which was executed in the private contract in Anduze, France, dated October 9th, 1879, between the plaintiffs and Don Clemente De Fleurian, and the second named at Juana Diaz, before the notary Don Ramon Rodriguez, on the 18th day of February, 1880, by Don Clemente De Fleurian and Don Fernando Labastide, in consequence of which it is ordered that after this decision shall have been final, the annotation of the said instrument of mortgage in the registry of property be canceled, for which purpose the proper orders shall issue, with the necessary excerpts, addressed to the registrar of property for the district, taxing all costs against the defendants, Don Clemente Fleurian and Don Fernando Labastide. Thus, finally adjudging, was pronounced, ordered, and signed by the judge."

On an appeal, taken by Labastide, the supreme court of Porto Rico, on January 28, 1891, affirmed the judgment of the court of first instance. Thereafter an appeal, also 485] taken by *Labastide, to the Supreme Court of Spain, was dismissed, and it is averred in the answer that "the said decision of the supreme court of Porto Rico became firm and fixed, and is still in full force and effect;" and that, pursuant to the

decisions of the Porto Rican courts above referred to, "the proper orders were issued and the registration of the said mortgage from the said Clemente De Fleurian to the said Labastide was duly canceled and annulled in the registry of property of Ponce, and the said decision of the court of first instance of Ponce, and the said decision of the supreme court of Porto Rico, confirming the same, have been carried out as to all matters and things which were ordered and directed therein and thereby."

The question, then, is whether these judgments of the courts of Porto Rico, entered in litigation prosecuted in the names of the former owners, for the benefit of their vendees, through whom the defendants in this action deraign title, are, as contended by the defendants in error, "a full, complete, and final determination of all the matters and things relating to the alleged title of the said Clemente De Fleurian in or to the said premises described in the plaintiff's complaint herein," operative as *res judicata* in favor of the defendants, and constituting a bar to the further prosecution of the proceedings under the complaint herein. We proceed to consider this question.

It is recited in the judgment entered on October 26, 1889, by the court of first instance of Porto Rico, that the then pending action was commenced on May 9, 1887, by the Laporte heirs, and it also expressly found that the property had been sold prior to the institution of the action, *viz.*, on October 16, 1883, by the Laportes, to Forgas and Gallart, from whom mediately or immediately the present defendants acquired title, "the vendors binding themselves to

execution of judgments rendered by foreign courts, in articles 951 and 952 of the law of Civil Procedure.

10. Whereas, according to the French legislation, real property, even if possessed by foreigners, is governed by the French law (article 3d of the Civil Code); "a judicial mortgage does not ensue from a judgment rendered in a foreign country except when such judgment has been declared executory by a French court" (paragraph 4 of article 2123); "contracts entered into in a foreign country, and acts executed before foreign officers, cannot produce mortgage on property in France" (article 2128); "the said acts and judgments are not subject to execution in France except in the manner and in the cases provided by articles 2123 and 2128 of the Civil Code" (article 546 of the Code of Procedure).

11. Whereas, according to the general interpretation in France as to the aforesaid provisions of its legislation, as well as to article 14 of the Civil Code, the acts and judgments rendered by foreign courts are subject to revision and new discussion before the French courts, and that in that

respect, and on the principle of reciprocity, the final judgment rendered by the French courts, to which reference has been made in this action by the plaintiff, cannot produce the force and effect of *res judicata* as to a decision of the questions which are being ventilated in the same, especially when the same have not had the *exequatur* of the supreme court of justice in the form provided by article 954 and subsequent articles of the said law of Civil Procedure.

12. Whereas, according to the principle of private international law, sanctioned by the supreme court of justice in several opinions, the efficacy of the acts or contracts affecting directly real property are governed by the royal statute, or namely, by the laws of the country where the real property is situated, and therefore, as the question in this suit is in regard to a property situated in a Spanish territory, the questions relating to the nullity or validity of the title to the said property, and of the mortgage put on the same, should be ventilated or decided in accordance with the Spanish laws. *Locus regit actum.*

guarantee the title to the same, as well as to answer for all obligations for which the said property might be liable." It is also apparent from the findings of the court [486] that the action referred *to was intended to make effective the result of the proceedings instituted in France, which had been commenced in order to remove the cloud upon the title of the Laportes, resulting from the contract of sale made to De Fleurian and the mortgage made by him to Labastide. As the judgment of the court of first instance, reciting the facts referred to, was affirmed by the supreme court of Porto Rico, we may properly assume that the Porto Rican courts did not consider that they were passing upon a merely moot question, but were of opinion that the adjudication made inured to the benefit of the vendees of the nominal complainants, such vendees being the real owners. It being, then, competent, under the Spanish law, for the vendors of property, after parting with title, to conduct in their own names, for the benefit of their vendees, a litigation having for its object ultimate relief such as was sought in the action so instituted by the Laporte heirs in 1887, we are of opinion that there is no merit in the contention upon which plaintiffs in error rely in assailing the sufficiency of the defense set up in the third paragraph of the answer. In effect, that contention simply was that, as the original owners had sold the property before the institution of the action commenced in 1887, the defendants herein, as claimants under purchasers who had bought from the Laportes before the commencement of that action, are not in privity with the complainants in that suit, as they were mere strangers to the litigation, and not entitled to enjoy the benefit of the adjudication. Let it be conceded, for the sake of argument, that ordinarily no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit (*Dull v. Blackman*, 169 U. S. 248, 42 L. ed. 735, 18 Sup. Ct. Rep. 333; *Freeman*, *Judgm.* 1st ed. § 162), nevertheless, the rule has no application to a case like this, where the nominal plaintiffs or complainants were, in legal intentment, conducting the litigation under the direction and for the benefit of the real owners of the property. The persons for whose benefit, to the knowledge [487] of the court and of all the parties *to the record, litigation is being conducted, cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecution or defense of an action

in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adversary party, as he would be if he had been a party to the record. *Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 129.

There is no merit in the contention that, in rendering judgment upon the pleadings, the court usurped the province of the jury. In the view we have taken of the case, it becomes necessary, for the purpose of testing that contention, to consider only the fourth paragraph of the replication, heretofore quoted. In asserting, as was done in that paragraph, "that the defendants herein were neither parties nor privies to the said judgments, suit, and appeals (referred to in the third defense), and therefore said judgments cannot bar this action," there was presented merely a question of law as to whether, upon the facts appearing in the judgments, or averred in the third defense, the defendants in this action were, as a matter of law, in privity with the complainants in the cause in which the judgments pleaded as *res judicata* were rendered. And this is true also as to the charge made in the fourth paragraph of the replication, that De Fleurian was insane when the judgments relied upon as *res judicata* were entered. We say this, because clearly, whether the judgments, on such mere averment, were subject to be collaterally attacked, was a matter of law for the court, even if the assumption be indulged in that the right to plead the asserted insanity (which we do not intimate to be the case) was within the condition as to replying imposed by the court when it overruled the demurrer.

Affirmed.

*ROBERT L. OWEN, Plff. in Err., [488 v.

WILLIAM W. DUDLEY and Louis T. Michener, Doing Business under the Firm Name and Style of Dudley & Michener.

(See S. C. Reporter's ed. 488-496.)

Attorneys — contract for division of fees — construction.

The fees of the attorney of record for the Eastern Cherokees were provided for by law, within the meaning of a contract between him and his associate counsel, by which he was to pay his associates a specified sum for their services out of his stipulated fees, upon collection thereof, provided that, "in the contingency of the fees not being provided for by legislation . . . but upon proof of services," each party should look out for himself, where his fees were

allowed in full by the court of claims, under the authority of the subsequent act of March 3, 1903 (32 Stat. at L. 996, chap. 994), since such statute, though not directly fixing the fees, dispensed with the necessity of making proof, under U. S. Rev. Stat. §§ 2103-2106 (32 Stat. at L. 726, chap. 1375, § 68), before the Commissioner of Indian Affairs and the Secretary of the Interior, which must have been the "proof of services" contemplated by the parties. [Compensation of attorneys, see Attorneys, III., in Digest Sup. Ct. 1908.]

[No. 142.]

Argued April 7, 8, 1910. Decided May 16, 1910.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which, reversing a judgment of the Supreme Court of the District, enforced a contract for the division of attorneys' fees. Affirmed.

See same case below, 31 App. D. C. 177. The facts are stated in the opinion.

Mr. William H. Robeson argued the cause and filed a brief for plaintiff in error.

Messrs. Charles Poe and Samuel A. Putman argued the cause and filed a brief for defendants in error.

Mr. Justice McKenna delivered the opinion of the court:

This action was brought in the supreme court of the District of Columbia by defendants in error against plaintiff in error to recover the sum of ten thousand dollars (\$10,000), alleged to be due on account of the following contract entered into by the parties:

This memorandum of agreement witnesseth: That John Vaile, Esq., of Fort Smith, Arkansas, having been employed by the Eastern Cherokee Council of the Cherokee Nation, Indian territory, under contract of February and April, 1900, and ratified a third time by that council of September 4, 1901;

489] *And whereas, the said John Vaile has employed the services of Robert L. Owen, of Muscogee, Indian territory, under his aforesaid contract:

Now, therefore, the premises considered, the said Owen hereby contracts and agrees to convey to W. W. Dudley and L. T. Michener, partners of the firm of Dudley & Michener, the sum of ten thousand dollars (\$10,000) out of the fee so placed to the said Owen, immediately upon the collection, or in the exact proportion as the said fees may be collected, it being understood and agreed that this contract is conditioned

upon the collection of the fees aforesaid. And in the contingency of the fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid, but upon proof of services, then, and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected, out of fees collected for his personal service, to pay the fees to the said Dudley & Michener, but it is understood and agreed that he will, in such a contingency, do what he can to assist Dudley & Michener to collect the fee hereby contracted by them.

The said Dudley & Michener, on their part, agree to give their co-operation in the collection of the money due the Eastern Cherokees and to assist the said Owen as associate counsel in this case.

Witness our hands and seals in duplicate on this 28th day of May, 1902.

(Signed) Robert L. Owen. [Seal]

(Signed) Dudley & Michener. [Seal]

The question in the case turns upon the construction of the following provision of the contract: "And in the contingency of the fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid, but upon proof of services, then, and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected, out of fees collected for his *personal service, to pay the [490 fees to the said Dudley and Michener, but it is understood and agreed that he will, in such a contingency, do what he can to assist Dudley and Michener to collect the fees hereby contracted by them." Certain facts were found by the trial court as helping to clear up, with the statute law then existing, the ambiguity of the provision. That court deduced from them a meaning favorable to plaintiff in error. The court of appeals found in them evidence of a different meaning, and reversed the judgment of the trial court. The facts found, in addition to the agreement, are as follows:

"On March 20, 1905, the court of claims rendered a judgment in the case of the Eastern Cherokees against the United States. On April 17, 1905, the defendant Owen addressed the following letter to the plaintiffs:

"The Southern,

"St. Louis, April 17, 1905.

"Dudley & Michener,

"Washington, D. C.

"Gentlemen:—

"I expect to be at Riggs House about April 28th, 1905, and wish by that time you would make up a careful affidavit of services rendered in case under contract of May 28,

'62, as I am preparing decree and wish to protect your fee.

"Yours truly,
"R. L. Owen.

"A few days thereafter the plaintiff Michener met the defendant, and was told by him that he had abandoned the purpose to make application for fees at that time, and would postpone said application until after the Supreme Court of the United States, to which the said case was to be appealed, had acted thereon, and the application was so postponed by the defendant, Owen. The judgment of the court of claims was affirmed by the Supreme Court with a slight modification. After the return of the mandate of the Supreme Court to the court of claims, the defendant, Owen, who was one of the attorneys of record in the case in the court of claims, together with his coattorney of record, R. V. Belt, made an application [491] *to the court of claims for the allowance of 15 per cent of the judgment to them as their fee. By an agreement between the said Owen and Belt and certain of their associate attorneys, other than the plaintiffs, and without notice from defendant to the plaintiffs, the court apportioned the fee of 15 per cent among said Owen and Belt and those associate attorneys, in accordance with their several contracts.

"Under the rules of the court of claims, the attorneys of record had absolute control of the distribution of the fee allowed by the court, and the court, not recognizing any associate counsel, save as directed by the attorneys of record, the plaintiffs could not, under the rules of the court, have claimed any fee except by permission of the said attorneys of record.

"Under said decree the defendant, Owen, was allowed and was paid the full amount of fees contemplated to be received by him according to the terms of the said contract between him and Dudley & Michener.

"The plaintiffs were not parties to the said agreement between Owen and Belt, as attorneys of record, and said associate counsel, and had no further notice from Owen that any application was to be made to the court to apportion fees to any counsel except attorneys of record, nor were they ever further notified by the defendant to prepare and render proof of their services after the interview between the plaintiff Michener and the defendant, in April, 1905."

The trial court also found that defendants in error gave plaintiff in error "their co-operation, assistance, and services in the prosecution and collection of the claim referred to in said contract, as said contract provided they should do," and that they have not been paid anything therefor.

The contentions of the parties are in sharp opposition. Plaintiff in error contends that the "contingency" provided for in the passage which we have quoted was direct and positive legislation, fixing his fee, and cites instances of such legislation as examples in the minds and intention of the parties. *Defendants in error contend that [492] the legislation contemplated was that which would exempt plaintiff in error from making proof of service to the Commissioner of Indian Affairs and to the Secretary of the Interior under §§ 2103 to 2106, both inclusive, of the Revised Statutes of the United States. And that the acts of Congress which we shall presently refer to constitute such legislation.

That some legislation there might be is conceded by both parties. That some proof of service might become necessary is also conceded by both parties. The disagreement is as to what tribunal, whether the Secretary of the Interior and the Commissioner of Indian Affairs or the court of claims. There was some legislation, and this is urged by defendants in error as proof of their contention; there was, in a sense, a proof of services required, and this is urged by plaintiff in error as a support of his contention. It must therefore be conceded that each contention has plausible support, and the different meanings which the lower courts assigned to the agreement show its ambiguity. The trial court, as we have seen, taking the view contended for by plaintiff in error; the court of appeals, that urged by defendants in error; and decided that the contract referred to the proof of services required by §§ 2103 to 2106.

Those sections provide that no agreement shall be made by any person with any tribe of Indians or individual Indians *not citizens of the United States* (italics ours) unless the agreement be in writing and in duplicate, and be executed before a judge of a court, and "bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it." Many other formalities are prescribed, and it is provided that contracts and agreements made in violation of the section "shall be null and void, and all money or other thing of value, in excess of the amount provided by the Commissioner and the Secretary for such services, may be recovered by suit in the name of the United States, regardless of the amount in controversy."

*By § 2104 it is provided that no [493] money shall be paid under such contract except for fees due thereunder and by the United States, through its officers or agents, and not until a sworn statement be filed with the Commissioner of Indian Affairs, showing each particular act of service, giving date

and fact in detail, "and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid; but if not, it shall be paid in proportion to the services rendered under the contract." It is provided in § 2105 that if any person receives money contrary to the provisions of the preceding section, he shall forfeit the sum paid, and be punished by fine and imprisonment.

It will be observed that these provisions apply to Indians *not citizens of the United States*, and it is pointed out that the Eastern Cherokees became citizens March 3, 1901 (31 Stat. at L. 1447, chap. 868). That may be true, but the foundation of Owen's right to the fee was under an agreement with John Vaile, and the latter's right to engage Owen depended upon a contract with the Indians, made in February and April 1900; that is, a contract which was made before citizenship had been conferred upon the Indians. It certainly can be contended that when the Vaile contract was made, it was subject to the provision of §§ 2103 *et seq.*, and that the approval of the Commissioner of Indian Affairs and the Secretary of the Interior was necessary to give it validity. It is true that it was ratified by the Indians September the 4th, 1901; that is, after they had been made citizens; but the effect of that might be disputed, and there being elements of doubt about it, plaintiff in error and defendants in error well might have supposed the contract would be subject to the provisions of the Revised Statutes, quoted above. The fact that legislation was sought confirms such view. If the Indians, after March 3, 1901, had the same power to contract and the same extent of responsibility as white [494] citizens, their contract would need no confirmation by legislation. But such freedom of contract was certainly not supposed to exist. It is not without importance that the first act passed contained a limitation of it, and adopted the proof of services required by the Revised Statutes. That act conferred jurisdiction on the court of claims to hear and determine the claim of the Indians, and provided that any suit brought under it should "be through attorneys employed and to be compensated in the manner prescribed in §§ 2103 to 2106, both inclusive, of the Revised Statutes of the United States." [32 Stat. at L. 726, chap. 1375, § 68.]

It must therefore have been a proof of services by sworn statement, as provided in the sections referred to, that the parties contemplated. There were no other pro-

visions in existence, and there is not a circumstance to show that in the legislation that was looked forward to there would be provision for a proof of services which should supersede the contract of Vaile with the Indians, and be the means through which Owens would be compensated. The legislation which was finally secured cannot be said to have acquired or provided for a "proof of services" in the sense that those words are used in the contract of plaintiff in error and defendants in error.

The final act was passed March 3, 1903. It made the Eastern Cherokees, so called, including those in the Cherokee Nation, a band or bands for all purposes of § 68 of the act of July 1, 1902 [32 Stat. at L. 726, chap. 1375], and provided that the prosecution of the suit in the court of claims on the part of the Eastern Cherokees should "be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the court of claims upon the termination of such suit." 32 Stat. at L. 996, chap. 994. In other words, it recognized whatever contract of employment that should be made by the Indians with their attorneys, and it gave the court of claims power over the amount of compensation. But that such power might be given, or rather, that there might be a limitation of the amount agreed upon, and therefore a reduction *of the [495] amount to be received by the plaintiff in error under the Vaile contract, was contemplated. The agreement recites that he (plaintiff in error) had been employed by Vaile, and that he agrees "to convey" to defendants in error "the sum of ten thousand dollars (\$10,000) out of the fees so placed" to him "immediately upon the collection, or *in the exact proportion as the said fees may be collected*" (italics ours). It seems to us, therefore, that the contract contemplated two contingencies and provided for them. (1) That the fee of plaintiff in error might receive reduction, even if it should be specifically provided for by legislation. In such case, the amount to be paid to defendants in error would be proportionately reduced. (2) That if the fee, as fixed by the Vaile contract, should be subject to supervision by the Commissioner of Indian Affairs, and the proof of services required as provided by § 2104, then the parties should make such proof independently.

It is contended by plaintiff in error that "the Vaile contract was confessedly invalid and was not enforced, and Owen (plaintiff in error) was not paid by virtue of its validity, but upon 'proof of service.'" The contention as to the invalidity of that con-

tract is made for the first time in a supplemental brief filed by plaintiff in error after the oral argument. The contract had no validity, it is said, "for the simple reason that there were 32,000 Eastern Cherokees, citizens of the United States, who obviously could not be bound by a few of their numbers." The purpose of the contention, no doubt, is to show that the contract was not, and that proof of services was, the ground of the action of the court of claims. And yet it is conceded that to Vaile was assigned 3 per cent of the fee allowed by the court. Why? it may be asked, and what other evidence is there in the record that plaintiff in error had any authority to appear for the Indians except through his engagement by Vaile? He was one of the attorneys of record—how did he become such? May we assume that it was in some other way than the record shows?

496] *The contention, however, has not much relevancy. The agreement sued on states the authority of plaintiff to be the Vaile contract, and the foundation of his power to engage defendants in error. His services and their services get their sanction from that contract, and according to the findings of the trial court he "was paid the full amount of the fees contemplated to be received by him according to the terms of the said contract between him and Dudley & Michener."

Our construction of the contract is fortified by that finding. It is also fortified by the letter which plaintiff in error addressed to the defendants in error April 17, 1905, which is set out in the bill of exceptions, and the subsequent conversation he had with them. It is also fortified by the finding of the trial court that the attorneys of record had absolute control of the distribution of the fees. The latter finding is attacked by plaintiff in error, and it is asserted that it has no justification in the rules of the court of claims, and is contradicted by the fact that fees were allowed others for services. We must take the record as we find it, and under what circumstances fees were allowed others does not appear. But the fact does appear, and we repeat it, because we regard it as especially pertinent, that the plaintiff in error received the fees, and the exact fees, that he expected to receive by his contract with Vaile with aid of legislation, upon which event he promised to pay defendants in error ten thousand dollars (\$10,000) for their services. And there is no denial that they rendered them, and no question is made of their value and efficiency.

Judgment affirmed.

*H. C. COOK COMPANY, Plff. in [497
Err.,
v.

FRANK H. BEECHER, Charles E. Fairchild, Thomas L. James, and William A. Ward.

(See S. C. Reporter's ed. 497-499.)

Federal courts — jurisdiction — patent suit — ancillary action.

A suit by the owner of a patent to make the directors of a corporation answerable for a judgment previously recovered against it for infringing the patent is not within the original jurisdiction of a Federal circuit court unless there is diversity of citizenship, since the suit is neither one upon the patent nor one ancillary to the judgment in the former suit.

[For other cases, see Courts, 553-569, 1040-1085, in Digest Sup. Ct. 1908.]

[No. 659.]

Submitted March 14, 1910. Decided May 16, 1910.

IN ERROR to the Circuit Court of the United States for the District of Connecticut to review a judgment which dismissed, for want of jurisdiction, a suit by the owner of a patent to make the directors of a corporation answerable for a judgment previously recovered against it for infringing the patent. Affirmed.

See same case below, 172 Fed. 166.

The facts are stated in the opinion.

Mr. **Vernice Munger** submitted the cause for plaintiff in error.

Mr. **Talcott H. Russell** submitted the cause for defendants in error.

Mr. Justice **Holmes** delivered the opinion of the court:

This case comes here on the single question of the jurisdiction of the circuit court, certified from the court below. 172 Fed. 166. The judge dismissed the complaint of his own motion, and the defendants in error confine themselves to the suggestion that for that reason the judgment should be reversed at the cost of the plaintiff in error, concurring in the argument that the judgment was wrong. As we are of opinion that the judgment was right, it will be unnecessary to consider that point.

The suit is brought by a Connecticut corporation against residents of Connecticut. We give an abridgment of the complaint.

*The plaintiff is the owner of a pat- [498

NOTE.—On ancillary jurisdiction in the Federal courts—see notes to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. 36 C. C. A. 195, and Rosenbaum Bros. v. Council Bluffs Ins. Co. 3 L.R.A. 190.

ent for finger nail clippers. The defendants, during the time of the acts complained of, were directors in control of another Connecticut corporation, the Little River Manufacturing Company. This company infringed the patent, and the plaintiff brought a suit in equity against it in the same circuit court, which ended in a decree for an injunction, \$12,871 damages, and \$496.35 costs. The defendants voted to continue the sale of the infringing clipper pending the suit, and also voted and caused to be executed a bond of indemnity from their company to the selling agent, against liability for the sale. As directors and as individuals they authorized and brought about such sales, and they directed the defense of the equity suit. In consequence of the expenditures to the foregoing ends, their company became and is insolvent, and the defendants knew that that would be the result of a judgment against it, but did the acts alleged for the purpose of increasing the value of their stock in the company, and of receiving the profits and dividends that might be received from the sale.

The plaintiff's argument is that the defendants and their corporation were joint tortfeasors, and that this is a suit against the defendants for their part in infringing its patent, the judgment against their cotrespasser not having been satisfied. It is unnecessary to speculate whether this is an afterthought, or whether the complaint was framed with intentional ambiguity, so that, if one cause of action failed, another might be extracted from the allegations, or what the explanation may be. But the present interpretation is not the natural interpretation of the complaint. The natural interpretation is that which was given to it by the court below; that it is an attempt to make the defendants answerable for the judgment already obtained. There was no other reason for alleging that judgment with such detail, while, on the other hand, the patent now supposed to be the foundation of the claim is not set forth. The judge was fully warranted in taking this not to be a suit upon a patent. Indeed, it would 499] seem *from his opinion that one of the grounds of jurisdiction urged before him was that this is an action ancillary to the judgment in the former suit, which, of course, it is not, any more than *Stillman v. Combe*, 197 U. S. 436, 49 L. ed. 822, 25 Sup. Ct. Rep. 480; but the argument recognized that the former judgment was the foundation of the present case. Apart from that contention, there can be no question that, as the judge below said, if the directors are under obligations by Connecticut law to pay a judgment against their corpo-

ration, that is not a matter that can be litigated between citizens of the same state, in the circuit court of the United States. The only argument attempted here is that which we have stated and have decided not to be open on the complaint.

Judgment affirmed.

JOHN STOFFELA, Appt.,

v.

M. J. NUGENT.

(See S. C. Reporter's ed. 499-502.)

Equity — quieting title — doing or offering equity.

The purchaser of mortgaged property, under an agreement to pay the lien of the mortgages and the judgments of foreclosure thereon, is not entitled to have his title quieted as against the mortgagee, without paying the mortgage debt, although the mortgagee in bad faith evaded the purchaser's effort to make such payment, and with full knowledge of the facts, and with intent to defraud, procured from the mortgagor a conveyance of a part of the premises, and a new mortgage on the residue, and satisfied of record the former mortgages and judgment liens.

[For other cases, see *Equity*, 301-308, in *Digest Sup. Ct.* 1908.]

[No. 179.]

Argued and submitted April 28, 1910. Decided May 16, 1910.

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which reversed a decree of the District Court of Yuma County, in that territory, quieting the title of a purchaser of mortgaged property upon payment of the mortgage debt, and remanded the cause, with directions to grant the relief sought without such payment. Reversed, with directions to affirm the judgment of the District Court.

See same case below, 10 *Ariz.* 151, 84 *Pac.* 910.

The facts are stated in the opinion.

Mr. J. J. Darlington argued the cause and filed a brief for appellant:

The action brought, being one to quiet title, was one in equity. Such an action has not lost its equitable character by reason of the fact that we have a statute defining and enlarging the original suit in equity.

Costello v. Mulheim, 9 *Ariz.* 422, 84 *Pac.* 906; *Chandler v. Chandler*, 55 *Cal.* 267; *Booth v. Hoskins*, 75 *Cal.* 271, 17 *Pac.* 225; *De Cazara v. Orena*, 80 *Cal.* 132, 22 *Pac.* 74; 217 U. S.

Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249; Brandt v. Thompson, 91 Cal. 458, 27 Pac. 763; Sloane v. Lucas, 37 Wash. 348, 79 Pac. 949; Johnston v. San Francisco Sav. Union, 75 Cal. 134, 7 Am. St. Rep. 129, 16 Pac. 753; Wickliffe v. Owings, 17 How. 47, 15 L. ed. 44; Broderick's Will (Kieley v. McGlynn) 21 Wall. 519, 520, 22 L. ed. 605, 606; Holland v. Challen, 110 U. S. 19, 24, 28 L. ed. 54, 55, 3 Sup. Ct. Rep. 495; Reynolds v. First Nat. Bank, 112 U. S. 405, 410, 411, 28 L. ed. 733, 735, 736, 5 Sup. Ct. Rep. 213; Frost v. Spitley, 121 U. S. 552, 557, 30 L. ed. 1010, 1012, 7 Sup. Ct. Rep. 1129; Gormley v. Clark, 134 U. S. 338, 348, 33 L. ed. 909, 913, 10 Sup. Ct. Rep. 554; Bardon v. Land & River Improv. Co. 157 U. S. 327, 330, 39 L. ed. 719, 720, 15 Sup. Ct. Rep. 650; Roberts v. Northern P. R. Co. 158 U. S. 1, 30, 39 L. ed. 873, 883, 15 Sup. Ct. Rep. 756.

The rule that he who seeks equity must do equity is applied where the adverse equity to be secured or awarded to the defendant grows out of the very controversy before the court, or out of such transactions as the record shows to be a part of its history, or where it is so connected with the cause in litigation as to be presented in the pleadings and proofs, with full opportunity afforded to the party thus recriminated to explain or refute the charges.

Pom. Eq. Jur. §§ 387, 388; Comstock v. Johnson, 46 N. Y. 615; Smith v. Wise, 132 N. Y. 172, 30 N. E. 229; Walling v. Aiken, McMill. Eq. 1; Secrest v. McKenna, 1 Strobl. Eq. 356.

So far from being an independent, unconnected matter, with which Stoffela was without connection, he might, under the law of Arizona, have sustained a suit at law against Nugent to enforce the payment, solely by reason of the privity between them created by Nugent's agreement with Mrs. Heyl to pay the debt.

Johns v. Wilson, 180 U. S. 440, 45 L. ed. 613, 21 Sup. Ct. Rep. 445.

In Hoyt v. Dimon, 5 Day, 479, a mortgagee took from the mortgagor an absolute conveyance, in fraud of the latter's creditors. It was unsuccessfully urged, on behalf of the creditors in a suit to annul the deed, that the mortgage had been absorbed or merged by the subsequent absolute deed,—a recital to which effect on the docket of the foreclosure suit is all there is of the release by appellant claimed in the case at bar.

The equities which must be done or performed by one seeking equity are not such only as the adverse party has the right, in some form of remedy, to enforce.

Story, Eq. Jur. § 301; Brown v. Swann, 10 Pet. 497, 9 L. ed. 508; Stanley v. Gadsby, 10 Pet. 521, 9 L. ed. 518; Spain v. Hamil-

ton (Spain v. Brent) 1 Wall. 604, 17 L. ed. 619; Fitzroy v. Gwillim, 1 T. R. 153.

The maxim "He who seeks equity must do equity" is applied in favor of a defendant who has been guilty of fraud, provided there are equities in his favor.

Loos v. Wilkinson, 113 N. Y. 485, 4 L.R.A. 353, 10 Am. St. Rep. 495, 21 N. E. 392; Veazie v. Williams, 8 How. 134, 161, 12 L. ed. 1018, 1029; Payne v. Dudley, 1 Wash. (Va.) 199; Carlton v. Inlett, 49 Minn. 320, 51 N. W. 1053.

The doctrine of Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271, and Morley Bros. v. Stringer, 133 Mich. 690, 95 N. W. 978, if of importance in the case at bar, is not in accord with the weight of authority.

Clements v. Moore (Clements v. Nicholson) 6 Wall. 299, 18 L. ed. 786; Chatterton v. Mason, 86 Md. 247, 37 Atl. 960; Neel v. Carson, 47 Ark. 430, 2 S. W. 107; Hamilton Nat. Bank v. Halsted, 134 N. Y. 524, 30 Am. St. Rep. 693, 31 N. E. 900; Baldwin v. June, 68 Hun, 287, 22 N. Y. Supp. 852.

Messrs. John J. Hawkins and Thomas Armstrong, Jr., also filed a brief for appellant:

The plaintiff, not having performed the condition upon which he took his deed, and not now offering to perform it, is not in a position to obtain any relief.

2 Pom. Eq. Jur. § 910; 6 Pom. Eq. Jur. § 688; 6 Cyc. Law & Proc. pp. 306, et seq.; Dunlap v. Kelsey, 5 Cal. 181; Littlejohn v. Miller, 5 Wash. 399, 31 Pac. 759.

Equitable decrees may be adapted to any requirement of a case. There is no limit to their variety or application, as called for by the varying circumstances of each particular case.

Robinson v. Clark, 76 Me. 493.

Adverse equities growing out of, or closely connected with, the subject-matter of a suit, are protected by awarding the party the relief to which he is entitled only on condition that he award to his adversary the corresponding right to which he is entitled.

Lynch v. Burt, 67 C. C. A. 305, 132 Fed. 417.

Where the defense is insufficient to justify decreeing a deed void as having been fraudulently obtained, and yet it was obtained under such circumstances as to render it at least unfair for the defendant to retain the full advantage of his bargain, the court may direct that the deed shall stand only as security for the defendant's indemnity in respect of a sum actually due.

Dunn v. Chambers, 4 Barb. 376.

Where a case for relief is made out by the bill, it may be given by imposing conditions on the plaintiff, consistently with the rules of equity, in the discretion of the court.

Waldon v. Bodley, 14 Pet. 156, 10 L. ed. 398.

Before one should, in good conscience, be permitted to reap what he has not sown, or profit by the misfortune, mistake, or undoing of another, or enjoy the fruits of dishonesty or sharp practice, it should be perfectly plain that he is himself free from any intentional wrongdoing.

Henry v. Mayer, 6 Ariz. 103, 53 Pac. 590.

Mr. Eugene S. Ives submitted the cause for appellee:

The maxim that he who seeks equity must do equity only applies when the relief sought by the plaintiff and the right demanded by the defendant belong to or grow out of the same transaction. It has no application where the demand of the defendant is based upon a contract separate and distinct from that which forms the subject of the plaintiff's action.

Mahoney v. Bostwick, 96 Cal. 53, 31 Am. St. Rep. 175, 30 Pac. 1020; 1 Pom. Eq. Jur. §§ 385-387; Otis v. Gregory, 111 Ind. 504, 13 N. E. 39.

A court of equity will not relieve Stoffela from the situation in which he has placed himself by his fraudulent conduct.

Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271; Neblett v. Macfarland, 92 U. S. 101, 23 L. ed. 471; Guckenheimer v. Angervine, 81 N. Y. 394; Davis v. Leopold, 87 N. Y. 620; Milwaukee & M. R. Co. v. Soutter, 13 Wall. 517, 20 L. ed. 543; Lynch v. Burt, 67 C. C. A. 305, 132 Fed. 417; Burt v. C. Gotzian & Co. 43 C. C. A. 59, 102 Fed. 937; Sands v. Codwise, 4 Johns. 598, 4 Am. Dec. 305.

The situation of the appellant is not, in principle, different from the cases in which a grantee under a deed given to defraud the creditors of the grantor has voluntarily paid off encumbrances upon the granted property. In such case, his fraudulent conduct precludes him from being reimbursed for such expenditures.

Daisy Roller Mills v. Ward, *supra*; Morley Bros. v. Stringer, 133 Mich. 690, 95 N. W. 978.

Mr. Justice Holmes delivered the opinion of the court:

This is a complaint in the nature of a bill in equity, brought by the appellee, Nugent, to set aside a deed and mortgage as a cloud upon his title to certain land. The defendant denied the allegations of the complaint, and filed a cross complaint to set aside the deed to the plaintiff. The case was tried before a judge without a jury, and he made findings of fact of which the following is an abridged statement. The land was subject to two mortgages held by the

defendant, upon which a judgment of foreclosure had been rendered, the sum due being \$15,700 and interest. Mrs. Heyl, the mortgagor and owner of the equity, sold and conveyed the land to Nugent on January 4, 1905, he agreeing to procure the payment of the mortgage and judgment liens. On January 9, the day before that fixed for the mortgage sale, the defendant, having knowledge of the conveyance to Nugent, and having evaded Nugent's efforts to pay the mortgage debt, induced Mrs. Heyl to convey a part of the premises to him absolutely, in satisfaction of \$10,000, and to mortgage the residue for \$5,700, and recorded the deeds before Nugent had recorded the deed to him. He also, with fraudulent intent to defeat Nugent's title, it is said, although the possibility is hard to conceive, satisfied of record the former mortgages and judgment liens, the only consideration for his act being the later deed and mortgage given by Mrs. Heyl. On these facts judgment was given for the plaintiff, conditioned upon his paying to the defendant \$15,700, without interest, less \$600 counsel fees and costs. The plaintiff appealed and the supreme court of the territory gave the plaintiff an unconditional judgment, on the ground that "the defendant's conduct was voluntary, in pursuance of his fraudulent scheme, and that he had no claim as against Nugent to be relieved from the consequences of a collateral act. It was thought that the debt from Mrs. Heyl to Stoffela was a matter with which Nugent, in spite of his covenant to pay it, had no concern, the only question being the relative validity of the plaintiff's and defendant's titles. The defendant appealed to this court.

We are of opinion that the judgment appealed from was wrong, and that the judgment of the court of first instance should be affirmed. It is true that the defendant acted fraudulently and knew what he was about. But a man, by committing a fraud, does not become an outlaw and *caput lupinum*. National Bank & L. Co. v. Petrie, 189 U. S. 423, 425, 47 L. ed. 879, 880, 23 Sup. Ct. Rep. 512. He may have no standing to rescind his transaction, but when it is rescinded by one who has the right to do so, the courts will endeavor to do substantial justice, so far as is consistent with adherence to law. See Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 150, 43 L. ed. 108, 113, 18 Sup. Ct. Rep. 808. If Nugent is allowed to have the land free of all charge, and the defendant's claim is extinguished, Nugent gets much more than he bargained for, and the defendant is deprived of his equitable interest in Nugent's covenant to pay the mortgage debt (Johns v.

Wilson, 180 U. S. 440, 40 L. ed. 613, 21 Sup. Ct. Rep. 445), and is made to lose a large sum rightly due to him, not from any necessity of justice, but simply because he has acted badly, and therefore any treatment is good enough for him. It is said that the discharge of the old mortgages was a collateral matter with which Nugent had no concern. If that were true, still justice might forbid Nugent to rely upon it. But it is not correct. The discharge and the new deeds, although different instruments, were parts of one transaction. Each was consideration for the other. As the plaintiff elects to do away with the consideration for the discharge, he must be taken to elect also to give up the discharge; or, to put it in another way, he must restore the defendant to the condition in which he stood before the 502] rescinded deeds were made. The defendant's rights were cut down at least sufficiently by the trial court.

Judgment reversed, with directions to affirm the judgment of the District Court.

CLEMENTE JAVIERRE, Matias Gil, and Felix Ramos, Copartners, Doing Business under the Firm Name of Javierre & Gil, et al., Appts.,

v.

CENTRAL ALTAGRACIA, Incorporated.

(See S. C. Reporter's ed. 502-508.)

Evidence — burden of proof — exceptions.

1. Persons seeking to escape from the obligations of a contract to deliver sugar cane at a specified sugar factory for grinding, because of the happening of a condition subsequent embodied in a proviso in the contract, justifying cancelation if a projected sugar mill should be erected or its construction started by a certain date, are charged with the burden of proving that the identical mill referred to in the contract has been so built or started, although the bill alleges affirmatively a conspiracy to evade the undertaking, by way of replication to the answer setting up the condition. [For other cases, see Evidence, 171-178, in Digest Sup. Ct. 1908.]

Injunction — against violation of contract — remedy at law.

2. Injunctive relief will not be granted in equity against the disposal of sugar cane elsewhere than at the sugar factory designated in a contract with the growers, as a suit for damages will afford adequate relief.

[For other cases, see Injunction, I. b, in Digest Sup. Ct. 1908.]

[No. 171.]

Argued April 26, 1910. Decided May 16, 1910.

APPEAL from the District Court of the United States for Porto Rico to review a decree enjoining the disposal of sugar cane elsewhere than at the sugar factory designated in a contract with the growers. Reversed.†

See same case below, 3 Porto Rico Fed. Rep. 256.

The facts are stated in the opinion.

Mr. Charles Hartzell argued the cause, and, with Mr. Manuel Rodriguez Serra, filed a brief for appellants:

He who avers a fact as a cause of action or defense must maintain his allegation by the greater weight of the evidence.

Mutual Reserve Fund Life Asso. v. Powell, 79 Ill. App. 482; Piper v. Matkins, 8 Kan. App. 215, 55 Pac. 487.

The burden of sustaining the affirmative of an issue does not shift during the progress of a trial, but it is for the party alleging facts constituting the issue, and remains there until the end.

Rapp v. Sarpy County, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242; Vertrees v. Gage County, 75 Neb. 332, 106 N. W. 331; Simonton v. Winter, 5 Pet. 141, 8 L. ed. 75; Adams v. Adams, 21 Wall. 185, 22 L. ed. 504; Knox v. Smith, 4 How. 298, 11 L. ed. 983; Lewis v. Cocks, 23 Wall. 470, 23 L. ed. 71.

Fraud and conspiracy, when alleged as the basis of an action, must be clearly proven in order to warrant a recovery.

Farrar v. Churchill, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771; Gaines v. Nicholson, 9 How. 356, 13 L. ed. 172; United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; Jones v. Simpson, 116 U. S. 609, 29 L. ed. 742, 6 Sup. Ct. Rep. 538; Jacobs v. Van Sickel, 123 Fed. 341.

This case presented, in any event, no ground for equitable relief, and the issuance of an injunction in the premises. The only consistent relief which could be applied for would be in the nature of specific performance.

Under the circumstances disclosed by the bill of complaint, specific performance would not lie.

Grape Creek Coal Co. v. Spellman, 39 Ill. App. 630.

Mr. Hugo Kohlman argued the cause, and Messrs. F. L. Cornwell and N. B. K. Pettingill filed a brief for appellee:

Relief was properly given by injunction instead of by specific performance.

Hendricks v. Hughes, 117 Ala. 591, 23 So. 637; Lumley v. Wagner, 1 De G. M. & G. 604, 6 Eng. Rul. Cas. 652; Jones v. North,

†Leave granted on May 31, 1910, to present petition for rehearing herein within thirty days.

44 L. J. Ch. N. S. 388; *Donnell v. Bennett*, L. R. 22 Ch. Div. 835; *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. 416; *Catt v. Tourle*, L. R. 4 Ch. 654; *Western U. Teleg. Co. v. Union P. R. Co.* 1 McCrary, 558, 3 Fed. 429; *Chicago & A. R. Co. v. New York, L. E. & W. R. Co.* 24 Fed. 521; *Alpers v. San Francisco*, 32 Fed. 503; *General Electric Co. v. Westinghouse Electric Co.* 151 Fed. 677; *Manhattan Mfg. & Fertilizing Co. v. New Jersey Stock Yard & Market Co.* 23 N. J. Eq. 161; *St. Regis Paper Co. v. Santa Clara Lumber Co.* 173 N. Y. 161, 65 N. E. 967; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 11, 43 L. ed. 341, 346, 19 Sup. Ct. Rep. 77; *Joy v. St. Louis*, 138 U. S. 46, 34 L. ed. 857, 11 Sup. Ct. Rep. 243.

When the exception or proviso is in a subsequent substantive clause, the ease contemplated in the enacting or general clause may be fully stated without negating the exception or proviso, as a *prima facie* ease is stated, and it is for the party for whom matter of excuse is furnished by the statute or contract to bring it forward in his defense.

United States v. Cook, 17 Wall. 177, 21 L. ed. 540.

Where an answer which is put in issue admits a fact, and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved.

Clements v. Moore (*Clements v. Nicholson*) 6 Wall. 299, 315, 18 L. ed. 786, 789.

Other courts have decided to the same effect.

Bour v. Kimball, 46 Ill. App. 327; *Nelson v. United States*, 30 Fed. 116; *Lake Shore & M. S. R. Co. v. Felton*, 43 C. C. A. 193, 103 Fed. 227; *Miller v. Shields*, 124 Ind. 170, 8 L.R.A. 406, 24 N. E. 670; *Rowell v. Janvrin*, 151 N. Y. 67, 45 N. E. 398.

Even had the proviso allowing the cancellation of the contract been absolute and self-operative in its terms, thus importing a condition, it would still have been a condition subsequent, of which the burden of proof would still be upon the party to be relieved by its fulfillment.

Den ex dem. Green v. Steelman, 10 N. J. L. 204; *Hotham v. East India Co.* 1 T. R. 645.

506] *Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from a decree enjoining the appellants from delivering sugar cane grown on the haciendas Florentina and Estero to the Central Eureka for the term of five crops, beginning with the crop of the year 1906-7, or so long within that term as the appellee is ready to grind and pay for the same; and also from "selling, donating,

renting, or mortgaging said haciendas," without stipulating for the carrying out of a contract made with the appellee. The contract referred to bound the appellants to have the cane grown on the haciendas ground at the sugar factory of the appellee for the term just stated, at a certain price, with mutual agreements, not necessary to set forth, but, so far as appears, fair, and made upon equal terms. It was subject to a proviso, however, that if, on January 15, 1908, the projected Eureka Central should have been erected, or should be in course of construction, the appellants might cancel the contract, giving notice on October 1, 1907. The notice was given, but the appellee contended that the Eureka Central referred to was abandoned, and that the central relied upon as the ground for the notice was one got up by the appellants, and named Eureka, with a view to getting out of their contract with the appellee.

The findings of fact are not entirely satisfactory upon the point in issue. They set out evidence and avoid a conclusion more definite than that which we shall state. It appears, however, that for some years one Swift had been negotiating for the construction of a Central Eureka, and was continuing his efforts on December 10, 1906, when the contract was made. But in October, 1906, Javierre had telegraphed to him that negotiations with him were at an end, and there was evidence that Javierre and others had met and made an agreement on October 20 to form a corporation to set up the "said central," to be called the Central Eureka, "it being almost sure" that Swift had failed. The parties were to sell their cane to this central for ten years. The [507] court studiously avoids finding that this agreement was made, but does find that if Javierre signed it, he did not consider himself bound by it, and, as has been seen, the contract with the appellee was of later date. The court also finds that it was not generally known that the planters had held the alleged meeting, or were contemplating the erection of the central, and, after stating other details, finds that the appellants have not proved, by a preponderance of evidence, that the contract referred to the Central Eureka started by them, or that the Central Eureka mentioned was other than the one projected by Swift. It ruled that the burden of proof was on the appellants, and thereupon made the decree.

There is some preliminary argument that the finding concerning the continuance of Swift's efforts is not warranted by the pleadings. If this were true, no objection seems to have been made in the court below, where no doubt an amendment would have been allowed, if necessary. But it is a mis-

take. The bill merely alleges that Swift's arrangement failed "during the latter part" of 1906, and qualifies even this by the further allegation that, in the beginning of December, Javierre stated to the officers of the complainant (appellee) that he was still bound to Swift, but that the thing had failed, and that he was disposed to make a contract with them if he could have a clause providing for the case of Swift's success. The only real questions concern the ruling on the burden of proof and the propriety of the relief in such a case as this.

As to the burden of proof, if that really in any way determined the result, the ruling was correct. The appellants were seeking to escape from the contract made by them on the ground of a condition subsequent, embodied in a proviso. It was for them to show that the facts of the condition had come to pass. It is said that the bill alleges affirmatively a conspiracy to evade the undertaking, but that is merely by way of replication to the answer setting up the condition, and is nothing but a specific mode of denying that the condition had 508] been fulfilled. An allegation of fact that is material only as an indirect negative of something to be proved by the other party does not shift the burden of proof. *Starratt v. Mullen*, 148 Mass. 570, 2 L.R.A. 697, 20 N. E. 178. So there is nothing but the general question to be considered, and that is answered by the statement of it, and by repeated decisions of this court. When a proviso like this carves an exception out of the body of a statute or contract, those who set up such exception must prove it. *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 10, 51 L. ed. 681, 685, 27 Sup. Ct. Rep. 407; *Ryan v. Carter*, 93 U. S. 78, 23 L. ed. 807; *United States v. Cook*, 17 Wall. 168, 21 L. ed. 538; *United States v. Dickson*, 15 Pet. 141, 165, 10 L. ed. 689. Therefore, it was for the appellants to prove that the central referred to by the contract had been built or started. It was not enough to prove that a central had been built and called by the same name.

The doubt as to the relief granted below is more serious, and, in the opinion of the majority of the court, must prevail. According to that opinion, a suit for damages would have given adequate relief, and therefore the appellee should have been confined to its remedy at law. Again, the court would not undertake to decree specific performance and to require and to supervise the raising of the crop and the grinding of the sugar, for even the now remaining period of the decree. There is a certain anomaly in granting the half-way relief of an injunction against disposing of the crops elsewhere 54 L. ed.

when the court is not prepared to enforce the performance to accomplish which indirectly is the only object of the negative decree. There is, too, a want of mutuality in the remedy, whatever that objection may amount to, as it is hard to see how an injunction could have been granted against the appellee had the case been reversed. *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 955. Notwithstanding these considerations, I should have preferred to affirm the decree, but, as my reasons have been stated to my brethren, and have not prevailed, it is unnecessary to repeat them now. Decree reversed.

*GUSTAV HOLMGREN, Petitioner, [509
v.
UNITED STATES.

(See S. C. Reporter's ed. 509-524.)

Aliens — naturalization — jurisdiction of state court — power of Congress.

1. Congress, in the exercise of its power under U. S. Const. art. 1, § 8, cl. 4, to establish a uniform rule of naturalization, may confer jurisdiction upon the courts of a state of naturalization proceedings involving admission to citizenship in the United States, and may constitutionally provide for the punishment of false swearing in such a proceeding.

[Naturalization, see Aliens, VII., in Digest Sup. Ct. 1908.]

Aliens — naturalization — false swearing in state court.

2. A conviction can be had in a Federal court for false swearing in naturalization proceedings in a state court, under U. S. Rev. Stat. § 5395, U. S. Comp. Stat. 1901, p. 3654, making punishable by fine and imprisonment the taking or making of a false oath or affidavit under or by virtue of any law relating to the naturalization of aliens, or in any proceeding under any such laws.

[Naturalization, see Aliens, VII., in Digest Sup. Ct. 1908.]

Appeal — questions reviewable — denial of new trial.

3. The denial of a motion for a new trial, raising for the first time the objection that the jury was permitted to take into the jury room the indictment, which contained an indorsement showing the conviction of the accused on a count thereof at a former trial, is not reviewable in the Federal Supreme Court.

[For other cases, see Appeal and Error, 4479-4492, in Digest Sup. Ct. 1908.]

Appeal — objections and exceptions — time for taking.

4. An objection first made on a motion for a new trial, that the court erred in permitting the jury to take into the jury room the indictment, which contained an indorsement of a conviction of the accused on a count thereof at a former trial, will

not be considered by the Federal Supreme Court, in the exercise of its power under Supreme Court rule 35, to notice a plain error not properly reserved, where the record contains all the testimony, and it is ample to sustain the conviction without giving weight to the effect of the indorsement, and the indorsement itself shows that a new trial was granted upon the former conviction, which is quite as likely to have influenced the jury favorably to the accused as was the fact of the former conviction to work to his prejudice.

[For other cases, see Appeal and Error, VI. c, in Digest Sup. Ct. 1908.]

Appeal — objections and exceptions — time for taking.

5. Mere formal objections to the indictment, not affecting substantial rights of the accused, are too late when not specifically pointed out in the demurrer, or otherwise taken advantage of upon the trial.

[For other cases, see Appeal and Error, VI. c, in Digest Sup. Ct. 1908.]

Appeal — refusal to instruct.

6. The refusal to give a requested instruction upon the necessity of corroborating the testimony of an accomplice is not error, where the request assumes that the witness was an accomplice, a conclusion which was controverted, and against which the jury might have found, in the light of the testimony.

[For other cases, see Appeal and Error, 5127-5147, in Digest Sup. Ct. 1908.]

[No. 132.]

Argued and submitted March 9, 1910. Decided May 16, 1910.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a conviction in the District Court for the Northern District of California, for false swearing in naturalization proceedings in a state court. Affirmed.

See same case below, 84 C. C. A. 301, 156 Fed. 439.

The facts are stated in the opinion.

Mr. Marshall B. Woodworth submitted the cause for petitioner:

The courts of the United States have no criminal jurisdiction except that which is given them by the laws of the United States.

United States v. Babeock, 4 McLean, 113, Fed. Cas. No. 14,488.

Criminal statutes should not be extended by implication.

Todd v. United States, 158 U. S. 282, 39 L. ed. 982, 15 Sup. Ct. Rep. 889; *Bolles v. Outing Co.* 175 U. S. 262, 264, 44 L. ed. 156, 157, 20 Sup. Ct. Rep. 94; *United States v. Harris*, 177 U. S. 305, 309, 44 L. ed. 780, 782, 20 Sup. Ct. Rep. 609; *Ex parte McNulty*, 77 Cal. 168, 11 Am. St. Rep. 257, 19

Pac. 237; *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37.

The power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had.

Re Loney, 134 U. S. 372, 374, 33 L. ed. 949, 951, 10 Sup. Ct. Rep. 384.

Perjury is properly punishable only by the jurisdiction where it is committed.

State v. Pike, 15 N. H. 83; *Ex parte Bridges*, 2 Woods, 428, Fed. Cas. No. 1,862; *State v. Shelley*, 11 Lea, 594; *Ross v. State*, 55 Ga. 192, 21 Am. Rep. 278; *State v. Adams*, 4 Blackf. 146; *People v. Kelly*, 38 Cal. 145, 99 Am. Dec. 360; *State v. Kirkpatrick*, 32 Ark. 117; *Rump v. Com.* 30 Pa. 475; *State v. Whittemore*, 50 N. H. 245, 9 Am. Rep. 196; *Spratt v. Spratt*, 4 Pet. 393, 408, 7 L. ed. 897, 902; *Re Loney*, supra; *United States v. Severino*, 125 Fed. 949.

Manifestly, Congress has no right to establish state courts, or, what would amount to the same thing, to endow state courts with jurisdiction. The Constitution never contemplated such a condition of affairs. But, where Congress has exclusive legislation over certain subjects, it may limit the jurisdiction of state courts, or take it away entirely.

United States v. Severino, supra; *Ex parte Knowles*, 5 Cal. 300; *State v. Whittemore and Rump v. Com.* supra; *Re Loney*, 134 U. S. 373, 33 L. ed. 950, 10 Sup. Ct. Rep. 384.

A court is a creature of the Constitution and laws under which it exists. To exercise any power not derived from such Constitution and laws would necessarily be a usurpation.

Ex parte Knowles, 5 Cal. 302.

While Congress cannot confer jurisdiction to naturalize on state courts, still it can, in naturalization proceedings, limit the state court in its mode of proceeding, and can prohibit the state courts from acting, and it actually has done so as to any state court which is not a court of record, and does not have common-law jurisdiction and a seal and clerk.

Ex parte Knowles, 5 Cal. 300; *State v. Whittemore*; *Rump v. Com.* and *Re Loney*, —supra.

State tribunals cannot punish breaches of the United States laws, even though an act of Congress undertakes to give them the authority. Neither can perjury against the United States be punished in the states as an offense against the states.

2 Bishop, *Crim. Law*. § 866.

The converse is equally true. Federal tribunals cannot punish breaches of the state laws in Federal courts, such as perjury committed in the state courts.

People v. Kelly, 38 Cal. 145, 99 Am. Dec. 360.

It was error for the trial court to permit the jury, on the retrial, to take with them to the jury room the indictment in the case, indorsed on the back of which was the fact that the petitioner had previously been found guilty of the same identical charge upon which he was being tried.

14 Enc. Pl. & Pr. p. 972; *Ogden v. United States*, 50 C. C. A. 380, 112 Fed. 523.

An exception to the general rule that an appellate court will not consider objections first raised on appeal exists in the case of errors apparent on the face of the record; these may be considered by the court, though not objected to below.

2 Cyc. Law & Proc. pp. 678, 715; *Fuller v. Ferguson*, 26 Cal. 546; *Bennett v. Butterworth*, 11 How. 669, 13 L. ed. 859; *Garland v. Davis*, 4 How. 131, 11 L. ed. 907; *Kentucky Life & Acci. Ins. Co. v. Hamilton*, 11 C. C. A. 42, 22 U. S. App. 386, 548, 63 Fed. 93; *Macker v. Thomas*, 7 Wheat. 530, 5 L. ed. 515.

When, from the whole case, manifest injustice has been done, the appellate court will remedy the error, notwithstanding that no objection was made.

Ringgold v. Haven, 1 Cal. 108.

When the whole record is brought up, the court may reverse upon a defect not noticed below, and even upon its own notice of one not pointed out by counsel.

Garland v. Davis, 4 How. 131, 143, 11 L. ed. 907, 911.

If error is apparent upon any part of the record, it is open to review, whether it is found in the bill of exceptions or elsewhere.

Snydam v. Williamson, 20 How. 427, 15 L. ed. 978.

The appellate court will notice a plain error in the record, even though there be no assignment of error.

United States v. Pena, 175 U. S. 500, 44 L. ed. 251, 20 Sup. Ct. Rep. 165; *Stevenson v. Barbour*, 140 U. S. 48, 35 L. ed. 338, 11 Sup. Ct. Rep. 690; *Rowe v. Phelps*, 152 U. S. 87, 38 L. ed. 365, 14 Sup. Ct. Rep. 622.

No presumption can be made in favor of the judgment of a lower court where error is apparent in the record.

United States v. Wilkinson, 12 How. 246, 13 L. ed. 974; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244.

The trial court erred in failing to warn the jury of the danger in convicting a defendant on the testimony of an accomplice.

1 Greenl. Ev. 6th ed. p. 493; 12 Cyc. Law & Proc. p. 453; *United States v. Ybanez*, 53 Fed. 536; *United States v. Flemming*, 18 Fed. 907; *United States v. Harries*, 2 Bond, 311, Fed. Cas. No. 15,309; *United States v. Smith*, 2 Bond, 323, Fed. Cas. No. 16,322; 54 L. ed.

United States v. McKee, 3 Dill. 546, Fed. Cas. No. 15,685; *United States v. Lancaster*, 2 McLean, 431, Fed. Cas. No. 15,556; *United States v. Reeves*, 38 Fed. 404; *United States v. Van Leuven*, 65 Fed. 81; *United States v. Sykes*, 58 Fed. 1004; *United States v. Kessler*, Baldw. 22, Fed. Cas. No. 15,528; *United States v. Sacia*, 2 Fed. 758; *People v. Bonney*, 98 Cal. 278, 33 Pac. 98; *United States v. Babcock*, 3 Dill. 581, Fed. Cas. No. 14,487; *United States v. Goldberg*, 7 Biss. 175, Fed. Cas. No. 15,223; *United States v. McKee*, 3 Dill. 551, Fed. Cas. No. 15,686; *Blashfield*, Instructions to Juries, p. 485; *Solander v. People*, 2 Colo. 48; *Cheatham v. State*, 67 Miss. 335, 19 Am. St. Rep. 310, 7 So. 204; *People v. Sternberg*, 111 Cal. 11, 43 Pac. 201; *People v. Strybe* (Cal.) 36 Pac. 3; *United States v. Neversen*, 1 Mackey, 152; *United States v. Bicksler*, 1 Mackey, 341; *State v. Hyer*, 39 N. J. L. 598; *State v. Haney*, 19 N. C. (2 Dev. & B. L.) 390; *State v. Miller*, 97 N. C. 484, 2 S. E. 363; *Hanley v. United States*, 59 C. C. A. 153, 123 Fed. 849; *Martin v. State*, 36 Tex. Crim. Rep. 632, 36 S. W. 587, 38 S. W. 194.

The question whether or not Werta was an accomplice should have been submitted to the jury.

Bell v. State, 39 Tex. Crim. Rep. 677, 47 S. W. 1010; *Rios v. State* (Tex. Crim. Rep.) 48 S. W. 505; *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799; *People v. Curlee*, 53 Cal. 604; *Hankins v. State* (Tex. Crim. Rep.) 47 S. W. 992; *People v. Barker*, 114 Cal. 617, 46 Pac. 601; *People v. Compton*, 123 Cal. 403, 56 Pac. 44.

One sovereign cannot make use of the municipal courts of another state to enforce its penal laws. As to its judicial powers and its penal laws, the government of the United States is as much an independent state and separate government as Great Britain or France or any of the United States.

United States v. Campbell, Tappan (Ohio) 29; *Worthington v. Masters*, 1 Hall, Journal Jurisprudence, 205; *State v. Rutter*, 12 Niles Register, 117; *United States v. Smith*, 4 N. J. L. 36; *United States v. Lathrop*, 17 Johns. 9; *Brown v. United States*, 2 Am. L. T. N. S. 467; *Meade v. Deputy Marshal*, 2 Wheeler, C. C. 570; *Jackson v. Rose*, 2 Va. Cas. 36; *Davison v. Champlin*, 7 Conn. 249; *Ely v. Peck*, 7 Conn. 242; *State v. Penney*, 10 Ark. 629; *People v. Sweetman*, 3 Park. Crim. Rep. 373; *Brigham v. Clafflin*, 31 Wis. 611, 11 Am. Rep. 623; *Newell v. National Bank*, 12 Bush, 59; *Chesapeake & O. R. Co. v. American Exch. Bank*, 92 Va. 502, 44 L.R.A. 449, 23 S. E. 935, 10 Ann. Cong. 893; *contra*, *State v. Wells*, 2 Hill, L. 694; 43 Am. Law Rev. p. 852.

Assistant Attorney General Fowler argued the cause and filed a brief for respondent:

The Federal courts have jurisdiction to inflict punishment for the offense of perjury committed in naturalization proceedings had in state courts.

Re Loney, 134 U. S. 372, 374, 33 L. ed. 949, 951, 10 Sup. Ct. Rep. 384; *United States v. Severino*, 125 Fed. 949; *Schmidt v. United States*, 66 C. C. A. 389, 133 Fed. 264.

Naturalization proceedings in state courts are valid.

Campbell v. Gordon, 6 Cranch, 176, 182, 3 L. ed. 190, 192; *Stark v. Chesapeake Ins. Co.* 7 Cranch, 420, 3 L. ed. 391; 2 Cyc. Law & Proc. pp. 111, 112.

The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject of review by writ of error.

Henderson v. Moore, 5 Cranch, 11, 12, 3 L. ed. 22; *Marine Ins. Co. v. Young*, 5 Cranch, 187, 191, 3 L. ed. 74, 75; *McLanahan v. Universal Ins. Co.* 1 Pet. 170, 183, 7 L. ed. 98, 104; *United States v. Buford*, 3 Pet. 12, 32, 7 L. ed. 585, 591; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 301, 23 L. ed. 898, 901; *Kerr v. Clappitt*, 95 U. S. 188, 24 L. ed. 493; *Newcomb v. Wood*, 97 U. S. 581, 583, 24 L. ed. 1085, 1086; *Mattox v. United States*, 146 U. S. 140, 147, 36 L. ed. 917, 920, 13 Sup. Ct. Rep. 50; *Haws v. Victoria Copper Min. Co.* 160 U. S. 303, 313, 40 L. ed. 436, 439, 16 Sup. Ct. Rep. 282; *Ogden v. United States*, 50 C. C. A. 380, 112 Fed. 525.

The trial court's attention was not called to the fact that said indictment, with the indorsement complained of thereon, was handed to the jury when the same was done, but it was first mentioned in the motion for a new trial; and no objection having been made and the court's ruling thereon required at the time the alleged error occurred, it affords no ground for a new trial.

Cook v. State, 4 Tex. App. 268; *Anschlicks v. State*, 6 Tex. App. 536; *State v. Tucker*, 75 Conn. 203, 52 Atl. 741; *Forbes v. Com.* 90 Va. 551, 19 S. E. 164; *Cargill v. Com.* 93 Ky. 581, 20 S. W. 782; *St. Louis, I. M. & S. R. Co. v. Higgins*, 53 Ark. 467, 14 S. W. 653; *St. Louis, I. M. & S. R. Co. v. Sweet*, 60 Ark. 556, 31 S. W. 571; *State v. Shores*, 31 W. Va. 499, 13 Am. St. Rep. 875, 7 S. E. 413; *Smalls v. State*, 105 Ga. 675, 31 S. E. 571; *Maynard v. Fellows*, 43 N. H. 259; *Gardner v. Kimball*, 58 N. H. 203; *Clapp v. Clapp*, 137 Mass. 184.

The record fails to disclose that the petitioner was prejudiced by the fact that the indictment, with the indorsement complained of thereon, was in possession of the

jury; and the mere fact that such indorsement was in their possession, and might have been or was read by them, affords no sufficient ground for a new trial.

12 Enc. Pl. & Pr. p. 599; *Harvey v. State*, 35 Tex. Crim. Rep. 561, 34 S. W. 623; *State v. Shores*, supra; *Green v. State*, 38 Ark. 314; *Herrold v. Com.* 10 Ky. L. Rep. 70, 8 S. W. 196.

No instructions requested should be given which assume as a matter of fact that which is not conceded or established by uncontradicted proof.

Knickerbocker L. Ins. Co. v. Foley, 105 U. S. 353, 26 L. ed. 1056; *Second Nat. Bank v. Hunt*, 11 Wall. 394, 20 L. ed. 190; *Washington & G. R. Co. v. Gladmon*, 15 Wall. 409, 21 L. ed. 116; *Merchants' Mut. Ins. Co. v. Baring*, 20 Wall. 159, 161, 22 L. ed. 250, 251.

A party cannot assign for error the refusal of an instruction to which he has not a right to the full extent as stated, and in its precise terms.

Catts v. Phalen, 2 How. 376, 381, 11 L. ed. 306, 307.

Where there is evidence introduced to support a plea, but the court is not requested to charge the jury upon the issue raised, the failure of the court to do so cannot be assigned for error.

United States Exp. Co. v. Kountze Bros. 8 Wall. 342, 19 L. ed. 457; *Carter v. Carusi*, 112 U. S. 478, 484, 28 L. ed. 820, 822, 5 Sup. Ct. Rep. 281.

Mr. Justice Day delivered the opinion of the court:

The petitioner, Gustav Holmgren, was convicted and sentenced in the district court of the United States for the northern district of California of the crime of false swearing in naturalization proceedings, in violation of § 5395 of the *Revised [516 Statutes of the United States (U. S. Comp. Stat 1901, p. 3654)]. The judgment was affirmed by the circuit court of appeals. 84 C. C. A. 301, 156 Fed. 439. The conviction was upon the third count of the indictment, which charged that in a naturalization proceeding, upon the application of one Frank Werta for admission to citizenship in the United States, pending September 21, 1903, in the superior court of the city and county of San Francisco, California, a court of record of the state of California, with common-law jurisdiction, a seal, and a clerk, the petitioner swore falsely in making the material statement, under oath, that he, the said Gustav Holmgren, had been acquainted with the said Frank Werta in the United States during the five years immediately preceding the application for naturalization, whereas, in truth and in fact, as he then

well knew, the said Werta had not resided continuously in the United States for a period of five years, and the said Holmgren had not known the said Werta for more than four years prior to said application.

The principal question in the case is whether, under § 5395, United States Revised Statutes, a conviction can be had in a Federal court for a false oath in naturalization proceedings had in a state court.

Preliminarily to a consideration of the proper construction of this section, we may notice the contention of the petitioner that there is no constitutional power in Congress to confer jurisdiction upon the courts of a state in naturalization proceedings, involving admission to citizenship in the United States.

Article 1, § 8, clause 4, of the Constitution of the United States, vests in Congress the power to establish an uniform rule of naturalization. Acting under this constitutional authority, from the earliest history of the government, Congress has passed acts regulating the naturalization of aliens, admitting them to citizenship in the United States, and has authorized such proceedings in the state as well as Federal courts. The validity of such proceedings by virtue of the [517] power conferred *by acts of Congress has been recognized from an early day. *Campbell v. Gordon*, 6 Cranch, 176, 182, 3 L. ed. 190, 192; *Stark v. Chesapeake Ins. Co.* 7 Cranch, 420, 3 L. ed. 391. The naturalization acts of the United States, from the first one, in 1790 [1 Stat. at L. 103, chap. 3], have conferred authority upon state courts to admit aliens to citizenship. *Van Dyne, Naturalization*, p. 11, and the following.

It is undoubtedly true that the right to create courts for the states does not exist in Congress. The Constitution provides (art. 3, § 1) that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish. But it does not follow that Congress may not constitutionally authorize the magistrates or courts of a state to enforce a statute providing for a uniform system of naturalization, and defining certain proceedings which, when complied with, shall make the applicant a citizen of the United States. This Congress had undertaken to do in making provision for the naturalization of aliens to become citizens of the United States in a certain class of state courts,—those of record having common-law jurisdiction, a clerk and a seal. U. S. Rev. Stat. § 2165, U. S. Comp. Stat. 1901, p. 1329, since superseded by the act of June 29, 1906 (34 Stat. at L. 596, 54 L. ed.

chap. 3592, U. S. Comp. Stat. Supp. 1909, p. 97).

The question is not here presented whether the states can be required to enforce such naturalization laws against their consent, for it appears that the Constitution of the state of California, in § 5, article 6, and the statutes in § 76 of the Code of Civil Procedure of that state, grant to the courts the power of naturalization, and the right to issue papers therefor. Unless prohibited by state legislation, state courts and magistrates may exercise the powers conferred by Congress under such laws. *Re Stephens*, 4 Gray, 559. The indictment charges that Werta made application as an alien to be admitted to citizenship in the United States, the proceeding was had, and false oath charged was taken, under authority of the statutes of the United States. The present proceeding was to prosecute the petitioner for alleged false swearing under *an [518] oath administered under authority of a law of the United States. Where such is the case we think the Congress of the United States may constitutionally provide for the punishment of such offenses, whether the oath is taken before a Federal court or officer, or before a state court or officer, acting under authority derived from the act of Congress. See *Re Loney*, 134 U. S. 372, 374, 33 L. ed. 949, 950, 10 Sup. Ct. Rep. 584.

We come, then, to the question whether the section under which the proceeding was had authorizes a prosecution for perjury when committed in naturalization proceedings in other than Federal courts. As we have seen, the statutes of the United States confer jurisdiction to admit aliens to citizenship in the United States, not only on Federal courts, but also upon certain state courts, and § 5395 of the Revised Statutes provides:

"In all cases where any oath or affidavit is made or taken under or by virtue of any law relating to the naturalization of aliens, or in any proceedings under such laws, any person taking or making such oath or affidavit, who knowingly swears falsely, shall be punished by imprisonment not more than five years nor less than one year, and by a fine of not more than one thousand dollars."

The terms of this section are certainly broad enough to include an oath or affidavit, whether taken in a Federal court or a state court, for the requirement of the statute is that such oath or affidavit be made or taken under or by virtue of any law relating to naturalization of aliens, or in any proceedings under any such laws. The false oath in question was taken under and by virtue of the Federal statutes regulating naturalization, and in a proceeding

authorized under such laws, although in a state court.

It is contended, however, that the history of this section (5395), and the effect of the revision of the laws embodied in the Revised Statutes of 1873, makes it applicable only to false swearing in the courts of the United States in such naturalization proceedings as may be therein instituted. As 519] carried *into the Revised Statutes, this section was taken from § 1 of the act of July 14, 1870, being an act to amend the naturalization laws and to punish crimes against the same, etc. 16 Stat. at L. 254, chap. 254. Section 4 of that act was as follows:

"And be it further enacted, that the provisions of this act shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization shall be commenced, had, or taken, or attempted to be commenced; and the courts of the United States shall have jurisdiction of all offenses under the provisions of this act, in or before whatsoever court or tribunal the same shall have been committed."

In codifying the statutes, the 1st section of the act of July 14, 1870, was made § 5395 of the Revised Statutes, and is part of title 70, chapter 4, "Crimes against Justice." Sections 2 and 3 of the act were made §§ 5424 to 5428 of the Revised Statutes, and part of chapter 5, U. S. Comp. Stat. 1901, pp. 3668-3670, entitled "Crimes against the Operations of the Government." Section 4 of the act of July 14, 1870, was made § 5429 of the Revised Statutes, and reads as follows:

"The provisions of the five preceding sections shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization may be commenced or attempted to be commenced."

The argument is that, inasmuch as § 5395 is not one of the "five preceding sections," it is to be inferred that Congress intended to give jurisdiction to the Federal courts for violation of that section only in naturalization proceedings in the Federal courts, and not to include false swearing in naturalization proceedings before any court, which would include a state court. But we cannot agree to this contention. The Revised Statutes are the result of the revision and codification of the laws under authority of an act of Congress, whose purpose it was not to create a new system of laws, but to codify and arrange former laws, omitting re-520] dundant or obsolete *enactments, and making such amendments and changes as were necessary to correct contradictions, supply omissions, and amend imperfections

in the original text. 14 Stat. at L. 75, chap. 140.

The courts will not infer that Congress, in revising and consolidating the laws, intended to change their policy, in the absence of a clear expression of such purpose. *United States v. Ryder*, 110 U. S. 729, 740, 28 L. ed. 308, 312, 4 Sup. Ct. Rep. 196. No reason is suggested for a change of the purposes of the law in the separation of the sections according to the codification in the manner we have stated. The purpose of the laws was still the same, and when we interpret this section of the statutes, in view of its origin, we think there can be no doubt of its meaning. The act of July 14, 1870, made its provision applicable to all proceedings had before any court in which naturalization proceedings might be commenced, and gave to the courts of the United States jurisdiction of all such offenses committed before any tribunal, state or Federal. The language of § 5395 is broad enough to include proceedings in any court, and, considered in the light of its adoption from laws of the same purport, we have no doubt of the intention of Congress to continue to include all such proceedings.

It is next contended that the court erred in permitting the indictment to go to the jury, and be taken with them into the jury room, which indictment contained an indorsement thereon, showing the conviction of the accused on the third count thereof at a former trial. The proceedings in this respect are thus set out in the record:

"Thereupon, and before the jury retired to deliberate upon their verdict, the clerk of the court handed to the jury the forms of verdict with the indictment in the case. That said indictment was taken by them to the jury room, and retained by them during their entire deliberations in the cause. That the jury retired at 12:30 o'clock, and later returned to the court with a verdict of guilty on the third count of said indictment. That at the time said indictment was handed to *the jury by the officials of [521 the court, and was taken by said jury to the jury room, there were the following indorsements upon said indictment: 'Form No. 168. Back of cover of indictment, with plea and judgment. Arraigned Nov. 2, 1905. Mch. 14, 1906. Pleaded not guilty. Tried April 5, 6, 7, 1906. Verdict not guilty on the 1st and 2d counts of the indictment, and guilty on the 3d count of the indictment. April 13, 1906. New trial is granted.'"

It would be sufficient to say of this objection that it was not taken until a motion was made for a new trial, which motion, with the accompanying affidavits to the effect that the jury had read and considered the indorsements upon the indictment, was

considered, and the motion overruled by the trial court. It has been frequently decided that the allowance or refusal of a new trial rests in the sound discretion of the trial court, and its action in that respect cannot be made the basis of review by writ of error from this court. *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 301, 23 L. ed. 898, 901; *Kerr v. Clappitt*, 95 U. S. 188, 24 L. ed. 493; *Newcomb v. Wood*, 97 U. S. 581, 583, 24 L. ed. 1085, 1086.

It is contended by the petitioner that a contrary view to that taken by the circuit court of appeals in this case was taken in *Ogden v. United States*, 50 C. C. A. 380, 112 Fed. 523, circuit court of appeals of the third circuit. In that case, however, it appeared that the court below refused to consider the motion and affidavit showing that the indictment, with an indorsement of a former conviction thereon, had been taken to and kept in the jury room during their deliberations. The court recognized the rule that the overruling of a motion for a new trial is not a subject of review in an appellate court, but found that the court below had refused to consider the motion and affidavits, and declined to exercise its discretion, as it was its duty to do. It is true the court, after finding that reversible error had been committed by the failure to entertain the motion for a new trial, deemed it was its duty not merely to remand, so that the motion might be considered by the court below, but itself passed upon the motion for 522] a new *trial. The primary basis, however, upon which the court acted, was the failure of the court below to consider the motion for a new trial,—a circumstance which does not exist here. To the like effect is *Mattox v. United States*, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50, where the court below refused to entertain affidavits showing the reading of a newspaper, containing an unfavorable article, during the deliberations of the jury, and also damaging remarks of an officer in charge of the jury during the progress of the trial. In both cases the basis of the action of the reviewing court was the refusal of the courts below to exercise the discretion vested in them by law.

But it is urged that, notwithstanding the objection was first taken in this case upon the motion for a new trial, this court may notice a plain error not properly reserved in the record. Undoubtedly the court has this authority and does sometimes exercise it.

But an examination of the record in this case does not satisfy us that we should exercise this right to review an error not properly reserved, and require the granting of a new trial because of the indorsements upon the indictment sent to the jury, together 54 L. ed.

with the forms of verdict. The record contains all the testimony, and is ample to sustain the conviction of the defendant without giving weight to the effect of this indorsement. The indorsement itself shows that a new trial was granted upon the former conviction on the third count. This action of the court in setting aside what the jury had formerly done is quite as likely to influence the jury favorably to the accused, as was the fact of former conviction by the jury to work to his prejudice.

We do not mean to indicate that such indorsements should be permitted to go to a jury, or that the fact of former conviction should be urged or referred to in the progress of the trial. It is undoubtedly the correct rule that the jury should be kept free from all such extraneous and improper influences. But in this case we do not find in the record any reason for the exercise of the authority granted to us under *the 35th rule, to notice a plain error [523 not properly reserved.

It is further urged that the indictment, in the third count thereof, does not properly charge an offense against Holmgren. It is true that in the third count it appears that the name of Frank Werta, the alien, was written by mistake for that of Gustav Holmgren, in averring that the witness was duly and properly sworn, but this count also contains the averment that "the said Gustav Holmgren, having taken such oath to testify, as aforesaid, did then and there wilfully," etc., and "contrary to the said oath, testify in substance and to the effect," etc. This objection does not appear to have been specifically pointed out in the demurrer or otherwise taken advantage of upon the trial. In this proceeding it is too late to urge such objections to a matter of form unless it is apparent that it affected the substantial rights of the accused. *Rev. Stat. § 1025*, U. S. Comp. Stat. 1901, p. 720; *Connors v. United States*, 158 U. S. 408, 411, 39 L. ed. 1033, 1034, 15 Sup. Ct. Rep. 951; *Armour Packing Co. v. United States*, 209 U. S. 56, 84, 52 L. ed. 681, 695, 28 Sup. Ct. Rep. 428.

It is further alleged that the court erred in refusing to give the following request to charge concerning the testimony of Frank Werta, the alien seeking to be naturalized in the proceeding:

"I charge you that if you believe the testimony of the witness Frank Werta, then that said witness was an accomplice in crime with the defendant; and I instruct you that before you can convict said defendant, the testimony of the witness Frank Werta should be corroborated by the testimony of at least one witness, or strong corroborating circumstances."

It may be doubtful whether Werta can be

regarded as an accomplice, as the record tends to show that he had no part in procuring the testimony of Holmgren, and in no wise induced him to make the oath which was the basis for the proceedings. Be that as it may, the request did not properly state the law, as it assumed that Werta was an accomplice,—a conclusion which was controverted, and against which the jury might have found in the light of the testimony. It 524] is *undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them. But no such charge was asked to be presented to the jury by any proper request in the case, and the refusal to grant the one asked for was not error.

Other questions are raised in the case as to the admissibility of certain testimony; we have examined them and find nothing prejudicial to the rights of the petitioner.

The judgment of the Circuit Court of Appeals is therefore affirmed.

Affirmed.

SOUTHERN RAILWAY COMPANY, Petitioner,

v.

JOSEPHINE KING. (No. 140.)

SOUTHERN RAILWAY COMPANY, Petitioner,

v.

INEZ KING, by Her Next Friend, Mrs. Josephine King. (No. 141.)

(See S. C. Reporter's ed. 524-539.)

Commerce — state regulation — railroad crossings.

1. A state may regulate, at least, in the

NOTE.—On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* 13 L. R. A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; and *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158.

On the duty of railroad companies to give warning signals at crossings—see note to *Chesapeake & O. R. Co. v. Steele*, 29 C. C. A. 90.

State limitation of speed as to interstate or mail trains.

The Georgia statute involved in *SOUTHERN R. Co. v. KING* was sustained in *Southern R. Co. v. Grizzle*, 131 Ga. 287, 62 S. E. 177, as against the contention that, as applied to an interstate train, it amounted to an unlawful interference with interstate commerce. But it seems reasonably certain that if the facts set out in the offer of

absence of congressional action upon the same subject-matter, the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the trains which shall be required under such circumstances.

[For other cases, see *Commerce*, 111. g, in Digest Sup. Ct. 1908.]

Pleading — sufficiency of answer — attacking regulations of grade crossings.

2. General averments in an amended answer in an action to recover damages from a railway company for a wrongful death caused by violation of Ga. Civ. Code, § 2222, requiring the slackening of speed at highway crossings, that such statute violates the commerce clause, and is a direct burden upon and impedes traffic, and impairs the usefulness of the railway company's facilities for that purpose, and that it is impossible to observe the statute in carrying mails and in interstate commerce business, are not sufficient as against demurrer, since they are mere conclusions, and do not show the number or location of the crossings at which the railway company will be required to check the speed of its trains, nor that the particular crossing is not a dangerous one.

[For other cases, see *Pleading*, 111. h, in Digest Sup. Ct. 1908.]

[Nos. 140, 141.]

Argued April 6, 7, 1910. Decided May 16, 1910.

TWO WRITS of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review judgments which affirmed judgments of the Circuit Court for the Eastern Division of the Northern District of Georgia, in favor of plaintiffs in an action to recover damages from a railway company, for a wrongful death caused by failure to observe a state statute requir-

proof at the trial in the principal case shall be shown to exist, the statute must be pronounced invalid.

The great danger to life and limb attending the operation of trains at a high rate of speed through populous communities justifies statutory or municipal regulation of the speed of interstate trains within the settled portion of municipalities. *Erb v. Morasch*, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819, affirming 60 Kan. 251, 56 Pac. 133; *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730.

And this is true though the railway carries the United States mail. *Peterson v. State*, 79 Neb. 132, 14 L.R.A.(N.S.) 292, 126 Am. St. Rep. 651, 112 S. W. 306.

A fortiori, such an ordinance will not constitute an unlawful interference with the operation of mail trains running exclusively within the confines of a state. *Whitson v. Franklin*, 34 Ind. 392.

ing the slackening of speed at highway crossings. Affirmed.

See same case below, 87 C. C. A. 284, 160 Fed. 332.

The facts are stated in the opinion.

Mr. John J. Strickland argued the cause, and, with Messrs. A. P. Thom, Hamilton McWhorter, and McDaniel, Alston, & Black, filed a brief for petitioner:

The amendment filed by the defendant below, alleging that the blow-post statute is void because a burden upon interstate commerce, was in proper form and conformed to the laws of Georgia on the subject, and properly raised the constitutional question mentioned therein.

Savannah, F. & W. R. Co. v. Hardin, 110 Ga. 433, 35 S. E. 681; Brown v. State, 114 Ga. 60, 39 S. E. 873; Sayer v. Brown, 119 Ga. 542, 46 S. E. 649.

When a constitutional question is not made or passed upon in the law court, the court of review will not consider it, though afterward argued there. The reverse of the proposition is likewise true.

Butler v. Merritt, 113 Ga. 241, 38 S. E. 751; Laffitte v. Burke, 113 Ga. 1000, 39 S. E. 433; State v. Henderson, 120 Ga. 781, 48 S. E. 334; Newkirk v. Southern R. Co. 120 Ga. 1048, 48 S. E. 426; Parham & Co. v. Potts-Thompson Liquor Co. 127 Ga. 303, 56 S. E. 460.

The evidence of Dewberry, offered and rejected by the court, properly raised the constitutional question. All that is required by the laws of Georgia is that the question shall be raised below, and be passed on directly or indirectly, and appear in the record, either in the pleadings or the evidence, or other parts of the record.

Parham & Co. v. Potts-Thompson Liquor Co. and Savannah, F. & W. R. Co. v. Hardin, supra; Newman v. State, 101 Ga. 534, 28 S. E. 1005; Laffitte v. Burke, 118 Ga. 1001, 39 S. E. 433.

Commerce among the states, consists, among other things, in intercourse and traffic, including in these terms the transportation and transit of persons and property, and the instrumentalities thereof.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; McCall v. California, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321.

There is no reserved power in the states to in any way regulate interstate commerce. Where the apparent exercise of power has been upheld by the courts, the power was either the mere declaration of a common-

law duty, as applied to the instrumentalities of interstate commerce, or the exercise of some other reserved power not pertaining to commerce.

Cooke, Commerce Clause of Fed. Const. pp. 111-124; Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561; 3 Elliott, Railroads, p. 1156.

If the authority to regulate an interstate railroad train at a public crossing is embraced in the police power of a state, that authority must be so exercised as not to burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for the traffic.

Illinois C. R. Co. v. Illinois, 163 U. S. 154, 41 L. ed. 111, 16 Sup. Ct. Rep. 1096; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; Jacobson v. Massachusetts, 197 U. S. 25, 49 L. ed. 649, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. ed. 23, 73; Simnot v. Davenport, 22 How. 227, 16 L. ed. 243; Missonri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; McLean v. Arkansas, 211 U. S. 547, 53 L. ed. 319, 29 Sup. Ct. Rep. 206; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Cooke, Commerce Clause of Fed. Const. p. 109; Mobile County v. Kimball, supra; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Prentice & E. Commerce Clause of Fed. Const. p. 61; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; McCall v. California, supra; Brennan v.

Titusville, 153 U. S. 289, 28 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

The statute under review is unconstitutional and void as to interstate railroads, for the following reasons: There is no common-law duty on a carrier to check its trains at a crossing, so as to stop if any person or thing should be thereon, and there is no reserve power in a state to impose such burden on an interstate carrier.

The act, as applied to through trains, is unreasonable. The reasonableness or unreasonableness of a state enactment in a given case will determine whether or not the same is a proper exercise of police power.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 301, 43 L. ed. 708, 19 Sup. Ct. Rep. 465.

The act in effect is to regulate an interstate carrier, and, thus, interstate commerce. So long as Congress does not pass any law to regulate commerce among the several states, it thereby indicates its own will that such commerce shall be free and untrammelled; and any regulation of the subject by the state is repugnant to such freedom.

Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732.

The effect of the statute is to burden, impede, and to impair the usefulness of the facilities of interstate carriers for such traffic.

Illinois C. R. Co. v. Illinois, supra; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 346, 51 L. ed. 215, 27 Sup. Ct. Rep. 90.

A pleading that, for the want of particularity, would be dismissed on special demurrer, if not amended, is good as against a general demurrer.

Bryan v. Macon, 91 Ga. 530, 18 S. E. 351; Pullman Palace Car Co. v. Martin, 92 Ga. 161, 18 S. E. 364; Blackstone v. Central R. Co. 105 Ga. 380, 31 S. E. 90; Miller v. Merchants' & M. Transp. Co. 115 Ga. 1009, 42 S. E. 385.

Mr. Reuben R. Arnold argued the cause and filed a brief for respondents:

The court is not bound by the mere conclusion of the pleader that the statute is a burden on interstate commerce. The railway company claims that, under a certain state of facts which exist on this particular railway, compliance with this blow-post law is an unreasonable burden on interstate commerce. Ought not the facts which sustain this claim to be so explicitly pleaded as to enable the court to determine for itself

whether compliance with this law is an unreasonable burden?

Parham & Co. v. Potts-Thompson Liquor Co. 127 Ga. 303, 56 S. E. 460; Newkirk v. Southern R. Co. 120 Ga. 1048, 48 S. E. 426.

Incidental effect on interstate commerce does not vitiate state legislation.

Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 133, 18 Sup. Ct. Rep. 289.

Cases which control the case at bar are as follows:

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 286, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Gladson v. Minnesota, 166 U. S. 430, 41 L. ed. 1065, 17 Sup. Ct. Rep. 627; Hennington v. Georgia, 163 U. S. 300, 41 L. ed. 168, 16 Sup. Ct. Rep. 1086; Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819.

Mr. Justice Day delivered the opinion of the court:

These cases were tried together in the circuit court, and were so considered in the circuit court of appeals, and will be so disposed of here. In No. 140, Josephine King brought her suit in the superior court of Habersham county, Georgia, to recover \$10,000 against the Southern Railway Company for the wrongful death of her husband, killed while riding in a buggy, at a crossing of the defendant's railway. The alleged negligence was the violation of a certain statute of the state of Georgia, in that the company failed to check and to keep checking "the [531 speed of its train while approaching the crossing at which her husband was killed.

In case No. 141, the action was brought by Inez King, by her next friend, Josephine King, in the same court, because of injuries received at the same time and place, and in alleged violation of the same statute. Both cases were removed to the United States circuit court for the eastern division of the northern district of Georgia. Upon trial, verdicts and judgments was rendered against the railroad company. These judgments were affirmed in the circuit court of appeals for the fifth circuit. 87 C. C. A. 284, 160 Fed. 332. The cases were then brought here by writs of certiorari.

The Federal question presented concerns the validity of the statute of the state of Georgia for violation of which a recovery was had, it being the contention of the petitioner that the statute is in violation of the interstate commerce clause of the Federal Constitution, in that it is an illegal burden upon and a regulation of interstate com-

merce. This statute is found in § 2222 of the Civil Code of Georgia, and reads as follows:

"There must be fixed on the line of said roads at the distance of 400 yards from the center of each of said crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road."

It has been frequently decided in this court that the right to regulate interstate commerce is, by virtue of the Federal Constitution, exclusively vested in the Congress of the United States. The states cannot pass any law directly regulating such commerce. Attempts to do so have been declared unconstitutional in many instances, 532] *and the exclusive power in Congress to regulate such commerce uniformly maintained. While this is true, the rights of the states to pass laws not having the effect to regulate or directly interfere with the operations of interstate commerce, passed in the exercise of the police power of the state, in the interest of the public health and safety, have been maintained by the decisions of this court. We may instance some of the cases of this nature in which statutes have been held not to be a regulation of interstate commerce, although they may affect the transaction of such commerce among the states. In *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, it was held to be within the police power of the state to require locomotive engineers to be examined and licensed. In *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418, a law regulating the heating of passenger cars and requiring guard posts on bridges, was sustained. In *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 286, 43 L. ed. 702, 19 Sup. Ct. Rep. 465, it was held to be a valid enactment to require railway companies operating within the state of Ohio to cause three of its regular passenger trains to stop each way daily at every village containing over 3,000 inhabitants. In *Erb v. Morasch*, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819, it was held that a municipal ordinance of Kansas City, Kansas, although applicable to interstate trains, which restricted the speed of all trains within the city limits to 6 miles an hour, was a valid exertion of the police power of the state. In the case of *Crutcher v. Kentucky*, 141 U. S. 47, 35 54 L. ed.

L. ed. 649, 11 Sup. Ct. Rep. 851, this court said:

"It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts, and sharp curves, and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect, to some extent, the *operations [533 of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

On the other hand, it has been held to be an illegal attempt to regulate interstate commerce to require interstate passenger trains to stop at county seats when adequate train service had already been provided for local traffic. *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722. In *Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90, it was held that orders of a state railroad commission which directed the stopping of interstate trains at certain local stations, where adequate transportation facilities had already been provided, was an unlawful attempt to regulate interstate commerce, and repugnant to the Federal Constitution.

Applying the general rule to be deduced from these cases to such regulations as are under consideration here, it is evident that the constitutionality of such statutes will depend upon their effect upon interstate commerce. It is consistent with the former decisions of this court, and with a proper interpretation of constitutional rights, at least, in the absence of congressional action upon the same subject-matter, for the state to regulate the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the train which shall be required under such circumstances. Crossings may be so situated in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb. On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such *crossings would be practically de- [534 structive of the successful operation of such

passenger trains. Statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the state to enact.

It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself, by proper averments and showing, within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution. *Tyler v. Registration Ct. Judges*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; *Turpin v. Lemon*, 187 U. S. 51, 60, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; *Hooker v. Burr*, 194 U. S. 415, 48 L. ed. 1046, 24 Sup. Ct. Rep. 706; *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736.

In the case at bar, the Federal question was sought to be raised by an amendment to the answer. The answer originally filed was general in its nature, and did not set up the defense of violation of the Federal Constitution. The amendment filed set up that the railroad company was engaged in interstate commerce, and, at the time of the injury complained of, was operating an interstate train; and after setting up the statute of the state of Georgia for a violation of which the company was sued, averred that it was inoperative as to the defendant's train, because in violation of § 8, article 1, of the Federal Constitution, giving Congress the power to regulate commerce, and further stated:

"Your defendant further shows that the statute of Georgia is not a reasonable regulation of the police power of the state, to secure the safety of passengers, but that the statute is a direct burden on and impedes the interstate traffic being done by this defendant, and impairs the usefulness of its facilities for such traffic.

"Defendant further shows that it is impossible to observe *said statute and carry the mails as defendant is required to carry them under the contract it has with the government; and it is likewise impossible to do an interstate business and at the same time comply with the terms of said statute.

"Wherefore it says that said statute is inoperative as to it, and it should not be required to comply with the same on its interstate line of railroad.

"All which it stands ready to verify, and

prays that it be hence discharged with its reasonable cost."

On oral demurrer to this amendment to the answer, the same was held insufficient, and it was dismissed. Petitioner's counsel further sought to raise the Federal question by an offer of proof at the trial by an engineer of the company, as follows:

"I expect to prove that between the South Carolina line and Atlanta there are practically one hundred road crossings, or between eighty-five and one hundred public road crossings; that the distance is 101 miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others farther apart, but, on the average, making a crossing to the mile, almost. We expect to show further, that, to observe the statute, and check and keep checking, so as to have a train under control, and to stop should any person or thing be on the crossing, would consume from five to ten minutes for each crossing, dependent, of course, upon the weight and length of the train and the grade; but it would make an average of seven or eight minutes. We wish to show that this train was made up and known as No. 39, the vestibule train which runs from the city of Washington, through the states of Virginia, North Carolina, South Carolina, and Georgia; that it was carrying passengers from one state to another, also carrying an express car with freight on it, from one state to another. We wish and expect to show that obedience *to that crossing [536 act would hinder, and practically prevent, interstate business being done by the defendant railroad. We wish to show the condition I have just stated all existed at the time this accident occurred, on the 11th of October, 1903."

This testimony was excluded and an exception was taken. It is apparent from this outline of the state of the record that when this testimony was offered there was no answer on file in the case under which it would be competent. A demurrer had been sustained to the amendment to the answer, and the case stood upon the complaint and the general issue filed by the defendant. It is elementary that the proof must conform to the allegations, and that without proper allegations, testimony cannot be admitted. We are then remitted to the question, Did the court err in sustaining the demurrer to the amended answer? The circuit court of appeals held, and we think correctly, that an inspection of that document shows that it did not contain a proper averment of the facts, which would show that the operation of the statute in controversy was such as to unlawfully regulate interstate commerce, and therefore deprive the railway company

of its constitutional right to carry on such commerce unhampered by such illegal restrictions. The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution, and a direct burden upon, and impedes, interstate traffic, and impairs the usefulness of defendant's facilities for that purpose; that it is impossible to observe the statute in carrying mails and in interstate commerce business. But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional. They do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains, so as to interfere with their successful operation. For aught that appears* as allegations of fact in this answer, the crossing at which this injury happened may have been so located and of such dangerous character as to make the slackening of trains at that point necessary to the safety of those using the public highway, and a statute making such requirement only a reasonable police regulation, and not an unlawful attempt to regulate or hinder interstate commerce. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained.

The learned counsel for the petitioner insists that under the decisions in Georgia, in the absence of a special demurrer requiring a more particular statement, the answer was sufficient. It is enough to say that we have examined those decisions, and think that they do not indicate a departure from the general rule that a pleading must state facts, and not mere conclusions, and that the want of definite allegations essential to a cause of action or defense renders a pleading subject to demurrer.

We find no error in the judgment of the Circuit Court of Appeals, and the same is affirmed in both cases.

Affirmed.

Mr. Justice Holmes, dissenting:

The petitioner set up as a defense to these actions that the statute under which it was sued was such a burden on commerce among the states as to violate art. 1, § 8, of the Constitution of the United States,—a pure issue of law. If, in order to try this issue intelligently, it was necessary to take evidence of facts, I think the court was bound to hear such evidence, even without any specific allegation of the facts that would maintain it, as it is the court's duty to know

and to declare the law. But I *leave [538 that question on one side because the petitioners did not stop with the naked proposition, but alleged further that "it is impossible to observe said statute and carry the mails as the defendant is required to carry them under the contract it has with the government; and it is likewise impossible to do an interstate business and at the same time comply with the terms of said statute." These are pure allegations of fact. They mean on their face that the requirement that the engineer at every grade crossing should have his train under such control as to be able to stop, if necessary, to avoid running down a man or wagon crossing the track, requires such delays as to prevent, or seriously to interfere with, commerce among the states. They refer to physical conditions and to physical facts; they can refer to nothing else. I think it obvious that they mean that the crossings are so numerous as to make the requirement impracticable, since I can think of nothing but the number of them that would have that effect.

The statement may be called a conclusion, but it is a conclusion of fact, just as the statement that a certain liquid was beer is a conclusion of fact from certain impressions of taste, smell, and sight. If the objection to the pleading had been that more particulars were wanted, although, for my part, I think it would have been unnecessarily detailed and prolix pleading to set forth what and where the crossings were, the pleading should not have been rejected, but the details should have been required. The petitioner showed that it was ready to give them, by its offer of proof. But evidently the answer was not held bad on that ground. Presumably, at least, as stated by the counsel for the petitioner, it was held bad on the ground taken by the supreme court of that state, that although the requirement was impracticable, it was the law. *Central R. Co. v. Hall*, 109 Ga. 367, 369, 34 S. E. 605. See 87 C. C. A. 284, 289, 160 Fed. 332, 337. *For it is to be observed [539 further that the facts involved were public facts, and that although the court might not take notice of the precise situation of particular crossings, it well might take notice, as the supreme court of Georgia seems to have taken notice in the case just mentioned, that they were numerous. See *United States v. Rio Grande Dam & Irrig. Co.* 174 U. S. 690, 698, 43 L. ed. 1136, 1139, 19 Sup. Ct. Rep 770, and for many cases, *Wigmore*, Ev. §§ 2575, 2580; 16 Cyc. Law & Proc. p. 862; 17 Am. & Eng. Enc. Law, 2d. ed. p. 904. Again, if any merely technical objection had been thought fatal to the de-

fense, the petitioner undoubtedly would have met it by a further amendment to its plea.

It seems to me a miscarriage of justice to sustain liability under a statute which possibly, and I think probably, is unconstitutional, until the facts have been heard which the petitioner alleged and offered to prove. I think that the judgment should be reversed.

I am authorized to say that Mr. Justice White concurs in this dissent.

OTIS G. FREEMAN, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 539-546.)

Imprisonment for debt — punishing embezzlement — imprisonment in lieu of restitution.

1. Imprisonment for debt, contrary to the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369), § 5, is not provided by the Philippine Penal Code, under which a person convicted of embezzlement may be made to suffer a subsidiary imprisonment for a term not exceeding one third of the principal penalty, in lieu of the restoration of the sum found to be embezzled, with the right to be released from such subsidiary punishment upon payment of the money wrongfully converted.

[For other cases, see Imprisonment for Debt, in Digest Sup. Ct. 1908.]

Criminal law — embezzlement — dismissing prosecution without prejudice to civil action.

2. The dismissal of a criminal prosecution in the Philippine Islands for embezzlement, without prejudice to the right to institute a civil action, is not demanded because the restoration of the money found to be embezzled, or, in lieu thereof, the suffering of a subsidiary imprisonment for a term not exceeding one third of the principal penalty, will not bar the creditor from a civil action to recover any sum which he may prove to be due in excess of the sum wrongfully converted.

[No. 156.]

Submitted April 12, 1910. Decided May 16, 1910.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a conviction in the Court of First Instance for the City of Manila of the crime of embezzlement. Affirmed.

See same case below, 9 Philippine, 168.

The facts are stated in the opinion.

NOTE.—On the constitutionality of imprisonment for debt—see note to Carr v. State, 34 L.R.A. 634.

Messrs. Aldis B. Browne, Alex. Britton, and W. A. Kineaid submitted the cause for plaintiff in error:

The judgment and sentence were erroneous because in effect imprisonment for debt.

Carr v. State, 106 Ala. 35, 34 L.R.A. 634, 54 Am. St. Rep. 17, 17 So. 350.

The money judgment rendered in this case for the benefit of the creditor is in no sense a fine.

United States v. Hutchinson, 5 Philippine, 343; United States v. Lineses, 5 Philippine, 631; United States v. Glefonea, 5 Philippine, 570; United States v. Cortes, 7 Philippine, 149; United States v. Macasaet, 11 Philippine, 449.

Mr. Evans Browne also submitted the cause for plaintiff in error.

Assistant Attorney General Fowler submitted the cause for defendant in error:

The prohibition is against imprisonment for debt due by contract, and not for a liability arising out of the embezzlement of money.

Re Wheeler, 34 Kan. 96, 8 Pac. 276; Musser v. Stewart, 21 Ohio St. 353; People ex rel. Brennan v. Cotton, 14 Ill. 415; Moore v. Green, 73 N. C. 397, 21 Am. Rep. 470; McCool v. State, 23 Ind. 131; Charleston v. Oliver, 16 S. C. 52.

If, as a part of the punishment, the criminal be required to return money stolen or embezzled, or to make reparation for an injury caused by the crime, or to suffer additional imprisonment in case the money is not returned or reparation made, either of the alternative punishments is suffered in consequence of, and for, the criminal offense, and the imprisonment, if it be the punishment actually inflicted, is not for debt.

Smith v. McLendon, 59 Ga. 527; Jeffries v. Laurie, 27 Fed. 198; State v. Nicholson, 67 Md. 1, 8 Atl. 817; Harris v. Bridges, 57 Ga. 407, 24 Am. Rep. 495; State v. Wallin, 89 N. C. 580; Re Ebenhack, 17 Kan. 622; Re Beall, 26 Ohio St. 195.

Mr. Justice Day delivered the opinion of the court:

This is a writ of error to the supreme court of the Philippine Islands, seeking to reverse a judgment of that court affirming a conviction of the plaintiff in error of the crime of *estafa* (embezzlement), growing out of the alleged misappropriation of some 3,500 pesos received by him as manager of the steamship department of Castle Brothers, Wolf & Sons. The sentence of the court of first instance was as follows:

"The court therefore finds the defendant, Otis G. Freeman, guilty of embezzlement of the sum of p3,500, Philippines *cur-[541

rency, as charged in the complaint, the property of Castle Brothers, Wolf & Sons, and does sentence him to imprisonment, *presidio correccional*, in the insular prison of Bilibid, for the period of one year and nine months, and to restore to said Castle Brothers, Wolf & Sons the sum of p3,500, Philippines currency, or in lieu thereof to suffer subsidiary imprisonment for the period of seven months, and to pay the costs of prosecution."

Upon appeal to the supreme court of the Philippine Islands, that court, after reviewing the testimony, said:

"This finding, of course, will in no way estop the said firm of Castle Brothers, Wolf & Sons from recovering in a civil action from the defendant any sum or sums in excess of this amount which are found to be due to the said firm. The only [charge] change which this finding makes in the conclusion of the lower court is in the amount of money which must be returned to the firm of Castle Brothers, Wolf & Sons by virtue of this sentence.

"[It is the judgment of this court that the sentence of the lower court be affirmed with this modification, and that the defendant be sentenced to be imprisoned for a period of one year and nine months of *presidio correccional*, and to restore to Castle Brothers, Wolf & Sons the sum of p2,078.50, or, in lieu thereof, to suffer subsidiary imprisonment for a period not to exceed one third of the principal penalty, and to pay the costs." [9 Philippine, 176, 177.]

The statute of the Philippine Islands defining the crime is article 535 of the Philippine Code:

"(1) Philippine Penal Code, article 535:

"The following shall incur the penalties of the preceding articles:

"5. Those who, to the prejudice of another, shall appropriate or misapply any money, goods, or any kind of personal property which they may have received as a deposit on commission for administration or 542] in any other *character producing the obligation to deliver or return the same, or who shall deny having received it."

Other pertinent articles of the Philippine Code are as follows:

"(2) Philippine Penal Code, article 534:

"A person who shall defraud another in the substance, quantity, or quality of things he may deliver to him, by virtue of an obligation, shall be punished—

"2. With that [the penalty] of *arresto mayor* in its medium degree to *presidio correccional* in its minimum degree, if it should exceed 250 pesetas and not be more than 6250 pesetas.

54 L. ed.

"(3) Philippine Penal Code, article 28:

"Those [penalties] of *presidio correccional* and *prision correccional* shall last from six months and one day to six years.

"That of *arresto mayor* shall last from one month and one day to six months.

"(4) Philippine Penal Code, article 49:

"In case the property of the person punished should not be sufficient to cover all the pecuniary liabilities, they shall be satisfied in the following order:

"1. Reparation of the injury caused and indemnification of damages.

"2. Indemnification to the state for the amount of stamped paper and other expenses which may have been incurred on his account in the cause.

"3. The costs of the private accuser.

"4. Other costs of procedure, including those of the defense of the person prosecuted, without preference among the persons interested.

"5. The fine.

"Should the crime have been of those which can be *prosecuted only at the [543 instance of a party, the costs of the private accuser shall be satisfied in preference to the indemnification to the state.

"(5) Philippine Penal Code, article 50:

"If the person sentenced should not have property to satisfy the pecuniary liabilities included in Nos. 1, 3, and 5 of the preceding article, he shall be subject to a subsidiary personal liability at the rate of one day for every 12½ pesetas, according to the following rules:

"1. If the principal penalty imposed is to be undergone by the criminal confined in a penal institution, he shall continue therein, although said detention cannot exceed one third of the term of the sentence, and in no case can it exceed one year.

"(6) Philippine Penal Code, article 52:

"The personal liability which the criminal may have incurred by reason of insolvency shall not exempt him from the reparation of the injury caused and indemnification of damages if his pecuniary circumstances should improve; but it shall exempt him from the other pecuniary liabilities included in Nos. 3 and 5 of article 49."

It is the contention of the plaintiff in error that the judgment of the supreme court of the Philippine Islands should be reversed for two reasons: first, because the judgment was, in substance and effect, an imprisonment for debt; second, because the court should have dismissed the case without prejudice to the right to institute a civil action for the rendition of accounts.

As to the first contention, that the judg-

ment and sentence amounted to imprisonment for debt: The act of July 1, 1902, providing for the administration of the affairs of the civil government of the Philippine Islands (32 Stat. at L. 691, chap. 1369), provides, among other things, in § 5 thereof, "that no person shall be imprisoned for debt." This provision was carried to the 544] Philippine Islands in the *statute quoted with a well-known meaning, as understood when thus adopted into the Bill of Rights for the government of the Philippines, and must be so interpreted and enforced. *Kepner v. United States*, 195 U. S. 100, 124, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797, 1 A. & E. Ann. Cas. 655.

Statutes relieving from imprisonment for debt were not intended to take away the right to enforce criminal statutes and punish wrongful embezzlements or conversions of money. It was not the purpose of this class of legislation to interfere with the enforcement of such penal statutes, although it provides for the payment of money as a penalty for the commission of an offense. Such laws are rather intended to prevent the commitment of debtors to prison for liabilities arising upon their contracts. *McCool v. State*, 23 Ind. 129; *Musser v. Stewart*, 21 Ohio St. 353; *Ex parte Cottrell*, 13 Neb. 193, 13 N. W. 174; *Re Ebenhack*, 17 Kan. 618, 622.

This general principle does not seem to be controverted by the learned counsel for the plaintiff in error, and the argument is, that inasmuch as the money adjudged is to go to the creditor, and not into the public treasury, imprisonment for the nonpayment of such sum is an imprisonment for debt. But we think that an examination of the statutes of the Philippines and the judgment of the supreme court shows that the imposition of the money penalty was by way of punishment for the offense committed, and not a requirement to satisfy a debt contractual in its nature, or be imprisoned in default of payment.

Section 5, article 535, of the Penal Code, provides that those who, to the prejudice of another, shall appropriate or misapply any money, goods, or any kind of personal property which they may have received as a deposit on commission for administration, or in any other character producing the obligation to deliver or return the same, or who shall deny having received it, shall incur certain *penalties. As a further means of punishing the act done in violation of the statute, he may, under the Philippine Code, be made to suffer a subsidiary imprisonment for a term not to exceed one third of the principal penalty in lieu of the restoration of the sum found to be embezzled. The sentence of the supreme court of the Philip-

pine Islands, including the imprisonment in lieu of the payment of the sum found due, was because of the conviction for the violation of this statute; in other words, the money payment was part of the punishment, and was not imposed as an imprisonment for nonpayment of the debt, regardless of the criminal offense committed. The sentence and each part of it was imposed because of the conviction of the defendant of the criminal offense charged.

This situation is not changed because the sentence provides for a release from the subsidiary imprisonment upon payment of the money wrongfully converted. The sentence imposed, nevertheless, includes the requirement to pay money because of the conviction of the offense. The requirement that there shall be no imprisonment for debt was intended to prevent the resort to that remedy for the collection of contract debts, and not to prevent the state from imposing a sentence for crime which should require the restoration of the sum of money wrongfully converted in violation of a criminal statute. The nonpayment of the money is a condition upon which the punishment is imposed. *State v. Nicholson*, 67 Md. 1, 8 Atl. 817.

We do not think that the sentence and judgment violated the statute providing that no person shall be imprisoned for debt.

As to the second objection, that the court should have dismissed the cause without prejudice to the right of instituting a civil action, the argument seems to be that this should be so because the payment of the money adjudged, or suffering the "subsidiary imprisonment" imposed, *would not, as [546 the supreme court adjudged, bar the creditor from a civil action to recover any sum which he might prove to be due in excess of the judgment rendered in the present case. "In other words," says the learned counsel, "imprisonment will satisfy (and therefore discharge) the judgment here rendered, leaving another and wholly civil action open to the complainants, to recover any additional sum arising out of the same cause of action." This possibility is said to be so wholly unjust that it ought not to be permitted to exist in any country subject to American jurisdiction. But we fail to appreciate the weight of this argument. We see no reason why the court may not, for the purpose of the criminal proceedings, find the amount wrongfully converted by the defendant for the purpose of fixing the sentence in this case, leaving the firm defrauded to recover in a civil action any sum or sums in excess of that amount which may be found due and remain unpaid to them. We are unable to perceive in this action such violation of the fundamental principles of justice as required the dismissal of the criminal action,

leaving the parties complaining to the remedies of a civil suit.

We find no error in the judgment of the court below, and the same is affirmed.

Affirmed.

547] *COLUMBIA HEIGHTS REALTY COMPANY, Plffs. in Err.,

v.

CUNO H. RUDOLPH et al.,† Commissioners of the District of Columbia.

(See S. C. Reporter's ed. 547-560.)

Appeal—assignment of error—plain error not assigned.

1. The option reserved under Supreme Court rules 21 and 35, of examining the transcript of record on writ of error or appeal, in order that the court may be advised as to whether there has occurred any "plain error" which obviously demands correction, will be exercised where the defendants in error have made no objection to the failure to assign error, under U. S. Rev. Stat. §§ 997, 1012, U. S. Comp. Stat. 1901, pp. 712, 716, but have submitted the case upon the specifications of error in the brief of plaintiffs in error.

[For other cases, see Appeal and Error, 3577-3594, in Digest Sup. Ct. 1908.]

Public improvements—reassessment of benefits.

2. A reassessment of benefits under the act of June 6, 1900 (31 Stat. at L. 668, chap. 809), upon lots benefited by the extension of Eleventh street, in the District of Columbia, is properly made, where the earlier act of March 3, 1899 (30 Stat. at L. 1344, chap. 431), under which the original assessment of benefits was made, had been superseded by the new enactment at the time of the court's refusal to confirm such assessment, which refusal was assumed by the parties to amount to an annulment of the award of benefits by the first jury.

[Assessments for public improvements, see Public Improvements, II., in Digest Sup. Ct. 1908.]

Limitation of actions—public improvements—new action.

3. A proceeding for the reassessment of

benefits upon lots benefited by the extension of Eleventh street, in the District of Columbia, taken under the act of June 6, 1900, superseding the act of March 3, 1899, cannot be regarded as a new action, for the purpose of applying the statute of limitations, but must be deemed a continuance of the old proceeding.

[For other cases, see Limitation of Actions, 599-605a, in Digest Sup. Ct. 1908.]

Appeal—objections to impaneling jury—when too late.

4. Objections that the court did not examine the jurors in the proceeding under the act of June 6, 1900, for the reassessment of benefits upon lots benefited by the extension of Eleventh street, in the District of Columbia, as to whether they possessed the qualifications required by § 4 of that act, nor administer to them the oath required by statute, come too late when not made at the time the jurors were accepted and sworn.

[For other cases, see Appeal and Error, VI. c, in Digest Sup. Ct. 1908.]

Public improvements—oath of jurors—journal entry.

5. A journal entry in the proceeding under the act of June 6, 1900, for the reassessment of benefits upon lots benefited by the extension of Eleventh street, in the District of Columbia, which recites that the oath was administered to the jurors in accordance with the provisions of that statute, imports that the statutory oath was followed as far as applicable.

[Assessments for public improvements, see Public Improvements, II., in Digest Sup. Ct. 1908.]

Appeal—reversible error—examining jurors after impaneling.

6. The refusal of the court, after the acceptance and swearing of the jury, in a proceeding under the act of June 6, 1900, for the reassessment of benefits upon lots benefited by the extension of Eleventh street, in the District of Columbia, to permit counsel to examine the jurors as to their qualifications, is not reversible error, although counsel was not present at the time they were accepted and sworn, where, under the statute and the warning order, the parties interested were required to be present and "continue in attendance" until the matter was ended.

[For other cases, see Appeal and Error, 5149a-5152, in Digest Sup. Ct. 1908.]

Judgment—res judicata—award in condemnation proceedings—damages—benefits.

7. Confirmation of that part of the verdict of the jurors in the proceeding under the act of March 3, 1899, for the extension of Eleventh street, in the District of Columbia, which awards damages to the land not taken, from being left high above or below the grade, is not *res judicata* as to the benefits accruing to the same land, which the statute says shall not be less than 50 per cent of the damages sustained.

[For other cases, see Judgment, 656-667, in Digest Sup. Ct. 1908.]

†Substituted as parties defendant April 12, 1910, on suggestion of the retirement of Henry B. F. Macfarland et al.

NOTE.—On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

Appeal — curing errors in instructions — assessing benefits from street extension.

8. An instruction in the proceeding under the act of June 6, 1900, for the reassessment of benefits upon the lots benefited by the extension of Eleventh street, in the District of Columbia, is not open to the objection that the jury was not limited to the benefits resulting immediately from the opening of the street, but might consider all enhancement which might come from subsequent improvement of or upon the street, where the court eliminated any doubt as to its meaning by other parts of its charge, in which the jury was told that the benefits must come immediately from the extension of the street, and not from any subsequent improvement.

[For other cases, see Appeal and Error, 4731-4736, in Digest Sup. Ct. 1908.]

Public improvements — assessments of benefits — judicial review.

9. The power of the court to review the award made by the jury appointed to view the premises and hear the testimony in the proceeding under the act of June 6, 1900, for the reassessment of benefits resulting from the extension of Eleventh street, in the District of Columbia, is limited to plain errors of law, misconduct, or grave error of fact, indicating plain partiality or corruption.

[Assessments for public improvements, see Public Improvements, II., in Digest Sup. Ct. 1908.]

Appeal — in condemnation proceedings — review of facts.

10. Whether or not the court below erred in holding the award of the jury appointed under the act of June 6, 1900, to reassess the benefits resulting from the extension of Eleventh street, in the District of Columbia, not unreasonable, nor so unjust as to require a new trial before another jury, is not open in the Federal Supreme Court, where it has not all the evidence before it, and there is no agreed statement of facts.

[For other cases, see Appeal and Error, 4744-4959, in Digest Sup. Ct. 1908.]

[No. 157.]

Argued April 12, 13, 1910. Decided May 16, 1910.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, confirming a reassessment of benefits resulting from the extension of Eleventh street, in that District. Affirmed.

See same case below, 31 App. D. C. 112. The facts are stated in the opinion.

Messrs. **Arthur A. Birney** and **Leo Simmons** argued the cause and filed a brief for plaintiffs in error.

Mr. James Francis Smith argued the cause and, with **Mr. Edward H. Thomas**, filed a brief for defendants in error.

Mr. Justice Lurton delivered the opinion of the court:

In 1899, the then commissioners for the District of Columbia filed a petition in the supreme court of the District for the condemnation of land necessary for the extension of Eleventh street northwest. In due course the statutory jury of seven filed an award of damages and of benefits. The verdict was confirmed so far as it awarded damages for the property, but was disaffirmed and vacated as to the amount of benefits. The award, so far as it assessed the damages, was accepted, and the money has long since been paid; but from the order setting aside or vacating the assessment of benefits, the commissioners appealed to the court of appeals of the District, where that order was reversed, and the proceeding remanded to the lower court, with direction to vacate the order setting aside the amount of benefits, "and for such further proceedings in the case, according to law, as may be just and right." The supreme court of the district, on March 4, 1904, in obedience to the mandate of the court of appeals, set aside its former order vacating the assessment of benefits by the jury, and thereupon heard the matter upon exceptions of the defendants to the award, and upon the motion of the petitioners for a confirmation of the award of benefits. Whereupon an order was made denying confirmation, and ordering that "in case the petitioners desire to proceed further in the premises, they shall, within a reasonable time, make application to this court for directions to the marshal to summon a jury of twelve, as provided by law." From this order refusing confirmation, the petitioners prayed an appeal, but did not perfect same. The next step in the case was taken on June 17, 1904, when the landowners moved the court *to dis- [550] miss the proceeding, assigning as reason therefor that "the law under which such proceeding must be had has been repealed;" and, second, "for failure of petitioners to proceed as required by the order of this court of March 4, 1904." Upon this motion the court, on June 17, 1904, made an order in these words:

"Upon consideration of the proceedings herein and the motion filed by Abner Greenleaf and others on June 17th, A. D. 1904, it is by the court, this 17th day of June, A. D. 1904, ordered, that the petitioners in the above-entitled cause, within sixty days from the date hereof, proceed in the matter of the reassessment of benefits herein, in accordance with the terms and provisions of the act of Congress approved June 6, 1900, entitled, 'An Act for the Extension of Columbia Road East of Thirteenth Street,

and for Other Purposes.' " [31 Stat. at L. 665, chap. 809.]

Thereupon the then commissioners, in continuance of the old proceeding under the act of March 3, 1899 (30 Stat. at L. 1344, chap. 431), filed an amended and supplementary proceeding according to the terms of the later act of June 6, 1900 (31 Stat. at L. 668, chap. 809), in which, after setting out all of the proceedings under the pending petition, they prayed for a reassessment of benefits against abutting and adjacent owners whose lands had not been assessed for benefits as required both under the former and later acts of Congress in respect to the extension of Eleventh street northwest. Under this amended petition a jury of seven was impaneled, who returned an assessment of benefits against the plaintiffs. This, after exceptions had been overruled, was confirmed. A writ of error was taken by the plaintiffs in error to the court of appeals for the District of Columbia, where the judgment of the supreme court was affirmed. Thereupon this writ of error was sued out.

This protracted litigation is now before us, unaccompanied by an assignment of errors.

551] *The act of February 9, 1893, chap. 74, § 8, 27 Stat. at L. 436, U. S. Comp. Stat. 1901, p. 573, concerning writs of error and appeals from the court of appeals of the District of Columbia, provides that they shall be allowed in the "same manner and under the same regulations as heretofore provided for in cases of writs of error on judgments or appeals from decrees rendered in the supreme court of the District of Columbia." The procedure referred to is that found in § 705, Rev. Stat., which provides that such writs or appeals shall be allowed in the "same manner and under the same regulations as are provided in cases of writs of error on judgments or appeals from decrees rendered in a circuit court."

Secs. 997 and 1012, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 712, 716), require the transcript from the circuit court to be filed with an assignment of error, and the 35th rule of this court prescribes the character of such assignments, and that "no writ of error or appeal shall be allowed until such assignment of errors shall have been filed, . . ." and that "errors not assigned according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned." This rule refers in terms only to writs of error and appeals under § 5 of the act of March 3, 1891 [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549], but it is, in effect, extended to every writ of error or appeal to or from any court by rule 21, which requires that

the brief shall set out "a specification of the errors involved." This "specification of error" must conform to rule 35 in particularity. Thus, the fourth paragraph provides: "When there is no assignment of errors, as required by § 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified."

The court has, however, not regarded itself as under any absolute obligation to dismiss a writ of error or appeal *because [552 of the nonassignment of errors, as required by §§ 997 and 1012, Rev. Stat., having, by its rules, reserved the option to notice a plain error, whether assigned or not. *Independent School Dist. v. Hall*, 106 U. S. 428, 27 L. ed. 237, 1 Sup. Ct. Rep. 417; *Farrar v. Churchill*, 135 U. S. 609, 614, 34 L. ed. 246, 249, 10 Sup. Ct. Rep. 771; *United States v. Pena*, 175 U. S. 500, 502, 44 L. ed. 251, 252, 20 Sup. Ct. Rep. 165.

In the present case, the brief of counsel for the plaintiffs in error specifies ten alleged errors. The defendants in error have made no objection for failure to assign error under §§ 997 and 1012, Rev. Stat., but have submitted the case upon the specifications of error in the brief of the plaintiffs in error. For these reasons, we shall exercise the option reserved under both rules 21 and 35, of examining the transcript, that we may be advised as to whether there has occurred any "plain error" which obviously demands correction.

1. Did the court err in allowing an assessment of benefits under the act of June 6, 1900? We think not. Under the proceedings had theretofore under the act of March 3, 1899, there had resulted a condemnation of the land needed for the extension of Eleventh street northwest, and an assessment of damages sustained by the landowners, which award had been confirmed and the money paid. But that act provided "that of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one half thereof shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets, as herein provided." Objection to this arbitrary fixing of the minimum amount to be assessed for benefits upon lots benefited by the opening of the street was considered, and the act sustained as within the complete jurisdiction which

553] *the United States possesses over the District of Columbia, in the case of *Wight v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616. The benefits assessable under that act were separately found as against each parcel of property supposed to be benefited, but that part of the award of the jury was vacated upon the erroneous supposition that the rule for assessment of benefits in the act was void. This action of the District court, as we have already seen, was reversed. Thereupon the District court denied the motion of the commissioners to affirm the verdict of the jury assessing benefits. In this situation it was open to the commissioners to apply for another jury. Before they did so the special act of June 6, 1900, was passed. The effect of the action of the court in refusing to confirm the first assessment of benefits was to make void the award and verdict of the jury, in so far as that verdict had separately found the benefits accruing to the property by the extension of the street. The commissioners were therefore complying with the direction to them found in the 12th section of the act of Congress of June 6, 1900. That act provided that the commissioners should make application to the supreme court of the District of Columbia "for the final ratification and confirmation of the awards of the jury for and in respect to the land condemned for the extension of Eleventh street," etc. And "in the event that the assessments for benefits levied by the jury in relation to said Eleventh street shall for any reason be declared void, the said commissioners . . . are authorized and directed to make application to said court for a reassessment of such benefits, under and in accordance with the provisions of this act." The procedure under this act differs in many particulars from that under the act of 1899. In view of this, the property owners, on June 17, 1904, moved the court to dismiss the old proceeding, basing the motion, as shown by the entry upon the journal of the court, 554] upon the contention that "the law under which such proceeding must be had has been repealed," and "for failure of the petitioners to proceed as required by the order of this court," of March 4, 1904. Thereupon the court made the order heretofore set out, requiring a reassessment of benefits under the later act.

There is no possible doubt as to the correctness of this order. The new act superseded the former act in so far as the reassessment of benefits was concerned. Both parties seemingly concurred in assuming that this was the case, and that the refusal of the court to confirm the original assessment of benefits was an annulment of the

award of benefits by the first jury. The order was in part based upon the motion of the plaintiffs in error, and was made without protest or objection, and none was suggested for more than a year. Such a reassessment was but a continuance of the original proceeding, which might well be done by an amended or supplementary petition by virtue of the authority of the new act. This disposes also of the contention that the proceeding for reassessment of benefits was barred by the statute of limitations of three years. The proceeding for reassessment was not a new action, but a continuance of the old one, and therefore not subject to the operation of the statute.

2. Coming now to the errors assigned upon the procedure under this petition for a reassessment of benefits. The first objection is that the court did not examine the jurors as to whether they possessed the qualifications required by § 4 of the new act, nor administer to them the oath required by the statute under which the court was proceeding.

These objections come too late. The statute made it the duty of the court to hear objections to jurors "before accepting them." None were made. So with the oath; if that administered departed in any particular from *the terms of the statute, objection should have been made at the time. None was made, and only after the verdict was any made. The journal entry, moreover, recites that the jurors summoned by the marshal, under the order theretofore made, were "accepted as qualified," and that the oath was administered to them "in accordance with the provisions of the act of Congress of June 6, 1900." It is now sought to contradict the record by a statement contained in a bill of exceptions allowed after final judgment, that counsel for the plaintiffs in error was not present when the order of record was made and the jury accepted and sworn, and that after they had been so accepted and sworn, counsel was denied the right to examine the jurors as to their qualifications. In respect to the oath administered, the bill of exceptions contains the meager statement that the jurors were sworn to "assess the benefits accruing to the property abutting or adjacent to Eleventh street extended, according to the statute."

The oath which is required to be administered by § 4 of the act of June 6, 1900, under which the court was proceeding, was an oath applicable only to the condemnation of land for an extension of the Columbia road, and the jury were to be sworn to *assess the damages and benefits resulting from the extension of that road*. Such an oath in the present case, when only

benefits were to be assessed for property already taken and paid for, *upon another street altogether*, was, of course, not applicable. The court, in such circumstances, required as it was to follow the procedure of the Columbia road statute, was perfectly justified in swearing the jury to assess benefits to the property concerned in this proceeding. True, the oath prescribed by § 4 includes an affirmation that the jury was disinterested and unrelated, and would act without favor or partiality; but the statement in the bill of exceptions does not show that these matters were omitted from the oath, and the presumption remains that [556] the *statutory oath was followed as far as applicable, which is the implication from the journal entry.

As to the qualifications of the jurors: Primarily, they had been summoned, as shown by the order to the marshal and his return, as men having the statutory qualifications. The journal recites that the court "accepted them as qualified." No hint is found in this transcript that they were not qualified, or that they were guilty of any misconduct. Not having asked the court to examine them before accepting them, or to be then permitted to qualify them, it was not reversible error to deny the privilege after they had been sworn and accepted. That counsel was not present when they were accepted and sworn does not invalidate the impaneling of the jury. Under the statute and the warning order, the parties interested were required to be present and "continue in attendance" until the matter was ended.

3. It is assigned as error that the court erred in overruling the plea of *res judicata* as to lots 1 and 30 in block 27, and lots 1 to 16 in block 28. The plea was not good.

The first jury, that which, under the act of March, 1899, assessed both damages and benefits, was, under that act, required to award damages not only for land taken for the extension of the street, but also damages to the remainder of the land by being left high above or below the grade. The then owners of these lots were awarded such grade damages to land not taken, which award has been confirmed and paid. But the same jury, as they were instructed to do, assessed the benefits sustained to the remainder, not taken, separately. This part of the verdict was set aside; so that, as it stands, the plaintiffs have been paid the damages sustained to the property not taken by reason of the grade resulting, but have never been assessed for the benefits accruing to the same untaken remainder. It is now said that the confirmation of the amount of

damages is an adjudication *that the [557] lots not taken were damaged, and not benefited. But that is not the legal construction of the judgment, for the real damages have never been reduced by the benefits, which the statute says shall not be less than 50 per cent of the damages sustained. The former judgment was conclusive only as to the damages, and that has not and could not be reopened. The benefits, having been separately stated in that verdict, remained to be determined, and were properly reassessed under the later act of Congress.

4. Alleged error in instructions given or refused.

The sixth assignment noticed in the brief is error in giving the first instruction asked by the commissioners. This request was in these words:

"It is the duty of the jury to consider and assess the benefits which have resulted to the pieces or parcels of land on each side of Eleventh street northwest, as extended from Florida avenue to Lydecker avenue, and the benefits which have resulted to any and all other pieces or parcels of land from the extension; and in determining the amounts to be so assessed against said pieces or parcels of land, the jury shall take into consideration the respective situations of the said pieces or parcels of land, and the benefits that they have severally received from said extension of said Eleventh street. By extension of the street, the jury are to understand its establishment, laying out, and completion for all the ordinary uses of a public thoroughfare, or highway."

The objection to this seems to be that the jury was not limited to the benefits resulting immediately from the opening of the street, but might consider all enhancement which might come from subsequent improvement of or upon the street. But this was not the whole of the instruction of the court upon that subject, and any doubt as to what the court did mean was eliminated by other parts of the charge. Thus, the court said that to lay an *assessment for [558] benefits against any piece of land abutting upon said street or adjacent thereto, the jury must find that the benefits upon which such assessment is based was brought about by the extension of said street, and not by any improvement made since it was extended, or by the extension of car lines in said street. Again, the court said that such benefits must accrue "immediately from the extension of the street in question." This was repeated when it was said that "the benefit assessable must be an enhancement in value immediately upon the opening and extension of said street," and that

they had "no right to consider any enhancement or increase in value that is the result of any special improvements made on the street after it was opened and established, as previously stated." There is no reason for doubting the meaning of the court.

The several requests made by the plaintiffs in error were sufficiently covered by the charge as given.

5. The next specification of error in the brief is in these words: "The court erred in refusing to review the evidence taken before the jury, and to determine if the verdict was unjust and unreasonable." The act of June 6, 1900, under which the court was proceeding, required the jury to go upon and view the premises, and then to hear and receive such evidence as might be offered, in the presence of the court, or otherwise, as the court might direct, and to then return the majority verdict as to the amount of benefits against the property involved. In this case the evidence was not heard by the jury in the presence of the court, that being according to the order of the court.

The act further provides that "the court shall have power to hear and determine any objections which may be filed to said verdict or award, and to set aside and vacate the same, in whole or in part, when satisfied that it is unjust or unreasonable, and in 559] such event a new jury *shall be summoned, who shall proceed to assess the damages or benefits, as the case may be," etc.

This specification of error has for its foundation the concluding paragraph of the bill of exceptions, as follows:

"The foregoing substance of the testimony taken before the said jury was abstracted by the appellant from the testimony filed as an affidavit in the case by order of the court. After the counsel had argued the case upon the propositions of the law raised by the exceptions, counsel for the appellant, in support of its motions and exceptions, offered to read to the court the said testimony, but the court declined to hear the same or consider it at the time in full, counsel saying that it would be his purpose to consider the same if the court found, after consideration, the propositions of the law were against the appellant. But counsel had no further opportunity to argue said case on the evidence, and without reading the evidence, or hearing it fully read, the court passed an order overruling all the exceptions, and confirming said verdict, and refused to consider said testimony any further, and the appellant excepted.

"And thereupon the appellant presented to the court, the justice who presided at the

hearing of this case, and made the rulings herein referred to, this, its bill of exceptions, containing the proceedings before the court and before the jury or commission, with the substance of the evidence taken before the said jury, and the affidavits filed in the case subsequent thereto, as herein referred to, with the exceptions as therein noted, which were duly taken by the appellant separately, in the order in which they appear, and allowed by the court at the time."

The certificate was in these words:

"And the said appellant, by its counsel, prays the court to sign and seal this, its bill of exceptions, and make the same a part of the record in this case, which is now accordingly done, and the said bill of exceptions is here *now signed and sealed in [560 due form and made a part of the record in this case this 14th day of August, 1907, *nunc pro tunc*."

Why the court should be required to read, or hear read, "in full," a paper which was confessedly but the substance of the testimony taken before the jury, as "abstracted by appellants from the testimony filed as an affidavit in the case," we are at a loss to know. The power of the court to review the award by such a jury must, in the very nature of the matter, be limited to plain errors of law, misconduct, or grave error of fact indicating plain partiality or corruption. The jury saw and heard the witnesses; the court did not. The jury went upon and viewed the premises; the court did not. The duty to review did not involve mere error in judgment as to the extent of enhancement in value, for the judgment of the jury manifestly rested upon much which could not be brought before the court. The jury was expected to exercise its own judgment, derived from personal knowledge from a view of the premises, as well as from the opinion evidence which might be brought before them. *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361. No specific wrong, injustice, or error is pointed out. Even if we had all of the evidence before us, it would not be within our province to weigh it. But we have not, nor is there, any agreed statement of facts. It is impossible for us to say, therefore, whether the trial court erred in holding the award not unreasonable, or so unjust as to require a new trial before another jury. Other matters complained of in argument need not be specifically referred to.

We find no error, and the judgment is affirmed.

561] *ROSA WALLACH et al., Plffs. in Err.,
v.
CUNO H. RUDOLPH et al., † Commissioners
of the District of Columbia.

(See S. C. Reporter's ed. 561, 562.)

Appeal—amount in dispute — contingent liability.

The contingent liability of owners of property assessed for benefits accruing from a street extension, incurred by reason of their disposal of other property pending the condemnation proceedings, under an undertaking to remove the lien of any assessment for benefits which might be made therein, does not enter into the amount in dispute on a writ of error from the Federal Supreme Court to review a judgment of the court of appeals of the District of Columbia, confirming the assessment as to the property owned by them.

[For other cases, see Appeal and Error, 437, 438, in Digest Sup. Ct. 1908.]

[No. 148.]

Argued April 12, 13, 1910. Decided May 16, 1910.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, confirming an assessment for benefits resulting from the extension of Eleventh street, in that District. Dismissed for lack of jurisdictional amount in dispute.

See same case below, 31 App. D. C. 130. The facts are stated in the opinion.

Mr. Samuel Maddox argued the cause, and, with Mr. H. Prescott Gatley, filed a brief for plaintiffs in error.

Mr. James Francis Smith argued the cause, and, with Mr. Edward H. Thomas, filed a brief for defendants in error.

Mr. Justice Lurton delivered the opinion of the court:

This case was argued with the case of Columbia Heights Realty Co. v. Rudolph [217 U. S. 547, ante, 877, 30 Sup. Ct. Rep. 581], and the questions presented are substantially the same. The plaintiffs in error were interested as owners of certain lots or parts 562] of lots involved in the general *proceeding for the condemnation of prop-

erty for the extension of Eleventh street, and an assessment for benefits was confirmed as to the property owned by them. They were allowed to prosecute a separate writ of error to the court of appeals for the District of Columbia from so much of the award as affected them, where the judgment was affirmed, and from that affirmation this writ of error has been sued out. The aggregate of the amounts which affect these plaintiffs in error, and in respect of which they have assigned error, is only \$2,450.

Jurisdictional limit upon writs of error and appeals to or from the court of appeals of the District of Columbia is \$5,000, exclusive of interest and costs. See act of Feb. 9, 1893 (27 Stat. at L. 436, chap. 74).

To sustain the jurisdiction, an affidavit has been filed to show that plaintiffs in error are contingently liable for an amount in excess of \$5,000, if this judgment is sustained, by reason of like assessments in the same proceeding upon certain other lots or parts of lots, under other subdivision numbers, and standing in the name of different owners, being lots disposed of pending the proceeding, under an undertaking to remove the lien of any assessment for benefits which might be made herein. It does not follow as matter of law that such assessments against such other lots, to other parties, will be determined by this review. But, however this may be, "jurisdiction is to be determined by the amount directly involved in the decree appealed from, and not by any contingent demand which may be recovered, or any contingent loss which may be sustained, by either one of the parties, through the probative effect of the decree, however direct its bearing upon such contingency." *Hollander v. Feilheimer*, 162 U. S. 326, 328, 40 L. ed. 985, 986, 16 Sup. Ct. Rep. 795, 796.

The motion to dismiss for want of jurisdiction must be granted, and the writ is accordingly dismissed.

*BROWN-FORMAN COMPANY, Plff. [563
in Err.,
v.

COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 563-576.)

Statutes—who may assail validity.

1. One not affected by the provisions of a statute cannot urge its unconstitutionality. [For other cases, see Statutes, 53-60, in Digest Sup. Ct. 1908.]

†Substituted as parties defendant April 12, 1910, on suggestion of the retirement of Henry B. F. Macfarland et al.

NOTE.—On appellate jurisdiction of Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269, 54 L. ed.

NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to *Wilson v. Perrin*, 11 C. C. A. 71;

Federal courts — following decisions of state courts.

2. The construction by the highest state court of the tax imposed by Ky. act of March 28, 1906, upon persons engaged in compounding, rectifying, adulterating, or blending distilled spirits, as being a license or occupation tax, and not a property tax, will be followed by the Federal Supreme Court.

[For other cases, see *Courts*, 1755-1774, in *Digest Sup. Ct.* 1908.]

Constitutional law — equal protection of the laws — occupation tax.

3. The license or occupation tax imposed upon the business of compounding, rectifying, adulterating, or blending distilled spirits by Ky. act of March 28, 1906, is not invalid as denying the equal protection of the laws because no such tax is exacted from either resident or nonresident distillers who neither rectify, compound, adulterate, nor blend their products, nor from rectifiers and blenders of other states and countries who vend in the state untaxed rectified or blended spirits, in direct competition with the spirits of local rectifiers or blenders.

[For other cases, see *Constitutional Law*, 360-368, in *Digest Sup. Ct.* 1908.]

[No. 6.]

Argued April 11, 12, 1910. Decided May 16, 1910.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Franklin Circuit Court in that state, enforcing a tax on the business of compounding, rectifying, adulterating, or blending distilled spirits. Affirmed.

See same case below, 125 Ky. 402, 101 S. W. 321.

The facts are stated in the opinion.

Mr. Levi Cooke argued the cause, and, with Messrs. W. M. Hough, A. B. Hayes, and Hough, Hough, & Walker filed a brief for plaintiff in error:

Upon a writ of error to review the judgment of the highest court of a state, upon the ground that such judgment is against a right claimed under the Constitution of the United States, this court is not bound by the state court's construction of a statute of the state.

Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Huntington v. Attrill*, 146 U. S. 657, 683, 36 L. ed. 1123, 1133, 13 Sup. Ct. Rep. 224; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed.

793, 14 Sup. Ct. Rep. 968; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.

A state may not, by an arbitrary exercise of its taxing function, single out for oppression a particular person or class of persons within its domain, in violation of the Constitution.

Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385.

Plaintiff in error does not contend that the provisions of the 14th Amendment were intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways; nor that the Amendment was intended to compel a state to adopt an iron rule of equal taxation.

Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305.

The tax is a property tax.

Thierman v. Com. 123 Ky. 740, 97 S. W. 366; *Welton v. Missonri*, 91 U. S. 275, 23 L. ed. 347; *Brown v. Maryland*, 12 Wheat. 425, 6 L. ed. 680; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Tiernan v. Rinker*, 102 U. S. 123, 26 L. ed. 103; *State v. Bengsch*, 170 Mo. 81, 70 S. W. 710; *Brookfield v. Tooley*, 141 Mo. 619, 43 S. W. 387; *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527.

The authorities condemn the act as unconstitutional.

Hinson v. Lott, 8 Wall. 148, 19 L. ed. 387; *State v. Bengsch*, supra; *State v. Hoyt*, 71 Vt. 59, 42 Atl. 973; *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165; *I. M. Darnell & Son Co. v. Memphis*, 208 U. S. 113, 52 L. ed. 413, 28 Sup. Ct. Rep. 247.

Mr. James S. Morris argued the cause, and, with Messrs. James Breathitt and Charles H. Morris, filed a brief for defendant in error:

This court is bound by the interpretation given the act by the highest state court.

Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518.

Plaintiff cannot raise the question of interstate commerce.

People v. Reusselaer & S. R. Co. 15 Wend.

Hill v. Hite, 29 C. C. A. 549; *Griffin v. Overman Wheel Co.* 9 C. C. A. 548; *Elmendorf v. Taylor*, 6 L. ed. U. S. 290; *Jackson ex dem. St. John v. Chew*, 6 L. ed. U. S. 583; *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490; *Clark v. Graham*, 5 L. ed.

U. S. 334; *Forepaugh v. Delaware, L. & W. R. Co.* 5 L.R.A. 508; and *Mitchell v. Burlington*, 18 L. ed. U. S. 351.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621, and *State v. Loomis*, 21 L.R.A. 789.

113, 30 Am. Dec. 33; *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; *Cooley, Const. Lim.* 6th ed. 196; *Albany County v. Stanley*, 105 U. S. 305, 26 L. ed. 1044; *Stickrod v. Com.* 86 Ky. 285, 5 S. W. 580; *Jones v. Black*, 48 Ala. 540; *State v. McNulty*, 7 N. D. 169, 73 N. W. 87; *Switzerland County v. Reeves*, 148 Ind. 467, 46 N. E. 995; *Schmidt v. Indianapolis*, 168 Ind. 631, 14 L.R.A.(N.S.) 787, 120 Am. St. Rep. 385, 80 N. E. 632.

Where the state court gives to an act or section an interpretation or meaning as to its operation and effect, and by enforcing the law as thus construed, and as the highest state court is thus bound to construe it, no injury can result to the person complaining, this court will adopt that construction, and hold that there is no violation of the Federal Constitution.

Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580-586, 43 L. ed. 1093-1096, 19 Sup. Ct. Rep. 755; *Welton v. Missouri*, 91 U. S. 278, 23 L. ed. 348; *Soon Hing v. Crowley*, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The act does not violate the "equal protection of the law" clause.

Welton v. Missouri; *Bell's Gap R. Co. v. Pennsylvania*; and *Barbier v. Connolly*,—*supra*; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Fraser v. McConway & T. Co.* 82 Fed. 257; *Re Grice*, 79 Fed. 627; *State v. Garbroski*, 111 Iowa, 496, 56 L.R.A. 570, 82 Am. St. Rep. 524, 82 N. W. 959; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565; *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Erb v. Morasch*, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *Peirce* 54 L. ed.

v. Van Dusen, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693.

Mr. Justice Lurton delivered the opinion of the court:

The commonwealth of Kentucky instituted this proceeding to collect an occupation tax imposed by an act of the general assembly of that state of March 28, 1906, *whereby every corporation or person [569] engaged in the state "in the business or occupation of compounding, rectifying, adulterating, or blending distilled spirits" is required to pay "a license tax of 1¼ cent upon every wine gallon of such compounded, rectified, blended, or adulterated distilled spirits." The defenses presented were, first, that the plaintiff in error had paid the tax due for the rectification of "single-stamp spirits," and that the act does not cover "double-stamp spirits," used as a basis for its operations; second, that the act was repugnant to the Constitution of the state; and, third, that the act is repugnant to the Constitution of the United States, in that it is a regulation of interstate commerce, and operates as a denial of the equal protection of the law. The questions concerning the validity of the act under the state Constitution, and as to the liability of the plaintiff in error under the act as construed and enforced by the highest court of Kentucky, may be laid on one side, for the only contentions which concern us under this writ of error to the state court are those which arise under the Constitution of the United States.

The two sections of the act which need be examined are the first and seventh, which are set out in the margin.† *The [570] other sections provide for reports, and impose penalties for delinquencies in reporting or paying.

It is said that the 7th section of the act imposes a license tax upon the business of shipping into the state of goods like those made by the plaintiff in error, when deceptively marked or labeled "as Kentucky whisky," or intended to be so deceptively branded or labeled when received in the state; and that such a burden is illegal as a regulation of interstate commerce. But as plaintiff in error concedes that it is not engaged in bringing into the state spirits deceptively marked as a Kentucky product, nor intended to be so branded, and has not been proceeded against under that section,

†Sec. 1. Every corporation, association, company, copartnership, or individual engaged in this state in the business or occupation of compounding, rectifying, adulterating, or blending distilled spirits, known and designated as single-stamp spirits, shall pay to the commonwealth of Kentucky a license tax of 1¼ cent upon every wine

it is clear, the section being a separable provision, that we need not deal with either of these objections, save only as the presence of that section in the act may have a bearing upon the question of discrimination between the domestic and foreign product, which is the real question in the case.

The question upon which the case must turn comes to this: Has the state denied to the plaintiff in error the equal protection of the law, guaranteed by the 14th Amendment, by the imposition of the tax provided under the 1st section of the act? It is urged that that section falls under the condemnation of the provision of the Federal Constitution, because, to quote from the brief of counsel, it "creates an unjust discrimination against *Kentucky rectifiers and blenders included within the provisions of the act, in favor of the three other classes engaged in the same business, to wit: (1) Kentucky distillers who vend unrectified and unblended spirits; (2) distillers of other states or countries who vend in Kentucky unrectified and unblended spirits; and (3) rectifiers and blenders of other states or countries who vend in Kentucky untaxed rectified or blended spirits, in direct competition with the spirits of Kentucky rectifiers or blenders, subject to the tax."

It has been urged that the tax is not imposed as a license upon the doing of business, but is laid upon the goods produced, and is therefore arbitrary and discriminatory as one not imposed upon all other like kinds of liquor, whether produced in or out of the state. This contention, if good, would only carry the case back to the underlying objection that the classification is arbitrary and unreasonable, and therefore void, as denying the equal protection of the law,—a question which at last must be answered, whether the tax be an occupation or a property tax. But the Kentucky court of appeals has construed the act as not a property tax, but as one imposing a license or occupation tax upon the business. Speaking by Judge Hobson, the Kentucky court of appeals said: "A license tax is imposed. The amount of the license tax is determined by the amount of spirits pro-

duced. The tax is not upon the spirits. It is a license tax upon the business. To hold it a tax upon the property, we must disregard the word 'license' in both the title and the body of the act. That a license tax was contemplated is also shown by § 3, which requires that notice shall be given to the auditor, stating certain facts, before the business shall be engaged in; by § 4, that upon such notice the auditor shall thereupon issue to each applicant a certificate showing that he has complied with the act, and by § 5, that upon the payment of the license tax to the *treasurer, the au- [572] ditor shall issue to such persons authority to continue in the business, if such authority is desired. Under the statute, a man may not legally engage in the business without giving the notice and having the certificate from the auditor. The payment of the tax at the times required by the statute is the condition upon which authority to continue in the business is made to depend. This is manifestly a tax on the business, and not upon the property. The amount of the tax is simply regulated by the amount of the product, but it is a license tax upon the business. To hold otherwise would be to say that the legislature cannot impose a graduated license tax based upon the amount of product manufactured." [125 Ky. 414, 101 S. W. 323.] Such a construction and interpretation of the statute here involved, by the highest court of the state, should be accepted as definitely determining that the tax complained of is not a property tax, but a license tax imposed upon the doing of a particular business plainly subject to the regulating power of the state.

We come, then, to the question as to whether this act makes an arbitrary and illegal discrimination in favor of other persons or corporations engaged in the same business. The question is at last one of classification of subjects, trades, or pursuits, for the purpose of taxation, and concerns the power of the states to exercise discretion in the methods, subjects, and rates of taxation. Fundamental to the very existence of the governmental power of the states as is this function of taxation,

gallon of such compounded, rectified, blended, or adulterated distilled spirits.

Sec. 7. Any corporation, association, company, copartnership, or individual who shall ship any compounded, rectified, blended, or adulterated distilled spirits, known and designated as single-stamp spirits, into this state, for the purpose of labeling, branding, marking, or stamping the same as Kentucky whisky, product or spirits, or which, before shipment into this state, shall have been, or may thereafter be, labeled, branded, marked, or stamped as Kentucky whisky, product or spirits, shall be deemed compounders, rectifiers, blenders, or adul-

terators under the provisions of this act, and shall pay the license tax imposed herein on compounders, rectifiers, blenders, or adulterators of such spirits in this state, and shall make the report required herein to the auditor of public accounts. Any corporation, association, company, copartnership, or individual who shall violate this section of this act shall be deemed guilty of a misdemeanor, and fined in any sum not less than \$500 nor more than \$1,000. Each shipment shall be deemed a separate offense. The Franklin circuit court shall have jurisdiction of all offenses committed under this act.

it is nevertheless subject to the beneficent restriction that it shall not be so exercised as to deny to any the equal protection of the law. But this restriction does not compel the adoption of "an iron rule of equal taxation," nor prevent variety in methods of taxation, or discretion in the selection of subjects, or classification for purposes of taxation of either properties, businesses, trades, callings, or occupations. This much has been over and over announced by this 573] court. *Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; W. W. Cargill Co. v. Minnesota, 189 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Cook v. Marshall County, 196 U. S. 268, 49 L. ed. 473, 25 Sup. Ct. Rep. 233; Williams v. Arkansas, 217 U. S. 79, ante, 673, 30 Sup. Ct. Rep. 493; Southwestern Oil Co. v. Texas, 217 U. S. 114, ante, 688, 30 Sup. Ct. Rep. 496.

The answer of the plaintiff in error concedes that it is "doing business in this state, and engaged in the business or occupation of compounding, rectifying, adulterating, or blending distilled spirits, known and designated as single-stamp spirits." Plaintiff in error now says that it has been arbitrarily singled out and its business or occupation taxed, thereby discriminating in favor of "three other classes engaged in the same business." The first class which is named as favored are distillers who neither rectify, compound, adulterate, nor blend their products. Manifestly there is nothing capricious in putting the occupation carried on by the plaintiff in error in a class distinct from that of the whisky distillers whose straight product is the basis for the manipulated product of those engaged in the taxed business. A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law. The reasons for discriminating between distillers and rectifiers is not obscure, and a classification which includes one and omits the other is by no means arbitrary or unreasonable. In American Sugar Ref. Co. v. Louisiana, cited above, a license tax imposed upon the business of refining sugar and molasses was sustained, although planters grinding and refining their own sugar were excluded. In W. W. Cargill Co. v. Minnesota, 189 U. S. 452, 469, 45 L. ed. 619, 54 L. ed.

627, 21 Sup. Ct. Rep. 423, 429, a state statute requiring elevator companies *operat- [574 ing elevators situated upon railway rights of way to take out a license, without requiring those not so situated to do so, was held not to be an illegal discrimination. This court there said, in reference to the insistence that the discrimination was a denial of the equal protection of the law, that "no such judgment could be properly rendered unless the classification was merely arbitrary, or was devoid of those elements that are inherent in the distinction implied in classification. We cannot perceive that the requirement of a license is not based upon some reasonable ground,—some difference that bears a proper relation to the classification made by the statute." In Williams v. Arkansas, cited above, a classification in a state statute which prohibited drumming on trains for business for any hotel, lodging house, bath house, physicians, etc., was sustained as not a capricious classification, although it did not apply to drumming for other business not mentioned, but distinguishable by reason of local conditions. In Southwestern Oil Co. v. Texas, supra, it was held that an occupation tax on all wholesale dealers in certain articles did not deny to the class taxed the equal protection of the law because a similar occupation tax was not imposed on wholesale dealers in other articles.

It is next said that "distillers of other states and countries who vend in Kentucky unrectified and unblended spirits" are untouched by the law. This is answered by what we have said as to such distillers manufacturing within the state, as well as by the obviousness of the fact that the state of Kentucky had no more right to impose an occupation tax upon a business conducted outside of the state than it had to lay a property tax upon property outside of the state.

Finally, it is said that "rectifiers and blenders of other states or countries who vend in Kentucky untaxed rectified or blended spirits, in direct competition with the *spirits of Kentucky rectifiers or [575 blenders, are not subject to the tax."

The contention comes to this: A state may not impose a tax upon the privilege of carrying on a particular business or occupation in the state, unless it can impose a similar tax upon the same business or occupation carried on outside of the state, if the latter may, through interstate commerce, compete by shipments into the state with the product of the taxed resident. A system of taxation discriminating in favor of residents and domestic products, and against nonresidents and foreign products, might result in commercial nonintercourse between

the states, and as a regulation of interstate commerce would clearly be invalid. The objection, however, would not apply to a uniform tax upon goods which does not discriminate in favor of residents or products of the state. *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Hinson v. Lott*, 8 Wall. 148, 19 L. ed. 387; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367.

There is no pretense here that there has been any discrimination in favor of either the residents or the products of Kentucky, but the reverse, in that the resident rectifier is discriminated against because the product of the untaxed nonresident rectifier meets those of the taxed rectifier in competition for the trade of Kentucky. But counsel say that discrimination against residents or products of the state is as much a denial of the equal protection of the law as any other method of unequal taxation, and cite *State v. Hoyt*, 71 Vt. 59, 64, 42 Atl. 973. That was a case involving the validity of a license tax by the state of Vermont upon peddlers of goods, "*the manufacture of this state*." The Vermont court held that when a business consists in selling goods, the exaction of a license for its pursuit was in effect a tax upon the goods themselves; and that as this tax discriminated arbitrarily against the products of the state, it was void, as denying the equal protection of the law. But the 576] ground of *the decision was that the discrimination against the goods of the state, and in favor of the products of other states, both classes of goods being within and subject to the taxing power of the state, was an illegal discrimination, as arbitrary and capricious. The court said:

"The question, therefore, is one of classification. If, in the case supposed, the resident and the nonresident manufacturer or their goods can be differently classed, the statute can be sustained; otherwise not. The rule on this subject is, that the mere fact of classification is not enough to exempt a statute from the operation of the equality clause of said Amendment, but that in all cases it must appear, not only that a classification has been made, but that it is one based on some reasonable ground,—some difference that bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255."

The case has no bearing upon the present case. In that case, the license might have been exacted from one peddling in Vermont, whether he peddled domestic or foreign goods. Here the exaction is not upon the product at all, but upon the business of producing the product in the state. The

same business carried on beyond the state could not have been subjected to a like tax. There has therefore been no arbitrary or capricious discrimination against the resident rectifier.

There is no error in the judgment, and it is affirmed.

*STATE OF MARYLAND, Complain- [577
ant,
v.
STATE OF WEST VIRGINIA.

(See S. C. Reporter's ed. 577-585.)

Boundaries — between states — high or low water mark.

1. The south bank of the Potomac river at low water mark on the West Virginia shore is the true southern boundary line of the state of Maryland.

[For other cases, see *Boundaries*, 26-50, in Digest Sup. Ct. 1908.]

Costs — in boundary dispute.

2. The cost of the surveys made by the surveyors of the respective states in a boundary dispute, pursuant to an order entered by the consent of both parties, should be equally divided between those states.

[Costs generally, see *Costs and Fees*, in Digest Sup. Ct. 1908.]

[No. 1, Original.]

Forms of decrees submitted April 20, 1910.
Decree entered May 31, 1910.

ON SETTLEMENT of Decree in original suit in equity between the states of Maryland and West Virginia, to settle the boundary between those states. Decree entered fixing boundary and dividing costs.

The facts are stated in the opinion.

Mr. Isaac Lobe Straus, for complainant:

The decree should fix the southern boundary of Maryland at and along the high-water mark on the southern bank of the Potomac.

Morris v. United States, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep. 649, 23 Wash. L. Rep. 745; *Stone v. Augusta*, 46 Me. 127; *Paine Lumber Co. v. United States*, 55 Fed. 864; *United States v. Pacheco*, 2 Wall. 587, 17 L. ed. 865; *Howard v. Ingersoll*, 13 How. 415, 14 L. ed. 204; *Kean v. Stetson*, 5 Pick. 494; 3 Kent, Com. *427; *Anderson's Law Dict.* 1889 ed. p. 104; *People ex rel. Highway Comrs. v. Madison County*, 125 Ill. 26,

NOTE.—On rivers and lakes as state boundaries—see note to *Buck v. Ellenbolt*, 15 L.R.A. 187.

On judicial settlement of state boundaries—see note to *Nebraska v. Iowa*, 36 L. ed. U. S. 798.

17 N. E. 147; *Brown v. Beard*, 85 Me. 294, 27 Atl. 182.

What was said in *Handly v. Anthony*, 5 Wheat. 374, 5 L. ed. 113, is wholly inapplicable to the point or boundary here under consideration.

3 Kent, Com. **431, 432.

The costs of the surveys ordered by the court should be treated as part of the costs of the case; and in a proceeding of this character between sovereign commonwealths, for public, governmental purposes, all the costs should be equally divided between the sovereign parties.

Whipple v. Cumberland Cotton Mfg. Co. 3 Story, 84, Fed. Cas. No. 17,515; *New Hampshire Land Co. v. Tilton*, 29 Fed. 766; *Nebraska v. Iowa*, 143 U. S. 359, 370, 36 L. ed. 186, 190, 12 Sup. Ct. Rep. 396; *Nebraska v. Iowa*, 145 U. S. 519, 521, 36 L. ed. 798, 799, 12 Sup. Ct. Rep. 976; *Peper v. Fordyce*, 119 U. S. 471, 30 L. ed. 435, 7 Sup. Ct. Rep. 287; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; *Hancock v. Holbrook*, 112 U. S. 229, 28 L. ed. 714, 5 Sup. Ct. Rep. 115; *Andrews v. Scotton*, 2 Bland, Ch. 662; *Lillienthal v. Southern California R. Co.* 61 Fed. 622; *Sturzenegger v. Marsh*, 1 Bail. L. 592; *Breithaupt v. Clarke*, 1 Hill, L. 399; *Tug River Coal & Salt Co. v. Brigel*, 14 C. C. A. 577, 31 U. S. App. 665, 67 Fed. 625, 17 C. C. A. 367, 22 U. S. App. 725, 70 Fed. 647; *Tefft v. Stern*, 21 C. C. A. 73, 43 U. S. App. 442, 74 Fed. 755; *Willis v. Terry*, 98 Fed. 8; *Swift & Co. v. Kortrecht*, 50 C. C. A. 429, 112 Fed. 709.

Messrs. **William G. Conley** and **George E. Price**, for defendant:

The boundary line is the low-water mark on the south bank of the Potomac river, and not the high-water mark.

Handly v. Anthony, 5 Wheat. 374, 5 L. ed. 113; *Com. v. Garner*, 3 Gratt. 655; *State v. Plants*, 25 W. Va. 119, 52 Am. Rep. 211; *Ravenswood v. Fleming*, 22 W. Va. 52, 46 Am. Rep. 485; *Point Pleasant Bridge Co. v. Point Pleasant*, 32 W. Va. 331, 9 S. E. 231; *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 43 L. ed. 823, 19 Sup. Ct. Rep. 553; *Indiana v. Kentucky*, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051.

Mr. Justice Day delivered the opinion of the court:

In accordance with the opinion of this [578] court handed down February 21, 1910 (217 U. S. 1, ante, 645, 30 Sup. Ct. Rep. 268), the learned counsel for the states of Maryland and West Virginia have submitted drafts of a decree to be entered in the case in accordance with the conclusions announced by this court.

54 L. ed.

The differences in the proposed decrees are: First, concerning the boundary of Maryland along the south bank of the Potomac river, from a point at or near Harper's Ferry, westwardly to the point where the north and south line from the Fairfax stone crosses the North Branch of the Potomac river, should that boundary line be located at high-water mark, as contended by counsel for the state of Maryland, or at low-water mark, as contended by counsel for the state of West Virginia? In the opinion heretofore delivered in this case, it was declared that the claim of the state of West Virginia for a location of her boundary line along the north bank of the Potomac river should be denied. This conclusion was reached upon the authority of the case of *Morris v. United States*, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep. 649. In the *Morris* Case it was held, in a contention between a title holder whose rights originated with the grant of 1632 to Lord Baltimore, and one whose rights originated under the grant of James II. to Lord Culpeper, that the grant to Lord Baltimore included the Potomac river to high-water mark on the southern or Virginia shore. As West Virginia is but the successor of Virginia in title, the conclusion thus announced in the *Morris* Case necessarily denied her claim to the Potomac river to the north bank thereof, and a decree was directed dismissing the cross bill of West Virginia, in which such a claim was made.

In the former hearing, however, and in the decision rendered, the attention of the court was not directed to the question whether the boundary of Maryland should be at high-water mark or at low-water mark, along the southern bank of the Potomac river.

*As stated in the former opinion, after [579] the state of West Virginia was created, an arbitration was had between the states of Virginia and Maryland, and the Virginia boundary was fixed at low-water mark on the south shore of the Potomac. See Code of Virginia, vol. 1, title 3, chap. 3, § 13, p. 18. This location of the boundary between Maryland and Virginia was accepted by the state of Maryland, and definitely fixed as the line between herself and the state of Virginia. The arbitration of 1877 was before eminent lawyers, and an elaborate opinion was rendered by them. They reached the conclusion that following the description in the charter of Charles I. to Lord Baltimore, the right or south bank of the Potomac river, at high-water mark, was the boundary between Maryland and Virginia. This conclusion is in accordance with the one reached by this court in the *Morris* Case, in which case it was declared that the province of Mary-

land, under the charter of Lord Baltimore, embraced the Potomac river to high-water mark on the southern, or Virginia, shore, and the court then declared that this title had not been divested by any valid proceedings prior to the Revolution, nor was it affected by the subsequent grant to Lord Culpeper; and therefore, as between the claimants under the old grant to Lord Baltimore and the one to Lord Culpeper, that the title of the claimants under the Baltimore grant embraced the Potomac river to high-water mark on the Virginia shore. But the arbitrators proceeding to establish the boundary between the states in the light of subsequent events, after referring to the effect of long occupation upon the rights of states and nations, and declaring that the length of time that raises a right by prescription in private parties likewise raises such a presumption in favor of states, as well as private parties, took up the location of the boundary between the states along the Potomac river, and said:

"The evidence is sufficient to show that 580] Virginia, from the earliest period of her history, used the south bank of the Potomac as if the soil to low-water mark had been her own. She did not give this up by her Constitution of 1776, when she surrendered other claims within the charter limits of Maryland; but, on the contrary, she expressly reserved 'the property of the Virginia shores or strands bordering on either of said rivers (Potomac or Poconoke) and all improvements which have or will be made thereon.' By the compact of 1785, Maryland assented to this, and declared that 'the citizens of each state respectively shall have full property on the shores of the Potomac, and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements.'

"Taking all together, we consider it established that Virginia has a proprietary right on the south shore to low-water mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.

"To that extent Virginia has shown her rights on the river so clearly as to make them indisputable."

The compact of 1785 (see Code of Virginia, vol. 1, title 3, chap. 3, § 13, p. 16) is set up in this case, and its binding force is preserved in the draft of decrees submitted by counsel for both states. We agree

with the arbitrators in the opinion above expressed, that the privileges therein reserved respectively to the citizens of the two states on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac river shall extend to high-water mark. There is no evidence that Maryland has claimed any right to make grants on that side of the river, and the privileges reserved to the citizens of the respective states in the compact of 1785, and its subsequent ratifications, indicate the intention of each state to maintain riparian rights and privileges to its citizens on their own side of the river.

This conclusion gives to Maryland a uniform southern boundary along Virginia and West Virginia, at low-water mark on the south bank of the Potomac river to the intersection of the north and south line between Maryland and West Virginia, established by the decree in this case. This conclusion is also consistent with the previous exercise of political jurisdiction by the states respectively.

The decree will therefore provide for the south bank of the Potomac river at low-water mark on the West Virginia shore as the true southern boundary line of the state of Maryland.

The other contention in the case concerns the costs of the surveys made by the surveyors of the respective states. It is the contention of Maryland that they should be equally divided, while West Virginia contends that each state should bear its own expense in this respect. An examination of the record shows that early in the proceedings in this case, on the 26th day of May, 1894, an order was entered by consent of parties, which authorized a survey to be made by surveyors, to be agreed upon in writing by counsel for the respective states, said surveyor or surveyors to return to this court a report and map or maps made by him or them under the order, together with copies of such report, map, or maps. The order provided for notice to be given attorneys for both parties of the time and place of commencing such surveys. Subsequently surveyors were designated, surveys were made, and elaborate reports were filed in this court. Under these circumstances we are of opinion that the order heretofore made concerning the division of the costs should include the costs of such surveys. As was said by this court in *Nebraska v. Iowa*, 143 U. S. 359, 370, 36 L. ed. 186, 190, 12 Sup. Ct. Rep. 396, *in [582 making an order for a division of costs between the two states in a boundary dispute, the matter involved is governmental in character, in which each party has a

real, and yet not a litigious, interest. The object to be obtained is the settlement of a boundary line between sovereign states in the interest, not only of property rights, but also in promotion of the peace and good order of the communities; and is one which the states have a common interest to bring to a satisfactory and final conclusion. Where such is the nature of the cause we think the expenses should be borne in common, so far as may be, and we therefore adopt so much of the decree proposed by the state of Maryland as makes provision for the costs of the surveys made under the order of this court.

We append the decree to be entered:

Decree.

This cause came on to be heard at this term and was argued by counsel; and thereupon, on consideration thereof, it was adjudged and decreed as follows:

First. That the true boundary line between the states of Maryland and West Virginia is ascertained and established as follows:

Beginning at the common corner of the states of Maryland and Virginia, on the southern bank of the Potomac river, at low-water mark, at or near the mouth of the Shenandoah river (near Harper's Ferry), and running thence with the southern bank of the said Potomac river, at low-water mark, and with the southern bank of the North Branch of the Potomac river at low-water mark, to the point where the north and south line from the Fairfax stone crosses the said North Branch of the Potomac, and thence running northerly, as near as may be, with the Deakins or Old State line to the line of the state of Pennsylvania.

Second. That Julius K. Monroe, William 583] McCulloch *Brown, and Samuel S. Gannett be, and they are hereby, appointed commissioners to run, locate, and establish, and permanently mark with suitable monuments, the said Deakins or Old State line as the boundary line between the states of Maryland and West Virginia, from said point on the southern bank of the North Branch of the Potomac river to the said Pennsylvania line, in accordance with the opinion of this court, heretofore filed in this case, and with this decree; the said line to be run and located as far as practicable as it has been generally recognized and adopted by the people residing about or near the same, as the boundary line between the said states, and not as conforming, except to a limited extent, to the western boundary of the Maryland military lots, as said lots are now located and held. Said commissioners shall mark said line as run, located, and estab-

lished by them, with suitable stone monuments, at reasonable and proper intervals, according to the topography of the country.

It is further ordered that, before entering upon the discharge of their duties, each of said commissioners shall be duly sworn to perform faithfully, impartially, and without prejudice or bias, the duties herein imposed; said oath to be taken before the clerk of this court, or before either of the clerks of the circuit courts of the United States for the district of Maryland or for the northern district of West Virginia, or before an officer authorized by law to administer an oath in the state of Maryland or of West Virginia, and returned with their report; that said commissioners may arrange for their organization, their meetings, and the particular manner of the performance of their duties, and are authorized to adopt all ordinary and legitimate methods in the ascertainment of the true location of said boundary line, including the taking of evidence under oath and calling for papers and documents; but in the event evidence is taken, the parties shall be notified and permitted to be present and cross-examine *the witnesses; and all evidence taken [584 by the commissioners and all exceptions thereto and action thereon shall be preserved and certified and returned with their report.

Said commissioners are also at liberty to refer to and consult the printed record in the cause so far as they may think proper to enable them to discharge their duties under this decree.

It is further ordered that the clerk of this court shall at once forward to the governor of each of said states of Maryland and West Virginia, and to each of the commissioners appointed by this decree, a copy of this decree, duly authenticated. And said commissioners are authorized, if they deem it necessary, to request the co-operation and assistance of the state authorities in the performance of the duties imposed on them by this decree.

It is further ordered that said commissioners do proceed, with all convenient despatch, to discharge their duties in running, locating, establishing, and marking said line, as herein directed, and make their report thereof and of their proceedings in the premises to this court on or before the 1st day of January, 1911, together with a complete bill of costs and charges annexed.

It is further ordered that should vacancies occur in said board of commissioners by reason of death, the refusal to act, or inability to perform the duties required by this decree, the chief justice of this court is hereby authorized and empowered to appoint other commissioners to supply such

vacancies, and said chief justice is authorized to act on such information in the premises as may be satisfactory to himself.

It is further ordered that all the costs of the proceedings by said commissioners under this decree, including a remuneration of not exceeding fifteen dollars (\$15) per day and his reasonable expenses for each commissioner whilst actually engaged in the performance of his duties *hereunder, and the other costs incident to the running, locating, establishing, and marking said line, shall be paid by the states of Maryland and West Virginia equally.

Third. That the cross bill of the state of West Virginia, in so far as it asks for a decree fixing the north bank of the Potomac river as the boundary line between said states, be, and the same is hereby, dismissed.

Fourth. That this decree shall not be construed as abrogating or setting aside the compact made between commissioners of the state of Maryland and the state of Virginia at Mount Vernon, on the 28th day of March, 1785, and which was confirmed by the general assembly of Maryland, and afterwards by act of the general assembly of Virginia, passed on the 3d day of January, 1786, but the said compact, except so far as it may have been superseded by the provisions of the Constitution of the United States, or may be inconsistent with this decree, shall remain obligatory upon and between the states of Maryland and West Virginia, so far as it is applicable to that part of the Potomac river which extends along the border of said states, as ascertained and established by this decree.

Fifth. That all the costs in this case and the proceedings therein, as the same shall be taxed by the clerk of this court, and including also the costs of the surveys made by the two states under the order or orders of this court, said costs for said surveys to be ascertained and taxed by the clerk of this court upon vouchers sworn to and exhibited to him, shall be equally divided between the said two states.

586] *EX PARTE: IN THE MATTER OF
J. W. GRUETTER, Petitioner.

(See S. C. Reporter's ed. 586-588.)

Mandamus — to control judicial action — remanding case to state court.

The denial by a Federal circuit court of a motion to remand a cause to a state court, because of the opinion that the grounds of the motion, *viz.*: that the suit was to recover a penalty, and was not therefore one of a civil nature; that the petition and record did not show that the suit

was sought to be removed to the circuit court for the district in which either plaintiff or defendant resided; and that the defendant did not specifically pray for the removal of the cause, are not well founded, cannot be reviewed by mandamus. [For other cases, see Mandamus, 61-66, in Digest Sup. Ct. 1908.]

[No. 9, Original.]

Submitted April 11, 1910. Decided May 31, 1910.

PETITION for mandamus to compel the District Judge of the United States for the Middle Division of the Middle District of Tennessee, holding the Circuit Court for that division, to remand a suit to the Circuit Court of Franklin County, in that state. Rule discharged and petition dismissed.

The facts are stated in the opinion.

Mr. Arthur Crowner submitted the cause for petitioner. Messrs Isaac W. Crabtree and William L. Myers were on the brief.

Mr. William L. Granbery submitted the cause for respondent.

Mr. Chief Justice Fuller delivered the opinion of the court:

Gruetter brought an action in the circuit court of Franklin county, Tennessee, against the Cumberland Telephone & Telegraph Company, to recover \$20,000 for violation of § 2 of chapter 66 of the Acts of 1885, which is § 1842 of Shannon's Code of Tennessee, for the unjust discrimination by defendant against plaintiff, set up in the declaration. The section is as follows:

"Every telephone company doing business within this *state, and engaged in a [587] general telephone business, shall supply all applicants for telephone connection and facilities, without discrimination or partiality, provided such applicants comply, or offer to comply, with the reasonable regula-

NOTE.—As to when mandamus is the proper remedy—see notes to United States ex rel. International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; McCluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnp. Co. v. State, 3 L.R.A. 265; State ex rel. Charleston. C. & C. R. Co. v. Whitesides, 3 L.R.A. 777; and Ex parte Hurn, 13 L.R.A. 120.

On mandamus to control judicial action—see notes to State ex rel. Bayha v. Kansas City Court of Appeals, 3 L.R.A. 476, and Re Morgan, 29 L. ed. U. S. 135.

On superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal—see note to State ex rel. Fourth Nat. Bank v. Johnson, 51 L.R.A. 33.

tions of the company; and no such company shall impose any condition or restriction upon any such applicant that are not imposed impartially upon all persons or companies in like situations, nor shall such company discriminate against any individual or company in lawful business by requiring, as condition for furnishing such facilities, that they shall not be used in the business of the applicant or otherwise, under penalty of \$100 for each day such company continues such discrimination and refuses such facilities after compliance, or offer to comply, with the reasonable regulations, and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused."

Defendant filed a petition to remove the case to the circuit court of the United States for the middle division of the middle district of Tennessee, to which plaintiff demurred on the ground that it was an action to recover a penalty, and therefore was not removable. The demurrer was heard by the circuit judge, who sustained it, dismissed the petition, and refused to remove the case. Defendant obtained a certified copy of the record, and filed the same in the circuit court of the United States for the sixth circuit, and plaintiff moved to remand the case because it was a suit to recover a penalty and the action was not of a civil nature; because the petition and record did not show that the suit was sought to be removed to the circuit court of the United States for the district in which either the plaintiff or the defendant resided; and because the de-

54 L. ed.

fendant did not specifically pray for the removal of the cause.

The circuit court, upon hearing, filed a memorandum opinion considering and overruling all of the grounds *presented to [588 sustain the motion, and denied the motion to remand, whereupon Gruetter filed a petition for writ of mandamus, directing the district judge of the United States for the middle division of the middle district of Tennessee, holding the circuit court for that division, to remand the suit to the circuit court of Franklin county, state of Tennessee. Leave to file this petition was granted and a rule to show cause was thereon entered, to which the judge filed his return, stating that the motion of plaintiff to remand was denied for the reason that, in respondent's opinion, the several grounds of the petitioner's motion were not well founded in law, and that, under the facts and pleadings presented by the record, the circuit court of the United States for the middle district of Tennessee, sitting at Nashville, had jurisdiction of said cause.

There was no controversy as to there being diversity of citizenship. The defendant was a corporation of Kentucky and plaintiff was a citizen of Tennessee. Inasmuch as we are of opinion that the circuit court of the United States had jurisdiction to determine the questions presented, we hold that mandamus will not lie. The final order of the circuit court cannot be reviewed on this writ. *Re Pollitz*, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729.

Rule discharged and petition dismissed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

589] *DAVID MUNRO ROGERS et al., Infants, etc., Plaintiffs in Error, v. CLARK IRON COMPANY et al. [No. 244.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court of St. Louis County, in that state, in favor of defendants, who set up an outstanding title in a third person as a defense to an action to quiet title, brought by persons claiming under a United States patent against persons in adverse possession under various claims of title.

See same case below, 104 Minn. 198, 116 N. W. 739.

Mr. John B. Richards for plaintiffs in error.

Messrs. John G. Williams, Joseph B. Cotton, William R. Begg, and Frank B. Kellogg for defendants in error.

April 11, 1910. *Per Curiam*: Writ of Error dismissed for want of jurisdiction. The case is reported below in 104 Minn. 198, 116 N. W. 739, where the facts are set forth at length. We hold that no Federal question was decided either by express terms or by necessary implication, and that the attempt to raise a Federal question was made in this court for the first time, which was too late.

May 31, 1910. Leave granted to present petition for rehearing within thirty days.

590] *EX PARTE: IN THE MATTER OF W. G. COYLE & Co., Petitioners. [No. —, Original.]

Motion for leave to file petition for a Writ of Mandamus.

Mr. Charles Louque for petitioners.

April 11, 1910. Denied.

54 L. ed.

MERT H. VOUGHT, Impleaded with Michael J. Collins, Alexander McDonald, H. B. Templin, and Peter Fishback, Plaintiff in Error, v. STATE OF WISCONSIN. [No. 153.]

Error to state court—frivolousness of Federal question—validity of freehold qualification for grand jurors.

In Error to the Supreme Court of the State of Wisconsin to review a judgment which affirmed a conviction of larceny in the Circuit Court of Ashland County, in that state. The Federal question raised was the alleged invalidity under the Federal Constitution of a state statute making a freehold qualification for grand jurors.

See same case below, 135 Wis. 6,—L.R.A. (N.S.) —, 128 Am. St. Rep. 1008, 114 N. W. 518, 646.

Messrs. Horace B. Walmsley and W. F. Bailey for plaintiff in error.

Messrs. Victor T. Pierrelee and A. C. Titus for defendant in error.

April 18, 1910. *Per Curiam*: Writ of Error dismissed for want of jurisdiction. The Federal question attempted to be made is without merit.

NOLLMAN & Co., Appellants and Petitioners, v. WENTWORTH LUNCH COMPANY. [No. 154.]

Bankruptcy—who may be involuntary bankrupt—restaurant and saloon corporation.

Appeal from and Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed an order of the District Court for the Southern District of New York, adjudicating as an involuntary bankrupt a corporation engaged in the restaurant and saloon business.

See same case below,—L.R.A. (N.S.) —, 86 C. C. A. 393, 159 Fed. 413.

Mr. Maurice P. Davidson for appellants and petitioners.

Mr. R. R. Billington for appellee and respondent.

April 18, 1910. *Per Curiam*: Judgment affirmed on the authority of *Toxaway Hotel Co. v. J. L. Smathers & Co.* (decided February 21, 1910) 216 U. S. 439, ante, 558, 30 Sup. Ct. Rep. 263.

593] *JOSEPH WENAR, Appellant, v. WILLIAM A. JONES, Bishop of Porto Rico. [No. 143.]

Appeal—final judgment below.

Appeal from the Supreme Court of Porto Rico to review a decree which dismissed, because not brought in conformity with local procedure, an appeal from a judgment of the District Court in and for the District of San Juan, in favor of plaintiff in an action of ejectment.

Mr. Willis Sweet for appellant.

Messrs. Frederic R. Coudert, Paul Fuller, and Howard Thayer Kingsbury for appellee.

April 25, 1910. *Per Curiam*: Appeal dismissed for want of jurisdiction. *Harrington v. Holler* (*Crawford v. Haller*) 111 U. S. 796, 28 L. ed. 602, 4 Sup. Ct. Rep. 697, and cases cited.

594] *H. J. SCHULTZ et al., Appellants, v. EDGAR B. DIEHL and Daniel Grabill. [No. 166.]

Parties—bringing in—absent defendants.

Appeal from the Circuit Court of the United States for the District of Oregon to review a decree dismissing as to nonresident defendants a minority stockholders' suit.

Mr. Charles W. Fulton for appellants.

No appearance for appellees.

April 25, 1910. *Per Curiam*: Decree reversed, with costs, and cause remanded, to be proceeded in according to law. *Jellenik v. Huron Copper Min. Co.* 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559; 18 Stat. at L. 470, chap. 137, § 8, U. S. Comp. Stat. 1901, p. 513; Oregon Code, §§ 5064, 300, 301.

PHILIP BRADY et al., Appellants, v. BERNARD & KITTINGER et al. [No. 501.]

Appeal—from circuit court of appeals—bankruptcy case.

Appeal from the United States Circuit Courts of Appeals for the Sixth Circuit to review a decree dismissing an appeal from an adjudication of bankruptcy in the District Court for the Western District of Kentucky, and from an order refusing to set aside such adjudication.

See same case below, 95 C. C. A. 656, 170 Fed. 576.

Mr. Hill McAlister for appellants.

Messrs. Edwin C. Brandenburg, Clarence A. Brandenburg, and F. Walter Brandenburg for appellees.

May 2, 1910. Appeal dismissed for the want of jurisdiction, and petition for Writ of Certiorari denied.

EX PARTE: IN THE MATTER OF CHARLES W. MORSE, Petitioner. [No. —, Original.] Motion for leave to file a petition for a Writ of Habeas Corpus.

Mr. Martin W. Littleton for petitioner.

May 16, 1910. Denied.

*EDWARD A. SHEDD et al., Plaintiffs [597 in Error, v. PEOPLE OF THE STATE OF ILLINOIS EX REL. JOHN J. HEALY, State's Attorney. [No. 708.]

Constitutional law—due process of law—impairing contract obligations—ouster of corporation.

In Error to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Circuit Court of Cook County, in that state, ousting an alleged corporation formed to hold and acquire real estate. The Federal questions raised were that such decision impairs contract obligations and takes property without due process of law.

See same case below, 241 Ill. 155, 89 N. E. 332.

Mr. Harry S. McCartney for plaintiffs in error.

Mr. James Hamilton Lewis for defendants in error.

May 31, 1910. Judgment affirmed with costs.

THOMAS RHODUS, Plaintiff in Error, v. ELBERT N. MANNING et al. [No. 739]; EDWARD T. RHODUS, Plaintiff in Error, v. ELBERT N. MANNING et al. [No. 740]; BIRCH F. RHODUS, Plaintiff in Error, v. ELBERT N. MANNING et al. [No. 741]; BIRCH F. RHODUS et al., Plaintiffs in Error, v. ELBERT N. MANNING et al. [No. 742].

Criminal law—self-incrimination.

Three Writs of Error to the Supreme Court of the State of Illinois to review judgments which affirmed judgments of the Circuit Court of Cook County, in that state, holding the officers of a corporation who are under indictment in the United States District Court for the Northern District of Illinois for fraudulent use of the mails, to be in contempt of court for refusing to turn over the books and papers of the company to its receiver. Also In Error to the Supreme Court of the State of Illinois to review a judgment which affirmed an order of the Circuit Court of Cook County for issuance

of writs of sequestration against said contumacious parties.

See same case below, 242 Ill. 584, —L.R.A. (N.S.)—, 90 N. E. 238.

Messrs. Benjamin C. Bachrach and Joseph B. David for plaintiffs in error.

Messrs. Charles R. Holden, Samuel Alschuler, and Joseph Weissenbach for defendants in error.

May 31, 1910. Judgments affirmed with costs.

599] *MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY et al., Plaintiffs in Error, v. GUS C. STREET, JR. [No. 813.] Removal of causes.

In Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Harris County, in that state, in favor of plaintiff in an action for personal injuries, in which an unsuccessful attempt was made to remove the case to the United States Circuit Court for the Southern District of Texas.

See same case below (Tex. Civ. App.) 122 S. W. 270.

Messrs. R. S. Lovett, Maxwell Evarts, J. P. Blair, and H. M. Garwood for plaintiffs in error.

Mr. John W. Parker for defendant in error.

May 31, 1910. Judgment affirmed with costs.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant, v. ROBERT W. SHEEGOG, Administrator, etc. [No. 879.]

Courts—conflict of jurisdiction.

Appeal from the Circuit Court of the United States for the Western District of Kentucky to review a decree which, on the ground of want of jurisdiction, dismissed a bill filed by a successful defendant in that court to enjoin the enforcement of a judgment of the Circuit Court of Union County, in that state, upon the same issues, which judgment had been affirmed by the Court of Appeals of the state, and by the Supreme Court of the United States.

See same case below, 177 Fed. 756.

Messrs. Edmund F. Trabue and Blewett Lee for appellant.

Mr. John G. Miller for appellee.

May 31, 1910. Advanced as under the Thirty-second Rule, and judgment affirmed with costs.

54 L. ed.

AMERICAN NATIONAL BANK OF WASHINGTON, Plaintiff in Error, v. FANNIE N. TAPPAN. [No. 837.]

Federal courts—jurisdiction.

In Error to the Circuit Court of the United States for the District of Massachusetts to review a judgment dismissing for want of jurisdiction an action by a national bank doing business in the District of Columbia against a citizen of the state of Massachusetts.

See same case below, 174 Fed. 431.

Messrs. Horace B. Stanton and Benjamin S. Minor for plaintiff in error.

Mr. Alexander Wolf for defendant in error.

May 31, 1910. Judgment affirmed with costs, without opinion.

UNITED STATES, Plff. in Err.,

v.

LIZZIE SEWELL and George B. Wood Sewell.

This case is governed by the decision in United States v. Welch, ante, 787.

[No. 181.]

Argued April 29, 1910. Decided May 31, 1910.

IN ERROR to the Circuit Court of the United States for the Eastern District of Kentucky to review a judgment awarding damages to the owner of property permanently flooded by a government dam. Affirmed.

Assistant Attorney General John Q. Thompson argued the cause, and, with Mr. W. W. Scott, filed a brief for plaintiff in error:

If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation on account of such injury does not attach under the Constitution.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175.

To entitle an owner to the protection of the 5th Amendment, property must be actually taken in the physical sense of the word; and the proprietor is not entitled to claim remuneration for indirect and consequential damage resulting from the exercise of the power of eminent domain.

Sedgw. Stat. & Const. Law, pp. 457, 458; Dill. Mun. Corp. § 784; Lansing v. Smith, 8 Cow. 149; Walls v. United States, 44 Ct. Cl. 482; Tompkins's Case (Ct. Cl.) Jan. 10,

1910; *Bedford v. United States*, 192 U. S. 217, 225, 48 L. ed. 414, 417, 24 Sup. Ct. Rep. 238.

The order of the court below, or the facts stated in the order, are a special verdict and determine all matters of fact, like the verdict of a jury.

United States v. Smith, 94 U. S. 214, 24 L. ed. 115; *Stone v. United States*, 164 U. S. 380, 41 L. ed. 477, 17 Sup. Ct. Rep. 71.

Special verdicts must contain within themselves, without the slightest reference to the testimony, every essential fact necessary to warrant the court in rendering judgment. A special verdict, in order to sustain the judgment, must pass upon all the material issues made in the pleading, so as to enable the court to say upon the pleading and verdict, without looking at the evidence, which party is entitled to judgment.

Ward v. Cochran, 150 U. S. 597, 608, 37 L. ed. 1195, 1198, 14 Sup. Ct. Rep. 230; *Prentice v. Zane*, 8 How. 470, 483, 12 L. ed. 1160, 1166; *Hodges v. Easton*, 106 U. S. 408, 27 L. ed. 169, 1 Sup. Ct. Rep. 307.

If the land has been merely injured or its use impaired, there has been no taking as contemplated by the 5th Amendment.

Northern Transp. Co. v. Chicago, 99 U. S. 635, 642, 25 L. ed. 336, 338; *Mills v. United States*, 12 L.R.A. 673, 46 Fed. 742.

Assistant Attorney General John Q. Thompson and Mr. P. M. Cox filed a separate brief for plaintiff in error:

The court cannot undertake to supply omissions or reconcile contradictory statements in the findings. It will only inquire whether the judgment below is supported by the facts specifically found.

Chase v. United States, 155 U. S. 489, 500, 39 L. ed. 234, 238, 15 Sup. Ct. Rep. 174; *District of Columbia v. Barnes*, 197 U. S. 146, 49 L. ed. 699, 25 Sup. Ct. Rep. 401; *Mahan v. United States*, 14 Wall. 1109, 20 L. ed. 764.

Mr. Edward S. Jouett argued the cause and filed a brief for defendants in error:

Land which is overflowed is taken in the constitutional sense.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; *United States v. Lynah*, 188 U. S. 455, 47 L. ed. 542, 23 Sup. Ct. Rep. 349.

Any injury to property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entitles him to a compensation.

Cooley, Const. Lim. 5th ed. p. 671.

The doctrine of *pro tanto* appropriation is universally recognized.

Broadwell v. Kansas City, 75 Mo. 213, 42 Am. Rep. 406; *Payne v. Kansas City*, St. J. & C. B. R. Co. 112 Mo. 6, 17 L.R.A. 632, 20 898

S. W. 322; *Mills*, Em. Dom. § 30; *Pearsall v. Eaton County*, 74 Mich. 558, 4 L.R.A. 193, 42 N. W. 77.

Even if the lower court does refer to and discuss the evidence, yet its ultimate finding of fact stands because it is a finding.

Stone v. United States, 164 U. S. 380, 41 L. ed. 477, 17 Sup. Ct. Rep. 71.

Per Curiam:

The judgment is affirmed on the authority of *United States v. Welch* (decided April 25, 1910), 217 U. S. 333, ante, 787, 30 Sup. Ct. Rep. 527; but it is ordered that before the government is required to pay for the land held to have been taken, plaintiffs below shall furnish a survey definitely ascertaining the land by metes and bounds.

Affirmed.

GERMAN ALLIANCE INSURANCE COMPANY, Petitioner, v. HOME WATER SUPPLY COMPANY. [No. 843.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Hartwell Cabell for petitioner.

No appearance for respondent.

April 11, 1910. Granted.

E. G. COFFIN et al., etc., Petitioners, v. CHAS. R. FLINT. [No. 838.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 176 Fed. 872.

Messrs. R. C. Strudwick and E. J. Justice for petitioners

Messrs. J. H. Merrimon and J. Frank Snyder for respondent.

April 11, 1910. Denied.

SOUTHERN PAVING & CONSTRUCTION CO. Petitioner, v. GREENSBORO. [No. 840.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 94 C. C. A. 292, 168 Fed. 880.

Mr. Alfred S. Barnard for petitioner.

Mr. E. J. Justice for respondent.

*April 11, 1910. Denied.

[603

S. GRAEME HARRISON, Petitioner, v. PHILADELPHIA CONTRIBUTIONSHIP FOR THE INSURANCE OF HOUSES. [No. 841.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 176 Fed. 323.

Mr. R. Mason Lisle for petitioner.

No appearance for respondent.

April 11, 1910. Denied.

LILLIAN F. SLOCUM, Executrix, etc., Petitioner, v. NEW YORK LIFE INSURANCE COMPANY. [No. 846.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Daniel B. Henderson for petitioner.

No appearance for respondent.

April 18, 1910. Granted.

GEORGE M. NOWELL et al., Petitioners, v. INTERNATIONAL TRUST COMPANY et al. [No. 855.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 94 C. C. A. 589, 169 Fed. 497.

Messrs. George M. Nowell and Joseph B. Church for petitioners.

Messrs. E. S. Pillsbury and Lewis P. Shackelford for respondents.

April 18, 1910. Denied.

HUBERT HOPKINS, Petitioner, v. HEBER C. PETERS et al. [No. 861.]

604] Petition for a Writ of *Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 34 App. D. C. 141.

Messrs. F. R. Cornwall and L. S. Bacon for petitioner.

No appearance for respondents.

April 18, 1910. Denied.

ILLINOIS CENTRAL RAILROAD COMPANY, Petitioner, v. MARY O'NEIL et al. [No. 866.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 177 Fed. 328.

Messrs. Hunter C. Leake, Gustave Lemle, and Blewett Lee for petitioner.

No appearance for respondents.

April 18, 1910. Denied.

UNITED STATES, Petitioner, v. ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY. [No. 878.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

The Solicitor General, Edward A. Moseley, and Philip J. Doherty for petitioner.

Mr. Robert Dunlap for respondent.

April 25, 1910. Granted.

54 L. ed.

FRANK D. ZELL et al., Petitioners, v. NORFOLK & SOUTHERN RAILWAY COMPANY et al. [No. 856.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 176 Fed. 1023.

Messrs. John G. Johnson, Thomas Leaming, and Tazewell Taylor for petitioners.

Messrs. Edward R. Baird, Jr., Thomas L. Chadbourne, Jr., and Frederick Hoff for respondents.

April 25, 1910. Denied.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Petitioner, v. MARK B. HAMBLE. [No. 884.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 22 L.R.A. (N.S.) 323, 92 C. C. A. 147, 164 Fed. 410.

Messrs. Gardiner Lathrop, Robert Dunlap, T. J. Norton, and Edgar W. Camp for petitioner.

Paul Sleman for respondent.

*April 25, 1910. Denied.

[605

WHITIN MACHINE WORKS, Petitioner, v. LEWIS T. HOUGHTON. [No. 873.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Edmund Wetmore and William A. Jenner for petitioner.

Messrs. Louis W. Southgate and W. K. Richardson for respondent.

May 2, 1910. Denied.

ROY VERMONT et al., Petitioners, v. UNITED STATES. [No. 887.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 174 Fed. 792.

Messrs. Shepard Barclay and Thomas T. Fauntleroy for petitioners.

The Attorney General, the Solicitor General, and Assistant Attorney General Harr for respondent.

May 16, 1910. Denied.

May 31, 1910, motion for leave to present petition for rehearing denied.

O. M. CARTER, Petitioner, v. CHARLES A. GOSS. [No. 902.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 175 Fed. 1019.

Messrs. F. Charles Hume and Leigh Robinson for petitioner.

Messrs. Maurice E. Locke, Eugene P. Locke, James H. McIntosh, John Charles Harris, and Edward F. Harris for respondent.

May 16, 1910. Denied.

606] *UNITED STATES EX REL. ANNIE KELLEY, Petitioner, v. J. M. PETERS, Sheriff, etc. [No. 896.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 177 Fed. 885.

Mr. H. Winship Wheatley for petitioner.

Mr. William M. Acton for respondent.

May 31, 1910. Denied.

SOUTHERN PACIFIC COMPANY, Petitioner, v. VISCOUNT DE VALLE DA COSTA, Administrator, etc. [No. 898.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 176 Fed. 843.

Messrs. Moses Williams and William D. Turner for petitioner.

No appearance for respondent.

May 31, 1910. Denied.

UNITED SURETY COMPANY OF BALTIMORE, Petitioner, v. IOWA MANUFACTURING COMPANY et al. [No. 924.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Joseph H. Zumbalen for petitioner.

Mr. Herbert R. Marlatt for respondents.

May 31, 1910. Denied.

WILLIAM W. WILMERTON, Petitioner, v. FRANK WILMERTON et al. [No. 927.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 176 Fed. 896.

Mr. James M. Spear for petitioner.

Messrs. S. S. Gregory and C. H. Poppenhusen for respondents.

May 31, 1910. Denied.

F. MORSE ARCHER, Substituted Receiver, etc., Petitioner, v. FIDELITY TRUST & SAFE DEPOSIT *COMPANY et al., Executors, etc. [No. 928.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Reynolds D. Brown, Malcolm Lloyd, Jr., Chas. H. Burr, and J. Arthur Lynham for petitioner.

Mr. Ira Jewell Williams for respondents.

May 31, 1910. Denied.

GLOBE ASPHALT COMPANY, Petitioner, v. UNION CONSTRUCTION & DEVELOPMENT COMPANY et al. [No. 929.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 97 C. C. A. 650, 173 Fed. 866.

Messrs. E. V. Brookshire and Joseph H. Call for petitioner.

Messrs. William Grant, Harry H. Hall, and J. Blanc Monroe for respondents.

May 31, 1910. Denied.

RANSOME CONCRETE MACHINERY COMPANY, Petitioner, v. UNITED CONCRETE MACHINERY COMPANY. [No. 930.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 177 Fed. 413.

Mr. Charles L. Sturtevant for petitioner.

Mr. Stephen J. Cox for respondent.

May 31, 1910. Denied.

GENERAL FIREPROOFING COMPANY, Petitioner, v. L. WALLACE & SON [No. 938]; TITLE GUARANTY & SURETY COMPANY OF SCRANTON, PA., Petitioner, v. L. WALLACE & SON [No. 939.]

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 175 Fed. 650.

Messrs. F. H. Atwood, Frank Hagerman, and Amor H. *Sargent for petitioner. [608]

Mr. John N. Hughes for respondents.

May 31, 1910. Denied.

LEHIGH VALLEY TRANSPORTATION COMPANY, Claimant, etc., Petitioner, v. THOMAS MONK, Jr., et al. [No. 940.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 176 Fed. 723.

Mr. Archibald G. Thacher for petitioner.

Messrs. Herbert Green, James J. Macklin, and De Lagnel Berier for respondents.

May 31, 1910. Denied.

PITTSBURGH MANUFACTURING COMPANY, Petitioner, v. LUDLOW VALVE MANUFACTURING COMPANY. [No. 945.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 177 Fed. 691.

Mr. James I. Kay for petitioner.

Messrs. Samuel Untermeyer and Louis Marshall for respondent.

May 31, 1910. Denied.

WESTERN ASSURANCE COMPANY OF TORONTO, Petitioner, v. TWEEDIE TRADING COMPANY [No. 950]; A. FOSTER HIGGINS et al., Petitioners, v. TWEEDIE TRADING COMPANY [No. 951].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Charles C. Burlingham and A. Leo Everett for petitioners.

Mr. Frederick M. Brown for respondents.

May 31, 1910. Denied.

ELLIS BARTHOLOMEW, Petitioner, v. UNITED STATES. [No. 949.]

609] Petition for a writ of *Certiorari to the United States Court of Appeals for the Sixth Circuit.

See same case below, 177 Fed. 902.

Mr. T. H. Kaiser for petitioner.

The Attorney General, the Solicitor General, and Assistant Attorney General Harr for respondent.

May 31, 1910. Denied.

THOMAS D. WILCOXON, Plaintiff in Error, v. MITCHELL H. WILLCOXON, Martha E. Lemon, and Mary D. Proctor. [No. 152.]

In Error to the Supreme Court of the State of Illinois.

H. T. Wilcoxon for plaintiff in error.

J. A. Crain for defendants in error.

April 11, 1910. Dismissed with costs, pursuant to the Tenth Rule.

54 L. ed.

C. R. SMITH, Plaintiff in Error, v. ARMOUR PACKING COMPANY. [No. 163.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. S. T. Bledsoe for plaintiff in error.

No appearance for defendant in error.

April 15, 1910. Dismissed with costs, pursuant to the Tenth Rule.

SECUNDINO MENDEZONA, Plaintiff in Error, v. UNITED STATES. [No. 885.]

In Error to the Supreme Court of the Philippine Islands.

The Attorney General and the Solicitor General for defendant in error.

April 18, 1910. Docketed and dismissed on motion of Mr. Solicitor General Bowers for the defendant in error.

*FERNANDO VASQUEZ MORALES et al., [610] Appellants, v. JUAN VICENTY RAMOS. [No. 169.]

Appeal from the Supreme Court of Porto Rico.

Mr. Herbert E. Smith for appellants.

No appearance for appellee.

April 19, 1910. Dismissed with costs, pursuant to the Tenth Rule.

S. DAVIES WARFIELD et al., Receivers, etc., Plaintiffs in Error, v. JOHN B. GASTON. [No. 483.]

In Error to the Supreme Court of the State of Alabama.

Messrs. John P. Tillman and Robert E. Steiner for plaintiffs in error.

Messrs. Alexander M. Garber and Samuel D. Weakley for defendant in error.

April 25, 1910. Judgment reversed with costs, and cause remanded for further proceedings, per stipulation of counsel.

NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error, v. FITZ H. McMMASTER, as Insurance Commissioner, etc. [No. 901.]

In Error to the Supreme Court of the State of South Carolina.

Mr. T. Moultrie Mordecai for plaintiff in error.

No appearance for defendant in error.

April 28, 1910. Dismissed with costs, on motion of counsel for the plaintiff in error.

FOURTH STREET NATIONAL BANK, Petitioner, v. A. MERRITT TAYLOR et al., Trustees, etc. [No. 629.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Samuel Dickson for petitioner.

No appearance for respondents.

May 31, 1910. Dismissed with costs on motion of counsel for the petitioner.

902

*OLIVE ELLA MARILLA HARDING, [611 Plaintiff in Error, v. MYRTLE GILLET et al. [No. 910.]

In Error to the Supreme Court of the State of Oklahoma.

Messrs. J. C. Robberts and George W. Buckner for plaintiff in error.

Messrs. Arthur A. Birney and Henry F. Woodard for defendants in error.

May 31, 1910. Dismissed with costs on motion of counsel for the plaintiff in error.

217 U. S.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1909.

Vol. 218.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERMS, 1909, 1910.

AND REPORTED HEREIN,

VOLUME 218,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 218 U. S.	Title.	Here in.	Off. Rep. 218 U. S.	Title.	Here in.
1	Sistare v. Sistare	905	89-91	Interstate Commerce Com- mission v. Chicago, R. I. & P. R. Co.	
7-8	" "	907		Burnham, H. M. Dry Goods Co. v. Chicago, R. I. & P. R. Co.	946
8-11	" "	908		" "	951
11-14	" "	909		" "	952
14-16	" "	910		" "	953
16-20	" "	911		" "	954
20-23	" "	912	91-94	" "	955
23-24	" "	913	94-97	" "	956
24-26	" "	914	97-99	" "	957
26	" "	915	99-102	" "	959
27	Rankin v. Emigh	915	102-105	" "	
28-29	" "	918	105-107	" "	
29-31	" "	919	107-110	" "	
31-34	" "	920	110-112	" "	
34-36	" "	921	113-114	Interstate Commerce Com- mission v. Chicago, B. & & Q. R. Co.	959
36	Louisville & N. R. Co. v. Melton	921		" "	960
43-44	" "	924	114-117	" "	961
44-46	" "	925	117-119	" "	962
46-49	" "	926	119	" "	
49-52	" "	927	120	Re Cleland	962
52-54	" "	928	120	" "	963
54-57	" "	929	120-123	" "	964
57	" "	930	123-124	" "	965
57	Shevlin-Carpenter Co. v. Min- nesota	930	124	Dozier v. Alabama	965
62	" "	932	126-127	" "	966
62-64	" "	933	127-128	" "	967
64-67	" "	934	129	Thomas v. Sugarman	967
67-70	" "	935	133-134	" "	969
70	" "	936	135	Herndon v. Chicago, R. I. & P. R. Co.	970
71-72	Chiles v. Chesapeake & O. R. Co.	936	146-147	" "	973
72-75	" "	937	148-150	" "	974
75-77	" "	938	150-154	" "	975
77-78	" "	939	154-155	" "	976
78	Standard Oil Co. v. Brown	939	155-157	" "	977
81	" "	943	157-159	" "	978
81-84	" "	944	159	Roach v. Atchison, T. & S. F. R. Co.	978
84-86	" "	945	160	" "	980
86-87	" "	946	161	Franklin v. South Carolina	980
88	Interstate Commerce Com- mission v. Chicago R. I. & P. R. Co.		162-164	" "	983
	Burnham, H. M. Dry Goods Co. v. Chicago, R. I. & P. R. Co.		164-167	" "	984
			167-169	" "	985
			169-172	" "	986
			172	" "	987
		940	173	Watson v. Maryland	987

REFERENCE TABLE.

Off. Rep. §18 U. S.	Title.	Here in.	Off. Rep. §18 U. S.	Title.	Here in.
174-176	Watson v. Maryland	988	326-329	Hooe v. United States	1057
175-177	" "	989	329-331	" "	1058
177-180	" "	990	331-334	" "	1059
180	Omaha v. Omaha Water Co.	991	334-336	" "	1060
191-192	" "	996	336	Cincinnati, I. & W. R. Co. v. Connersville	1060
192-195	" "	997	340-341	" "	1063
195-197	" "	998	341-344	" "	1064
197-200	" "	999	344	" "	1065
200-202	" "	1000	345	National Bank of Commerce v. Downie	1065
202-205	" "	1001	349-350	" "	1066
205	Hertz v. Woodman	1001	350-352	" "	1067
210-211	" "	1004	352-355	" "	1068
211-214	" "	1005	355-357	" "	1069
214-216	" "	1006	357	Ladew v. Tennessee Copper Co.	1069
216-219	" "	1007	361-363	" "	1070
219-222	" "	1008	363-365	" "	1071
222-224	" "	1009	365-368	" "	1072
224-227	" "	1010	368-369	" "	1073
227-230	" "	1011	369-370	Wetmore v. Tennessee Copper Co.	1073
230-232	" "	1012	370-371	" "	1074
232	" "	1013	371	Montezuma Canal Co. v. Smithville Canal Co.	1074
233	United States v. Chicago, M. & St. P. R. Co.	1015	372-374	" "	1075
234-235	" "	1017	374-377	" "	1076
235-238	" "	1018	377-382	" "	1077
238-240	" "	1019	382-383	" "	1078
240-243	" "	1020	383-384	" "	1079
243-244	" "	1021	384-386	" "	1080
245	Holt v. United States	1021	386	Roura v. Government of Phil- ippine Islands	1080
246-249	" "	1028	387-389	" "	1081
249-251	" "	1029	389-392	" "	1082
252-254	" "	1030	392-395	" "	1083
254	" "	1031	395-397	" "	1084
255-257	Jennings v. Philadelphia, B. & W. R. Co.	1031	397-400	" "	1085
257-258	" "	1032	400-402	Moffitt v. Kelly	1086
258	{ Rickey Land & C. Co. v. Lux		402-405	" "	1087
	{ Rickey Land & C. Co. v. Wood	1032	405-406	" "	1088
259-260	" "	1037	406	Western U. Teleg. Co. v. Commercial Milling Co.	1088
260-263	" "	1038	407-409	" "	1089
263	" "	1039	413-414	" "	1090
264-270	The Ira M. Hedges (Lehigh Valley R. Co.) v. Cornel S. S. Co.	1039	414-417	" "	1091
270-271	" "	1040	417-420	" "	1092
272-277	Ong Chang Wing v. United States	1040	420-421	" "	1093
277-280	" "	1041	422	Moore Printing T. Co. v. Na- tional Sav. & T. Co.	1093
280	" "	1042	422-424	" "	1094
281-285	Kerfoot v. Farmers & M. Bank	1042	424-427	" "	1095
285-288	" "	1043	427-430	" "	1096
288	" "	1044	430-431	" "	1097
289	Richardson v. Ainsa	1044	431	Arkansas S. R. Co. v. Louisi- ana & A. R. Co.	1097
294	" "	1045	435-437	" "	1098
294-297	" "	1046	437-438	" "	1099
297-298	" "	1047	438-439	Fisher v. New Orleans	1099
299	Duryea Power Co. v. Stern- bergh	1047	439-442	" "	1100
300-302	" "	1048	442	" "	1101
302-307	Ling Su Fan v. United States	1049	442	Harlan v. McGourin	1101
307-310	" "	1050	443-444	" "	1103
310-311	" "	1051	444-446	" "	1104
312	Re Metropolitan Trust Co.	1051	446-449	" "	1105
312-315	" "	1052	449-451	" "	1106
318-320	" "	1054	451-452	" "	1107
320-321	" "	1055	452	United States v. Ansonia Brass & C. Co.	1107
322	Hooe v. United States	1055			

REFERENCE TABLE.

Off. Rep. 218 U. S.	Title.	Here in.	Off. Rep. 218 U. S.	Title.	Here in.
461-463	United States v. Ansonia		563	Griffith v. Connecticut	1151
	Brass & C. Co.	1111	564-565	" "	1152
463-466	" "	1112	567-569	" "	1153
466-468	" "	1113	569-572	" "	1154
468-471	" "	1114	572	Griffith v. Connecticut	1155
471-473	" "	1115	573	Hunter v. Mutual R. L. Ins.	
474-476	" "	1116		Co.	1155
476	Chantangco v. Abaroa	1116	579-580	" "	1158
479-481	" "	1118	580-583	" "	1159
481-484	" "	1119	583-586	" "	1160
484-486	" "	1120	586-588	" "	1161
487	Richardson v. McChesney	1121	588-591	" "	1162
490-491	" "	1121	591	" "	1163
491-493	" "	1122	591	Calder v. Michigan ex rel.	
493	United States use of Hine v.			Ellis	1163
	Morse	1123	597-599	" "	1167
499	" "	1125	599-601	" "	1168
500-502	" "	1126	601	United States v. Kissel	1168
502-505	" "	1127	605-608	" "	1178
505-508	" "	1128	608-610	" "	1179
508-510	" "	1129	611	Thompson v. Thompson	1180
510-512	" "	1130	614-616	" "	1181
513-514	Eagle Min. & Imp. Co. v.		616-618	" "	1182
	Hamilton	1131	618-621	" "	1183
514-516	" "	1132	621-624	" "	1184
516	" "	1133	624	" "	1185
517-520	United States v. Mason	1133	624-626	Memphis v. Cumberland	
520-521	" "	1134		Teleph. & Teleg. Co.	1185
521-524	" "	1135	626-629	" "	1186
524-526	" "	1136	629-632	" "	1187
526-529	" "	1137	632-634	" "	1188
529-531	" "	1138	634-637	" "	1189
532	United States v. Heinze	1139	637-639	" "	1190
537-539	" "	1142	639-642	" "	1191
539-542	" "	1143	642-644	" "	1192
542-544	" "	1144	645	Columbus v. Mercantile Trust	
544-546	" "	1145		& D. Co.	1193
547	United States v. Heinze	1145	649-651	" "	1194
548-550	" "	1146	651-654	" "	1195
550-551	" "	1147	654-656	" "	1196
551	Illinois C. R. Co. v. Kentucky	1147	656-659	" "	1197
555-557	" "	1148	659-662	" "	1198
557-560	" "	1149	662-663	" "	1199
560-562	" "	1150	664-694	Memorandum Decisions	1201-1214
562-563	" "	1151			

54 L. ed.

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1909.

1] *MATILDA VON ELLERT SISTARE,
Plff. in Err.,
v.
HORACE RANDALL SISTARE.

(See S. C. Reporter's ed. 1-26.)

Judgment — full faith and credit — alimony.

1. A decree for the future payment of alimony is, as to instalments past due and unpaid, within the protection of the full faith and credit clause of the Federal Constitution, provided that no modification of the decree was made prior to the maturity of such instalments, unless by the law of the state in which the decree was rendered its enforcement is so completely within the discretion of the courts of that state that they may annul or modify the decree, even as to overdue and unsatisfied instalments. [For other cases, see Judgment, 983-987, in Digest Sup. Ct. 1908.]

Judgment — full faith and credit — alimony.

2. Decrees of the New York courts for the future payment of alimony are not subject to annulment or modification by those courts as to overdue and unsatisfied instalments, so as to deprive such decrees of the protection, as to past-due and unpaid instalments, of the full faith and credit clause of the Federal Constitution.

[For other cases, see Judgment, 983-987, in Digest Sup. Ct. 1908.]

Judgment — full faith and credit.

3. A judgment enforceable in the state where rendered must be given effect in another state, under the full faith and credit clause of the Federal Constitution, although the modes of procedure to enforce

its collection may not be the same in both states.

[For other cases, see Judgment, VI. b, 2. in Digest Sup. Ct. 1908.]

[No. 7.]

Argued November 1, 1909. Decided May 31, 1910.

IN ERROR to the Supreme Court of Errors of the State of Connecticut to review a judgment which reversed a judgment of the Superior Court of New London County, in that state, for the recovery of overdue and unsatisfied instalments of alimony under a decree of the Supreme Court of the State of New York. Reversed and remanded for further proceedings.

See same case below, 80 Conn. 1, 125 Am. St. Rep. 102, 66 Atl. 772.

The facts are stated in the opinion.

Messrs. Robert Goeller and Benjamin Slade argued the cause and filed a brief for plaintiff in error:

Alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.

Barber v. Barber, 21 How. 582, 16 L. ed. 226; Howard v. Howard, 15 Mass. 196; Clark v. Clark, 6 Watts & S. 85; Wheeler v. Wheeler, 2 Dane, Abr. 310; Knapp v. Knapp, 59 Fed. 641; Trowbridge v. Spinning, 23 Wash. 48, 54 L.R.A. 204, 83 Am. St. Rep. 806, 62 Pac. 125; Arrington v. Arrington,

and Huntington v. Attrill, 36 L. ed. U. S. 1123.

On action to recover instalments of alimony accruing under a decree rendered in another state—see note to Israel v. Israel, 9 L.R.A. (N.S.) 1168.

On equity jurisdiction to enforce a foreign decree for alimony—see note to Davis v. Davis, 9 L.R.A. (N.S.) 1071.

NOTE.—As to full faith and credit to be given to state records and judicial proceedings—see notes to Lindley v. O'Reilly, 1 L.R.A. 79; Cummington v. Belcherton, 4 L.R.A. 131; Rand v. Hanson, 12 L.R.A. 574; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; Mills v. Duryee, 3 L. ed. U. S. 411; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; 54 L. ed.

127 N. C. 190, 52 L.R.A. 201, 80 Am. St. Rep. 791, 37 S. E. 212.

The court's power to modify a decree in respect to alimony does not destroy its finality.

Dow v. Blake, 148 Ill. 76, 39 Am. St. Rep. 156, 35 N. E. 761.

In the absence of a modification, the courts of Connecticut should be required to give to that decree the same binding force and effect that it has in the state of New York.

Barber v. Barber, supra; *Kunze v. Kunze*, 94 Wis. 54, 59 Am. St. Rep. 857, 68 N. W. 391; *Trowbridge v. Spinning*, supra; *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152; *Fletcher v. Ferrel*, 9 Dana, 372, 35 Am. Dec. 143; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604; *Shields v. Thomas*, 18 How. 253, 15 L. ed. 368; *Youngs v. Carter*, 10 Hun, 194.

The judgment of a state court, if that court had jurisdiction to render it, is entitled to the same full faith and credit in the courts of another state that it has in the state where rendered, as a valid domestic judgment.

Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 A. & E. Ann. Cas. 1084.

An action at law will lie in a Federal court upon a decree of divorce rendered by a state court of equity to recover the alimony accrued at the time of the filing of the complaint.

Knapp v. Knapp, 59 Fed. 641; *McCracken v. Swartz*, 5 Or. 63; *Dubois v. Dubois*, 6 Cow. 494; *Allen v. Allen*, 100 Mass. 374; *Hansford v. Van Auken*, 79 Ind. 302.

The same general rule of law should apply to the decree in question that would apply to an instrument in writing for the payment of money that will become due in instalments, except that the decree in question has greater dignity, and must be given more faith and credit than a mere written obligation can possibly have.

Brisbane v. Dobson, 50 Mo. App. 176.

An action of debt will lie on a judgment as soon as it is recovered. In the majority of the states of this Union the owner of a judgment may bring suit thereon in the same court that rendered it, or in any other court of competent jurisdiction, and prosecute it to final judgment, notwithstanding the collection of the original judgment might still have been enforced by execution in the state of its rendition.

Freeman, Judgm. § 432.

The judgment of a sister state is conclusive on the merits for the purpose of pleading and evidence, and is entitled to the full dignity of a record; and the defendant cannot, when sued on a judgment, deny

the notice which it recites, or the obligation which it establishes, or impeach its justice.

Mills v. Duryee, 7 Cranch, 481, 3 L. ed. 411.

An order for the payment of alimony is simply an order for the payment of money. *Blake v. People*, 80 Ill. 14; *Coughlin v. Ehler*, 39 Mo. 287.

That being so, the irresistible conclusion follows that, in order to recover the payment of such money, an ordinary civil action is all that is necessary to enforce the payment of the amount of money due at the time of the institution of the action.

Barber v. Barber and *Brisbane v. Dobson*, supra.

The defendant in error in the case at bar is precluded from attacking the dignity and effect of the judgment in question until it has been actually reversed or set aside.

Bullock v. Bullock, 57 N. J. L. 508, 31 Atl. 1024; *Bennett v. Bennett*, Deady, 299, Fed. Cas. No. 1,318.

The decree of divorce, valid and effectual by the law of the state in which it is obtained, is valid and effectual in all other states.

Cheever v. Wilson, 9 Wall. 108, 19 L. ed. 604.

A judgment of one state does not carry the efficacy of a judgment in another state, capable of enforcement by execution, until such judgment is reduced to a new judgment in the place where it is sought to enforce it. After obtaining a judgment in the place of enforcement, it can only be executed in the latter state as its laws may permit.

First Nat. Bank v. Ducl County, 74 Fed. 373; *Lamberton v. Grant*, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127; *Carter v. Bennett*, 6 Fla. 214; *Thompson v. Whitman*, 18 Wall. 457, 463, 21 L. ed. 897, 899; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 292, 32 L. ed. 239, 244, 8 Sup. Ct. Rep. 1370; *Bullock v. Bullock*, 51 N. J. Eq. 444, 27 Atl. 435.

A judgment recovered in one state is not executory in any other state in the sense that final process for its enforcement could issue on merely filing or docketing the judgment, as in the case of a domestic judgment.

Carter v. Bennett, supra; *Leathe v. Thomas*, 109 Ill. App. 434; *Dunham v. Dunham*, 57 Ill. App. 475; *Joice v. Scales*, 18 Ga. 725.

The constitutional provision for giving full faith and credit to such judgments, as we understand it, relates only to their effect as evidence or a bar to further litigation.

Claffin v. McDermott, 20 Blatchf. 522, 12 Fed. 375; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 108 U. S. 18, 27 L. ed. 636, 1 Sup. Ct. Rep. 614, 617.

In an action on a foreign judgment awarding alimony to the plaintiff, no other relief can be had than a recovery for past-due alimony.

Wood v. Wood, 7 Misc. 579, 28 N. Y. Supp. 154.

A bill in equity by a woman against her former husband, to enforce a provision of a foreign decree of divorce awarding her a definite and ascertained sum as alimony, is demurrable on the ground that she has an adequate remedy at law by an action of debt on the decree.

Davis v. Davis, 29 App. D. C. 258, 9 L.R.A.(N.S.) 1071.

The allowance in the decree of alimony created a judicial debt of record, and formed a proper foundation for the recovery of said debt in the present action.

Wetmore v. Wetmore, 149 N. Y. 520, 33 L.R.A. 708, 52 Am. St. Rep. 752, 44 N. E. 169; France v. France, 79 App. Div. 291, 79 N. Y. Supp. 579; Barber v. Barber, supra.

The decree in question ought to be enforced as any other judgment out of any property of the husband, wherever found.

Bouslough v. Bouslough, 68 Pa. 495; Brisbane v. Dobson and Barber v. Barber, supra.

Mr. William J. Brennan argued the cause and filed a brief for defendant in error:

The New York courts hold that an order of this character is subject to modification at any time by the court which granted it, independent of statute, and is enforceable only in the method provided by the statute.

Tonjes v. Tonjes, 14 App. Div. 542, 43 N. Y. Supp. 941; Weber v. Weber, 93 App. Div. 149, 87 N. Y. Supp. 519; Branth v. Branth, 20 N. Y. Civ. Proc. Rep. 33, 13 N. Y. Supp. 360.

The courts of one state will not enforce the judgments of the courts of another state, which are subject to modification, and are not final judgments for fixed sums of money.

Lynde v. Lynde, 162 N. Y. 405, 48 L.R.A. 679, 76 Am. St. Rep. 332, 56 N. E. 979, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555; Audubon v. Shufeldt, 181 U. S. 577, 45 L. ed. 1010, 21 Sup. Ct. Rep. 735; Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. Rep. 172, 2 A. & E. Ann. Cas. 265; Israel v. Israel, 9 L.R.A.(N.S.) 116, 79 C. C. A. 32, 148 Fed. 576, 8 A. & E. Ann. Cas. 697; Arrington v. Arrington, 131 N. C. 143, 92 Am. St. Rep. 769, 42 S. E. 554; Page v. Page, 189 Mass. 85, 75 N. E. 92, 4 A. & E. Ann. Cas. 296.

Mr. Justice White delivered the opinion of the court:

In 1899, by a judgment of the supreme 54 L. ed.

court of the state of New York, the plaintiff in error was granted a separation from bed and board from her husband, the defendant in error, and he was ordered to pay her weekly the sum of \$22.50 for the support of herself and the maintenance and education of a minor child. The judgment, omitting title, is copied in the margin.†

*In July, 1904, at which time none of the [8 instalments of alimony had been paid, the wife commenced this action in the superior court of New London county, Connecticut, to recover the amount then in arrears of the decreed alimony. The cause was put at issue and was heard by the court. As stated by the trial judge, in a "finding" by him made: "The defendant made the following

†This action having been begun by the service of the summons herein on the defendant personally, . . . now on motion of . . . attorneys for the plaintiff, it is

Ordered, adjudged, and decreed that the plaintiff be, and she hereby is, forever separated from the defendant, and from the bed and board of said defendant, on the ground of nonsupport and cruel and inhuman treatment by the defendant. And it is

Further ordered, adjudged, and decreed that from and after the entry of this decree the defendant, Horace Randall Sistare, pay to the plaintiff, Matilda Von Ellert Sistare, for her maintenance and support and the maintenance and education of Horace Von Ellert Sistare, the minor child of the plaintiff and defendant, the sum of twenty-two and 50-100 dollars (\$22.50) per week, such sum to be paid into the hands of her attorneys of record in this action on each and every Monday. And it is further

Ordered, adjudged, and decreed that the sole care, custody, control, and education of said minor child, Horace Von Ellert Sistare, is hereby awarded to the plaintiff, and the defendant, upon complying fully with each and all of the directions of the decree herein, and not otherwise, and during his good behavior, shall, until the further order of this court, be permitted to see said child for the space of two hours, between the hours of 10 and 12 o'clock in the forenoon on Wednesdays and Saturdays, excepting Wednesdays and Saturdays during the months of July, August, and September of each year. And it is further

Ordered, adjudged, and decreed that costs are hereby awarded to the plaintiff against the defendant, taxed at the sum of one hundred and seventeen and 67-100 dollars (\$117.67), and that the plaintiff do recover said costs from the defendant and have execution therefor. And it is further

Ordered, adjudged, and decreed that the plaintiff have leave to apply from time to time for such orders at the foot of this judgment as may be necessary for its enforcement and for the protection and enforcement of her rights in the premises.

claims of law as to the judgment to be rendered in this action:

9] *“(a) That the judgment rendered by the supreme court of the state of New York, in requiring the future payment of \$22.50 per week, did not constitute a final judgment for a fixed sum of money, which is enforceable and collectible in this action.

“(b) That said judgment, being subject to modification by the court which granted it, is not a judgment which the courts of this state will enforce.

“(c) That the requirement that said sums of money should be paid as aforesaid does not constitute a debt or obligation from the defendant to the plaintiff which can be enforced in this action.

“(d) That said judgment requiring the said weekly payments cannot be enforced in any other way than according to the procedure prescribed in the statutes of the state of New York, and cannot be enforced in this action.

“(e) That the judgment which is sought to be enforced in this action is not a final judgment, entitled to full faith and credit in this state by virtue of the provisions of the Constitution of the United States.

“(f) That the judgment which is sought to be enforced in this action will not be enforced by the courts of this state through comity.

“(g) That the facts will not support a judgment for the plaintiff.”

The court, however, adjudged in favor of the plaintiff, and awarded her the sum of \$5,805, the arrears of alimony at the commencement of the action.

On appeal, the supreme court of errors (80 Conn. 1, 125 Am. St. Rep. 102, 66 Atl. 772) reversed the judgment and remanded the cause “for the rendition of judgment in favor of the defendant;” and such a judgment, the record discloses, was subsequently entered by the trial court. This writ of error was prosecuted.

The supreme court of errors of Connecticut reached the conclusion that the power 10] conferred upon a New York *court to modify a decree for alimony by it rendered extended to overdue and unsatisfied instalments as well as those to accrue in the future; that hence decrees for future alimony, even as to instalments after they had become past due, did not constitute debts of record, and were not subject to be collected by execution, but could only be enforced by the special remedies provided in the law, and were not susceptible of being made the basis of judgments in the state of New York in another court than the one in which the decree for alimony had been made. Guided by the interpretation thus given to the New York law, and the character of the

decree for future alimony which was based thereon, it was decided that the New York judgment for alimony which was sought to be enforced, even although the instalments sued for were all past due, was not a final judgment, which it was the duty of the courts of Connecticut to enforce in and by virtue of the full faith and credit clause of the Constitution of the United States. While the ruling of the court was, of course, primarily based upon the interpretation of the New York law, the ultimate ruling as to the inapplicability of the full faith and credit clause of the Constitution was expressly rested upon the decision of this court in *Lynde v. Lynde*, 181 U. S. 187, 45 L. ed. 814, 21 Sup. Ct. Rep. 555.

To sustain her contention that the action of the court below was in conflict with the duty imposed upon it by the full faith and credit clause, the plaintiff in error, by her assignments, in effect challenges the correctness of all the propositions upon which the court below rested its action, and virtually the defendant in error takes issue in argument as to these contentions. In disposing of the controversy, however, we shall not follow the sequence of the various assignments of error, or consider all the forms of statement in which the contentions of the parties are pressed in argument, but come at once to two fundamental questions which, being determined, will dispose of all the *issues in the case. Those in- [11] quiries are: 1st. Where a court of one state has decreed the future payment of alimony, and when an instalment or instalments of the alimony so decreed have become due and payable and are unpaid, is such a judgment as to accrued and past-due alimony ordinarily embraced within the scope of the full faith and credit clause of the Constitution of the United States so as to impose the constitutional duty upon the court of another state to give effect to such judgment? 2d. If, as a general rule, the full faith and credit clause does apply to such judgments, is the particular judgment under review exceptionally taken out of that rule by virtue of the nature and character of the judgment, as determined by the law of the state of New York, in and by virtue of which it was rendered? We shall separately consider the questions.

First. *The application, as a general rule, of the full faith and credit clause to judgments for alimony as to past-due instalments.*

An extended analysis of the principles involved in the solution of this proposition is not called for, since substantially the contentions of the parties are based upon their divergent conceptions of two prior decisions

of this court (*Barber v. Barber*, 21 How. 582, 16 L. ed. 226, and *Lynde v. Lynde*, supra), and an analysis of those cases will therefore suffice. For the plaintiff in error it is insisted that the case of *Barber v. Barber* conclusively determines that past-due instalments of a judgment for future alimony, rendered in one state, are within the protection of the full faith and credit clause, while the defendant in error urges that the contrary is established by the ruling in *Lynde v. Lynde*, and that if the *Barber* Case has the meaning attributed to it by the plaintiff in error, that case must be considered as having been overruled by *Lynde v. Lynde*.

Substantially the controversy in *Barber* 12] *v. Barber* was *this: In the year 1847, the court of chancery of New York granted Huldah B. Barber a separation from Hiram Barber, and directed the payment of alimony in quarterly instalments. Although the separation was decreed to be forever, the power to modify was reserved by a provision that the parties might at any time thereafter, by their joint petition, apply to the court to have the decree modified or discharged. It was provided that unpaid instalments of alimony should bear interest, "and that execution might issue therefor *toties quoties*." The husband failed to pay any of the alimony, and removed to Wisconsin, where he procured an absolute divorce. Subsequently an action was brought by Mrs. Barber upon the common-law side of the district court of the United States in the territory of Wisconsin, to recover the arrears of alimony, but relief was denied "for the reason that the remedy for the recovery of alimony was in a court of chancery, and not at law." A suit in equity to recover the overdue alimony was then commenced by Mrs. Barber, Wisconsin having been admitted into the Union, in the district court of the United States for the district of Wisconsin. Among other things, it was urged in ~~the~~ demurrer by the respondent, as a reason why the relief should be denied, "that the relief sought could only be had in the court of chancery for the state of New York, and that it did not appear that the complainants had exhausted the remedy which they had in New York." The proceedings culminated in a decree in favor of the complainant for the amount of alimony in arrears at the commencement of the suit, and the case was then brought to this court and the questions arising were disposed of in a careful and elaborate opinion. The decree was affirmed. In the course of the opinion it was declared, among other things, that courts of equity possessed jurisdiction to interfere to prevent the decree of the court of another state from

being defeated by fraud, and reference was made to English decisions *asserting the [13 power of chancery to compel the payment of overdue alimony. Considering the nature and character of a decree of separation and for alimony, and the operation and effect upon such a decree as to past-due instalments of the full faith and credit clause, it was said (p. 591):

"The parties to a cause for a divorce and for alimony are as much bound by a decree for both, which has been given by one of our state courts having jurisdiction of the subject-matter and over the parties, as the same parties would be if the decree had been given in the ecclesiastical courts of England. The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any state of the United States, the court having jurisdiction, will be carried into judgment in any other state, to have there the same binding force that it has in the state in which it was originally given."

And, again, determining the effect of a decree for future alimony, the court expressly declared (p. 595): "Alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is." And it is, we think, clear from the context of the opinion, that the court held that the decree in favor of Mrs. Barber operated to cause an indebtedness to arise in her favor as each instalment of alimony fell due, and that a power to modify, if exerted, could only operate prospectively.

The facts in *Lynde v. Lynde* which are pertinent to this controversy are these: A decree of the court of chancery of New Jersey in favor of Mrs. Lynde was rendered in 1897 for the sum of \$7,840, as alimony due at the date of the decree, with \$1,000 for counsel fees, and payment was directed to be made of \$80 weekly from the date of the decree. An action on this New Jersey decree was brought in May, 1898, in the supreme court of New York, and *recoy- [14 ery was allowed by the trial court for the alimony due at the date of the New Jersey decree, with interest, counsel fee, and costs, and for an additional amount representing future alimony, which had accrued from the date of the decree to the commencement of the action in New York. The judgment also directed the payment of future alimony as fixed by the New Jersey decree, and awarded certain remedies for the enforcement of the decree in accordance with the relief which had been awarded in the New Jersey decree, in conformity to the law of that state. The judgment thus rendered by the trial court in New York was ulti-

mately modified by the court of appeals of New York by allowing the recovery only of the alimony which had been fixed in the New Jersey decree as due at its date, with interest and the counsel fee, and disallowing recovery of the instalments of future alimony which had accrued when the action was commenced in New York, as well as the allowance in respect to alimony thereafter to accrue. In this court three questions were presented: 1. Whether the decree of the New Jersey court was wanting in due process because of the absence of notice to the defendant; 2, whether the duty to enforce the decree for alimony was imposed upon the courts of New York by the full faith and credit clause of the Constitution; and, 3, upon the hypothesis that the full faith and credit clause was applicable, whether that clause required that the remedies afforded by the laws of New Jersey should be made available in the state of New York. Deciding that the New Jersey decree was not wanting in due process, the court came to consider the second and third questions, and held that in so far as the New Jersey decree related to alimony accrued at the time it was rendered and fixed by the decree and the counsel fee, it was entitled to be enforced in the courts of New York; but that, in so far as it related to future alimony, its enforcement was not commanded by the full faith and credit [15] clause. No reference *was made to the case of *Barber v. Barber*, the opinion briefly disposing of the issue as follows (p. 187): "The decree for the payment of \$8,840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the court of chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum." These sentences were followed by a brief adverse disposition of the claim that there was a right to avail, for the enforcement of the New Jersey decree in the courts of New York, of the remedies peculiar to the New Jersey law.

When these two cases are considered together we think there is no inevitable and necessary conflict between them, and, in any event, if there be, that *Lynde v. Lynde* must be restricted or qualified so as to cause it not to overrule the decision in the *Barber* Case. In the first place, in the *Lynde* Case no reference whatever was made to the prior decision, and it cannot be said that such decision was overlooked, because it was referred to in the opinion of the court below and was expressly cited and commented upon in the briefs of counsel submitted in the *Lynde* Case. In the second place, in view of

the elaborate and careful nature of the opinion in *Barber v. Barber*, of the long period of time which had intervened between that decision and the decision in *Lynde v. Lynde*, and the fact which is made manifest by decisions of the courts of last resort of the several states that the rule laid down in the *Barber* Case had been accepted and acted upon by the courts of the states generally as a final and decisive exposition of the operation and scope of the full faith and credit clause, as applied to the subject with which the case dealt, it is not to be conceived that it was intended by the brief statement in the opinion in *Lynde v. Lynde* to announce a new and radical departure from the settled rule of constitutional *construction [16] which had prevailed for so long a time. And nothing in the mere language used in the *Lynde* Case would justify such a conclusion, because the reasoning expressed in that case was based solely and exclusively on the ground that the portions of the decree for alimony which were held to be not within the purview of the full faith and credit clause were not so embraced, because their enforcement "was subject to the discretion of the court of chancery of New Jersey, which might at any time alter it, . . ." In other words, the ruling was expressly based upon the latitude of discretion which the courts of New Jersey were assumed to possess over a decree for the payment of future alimony. But it is said although this be true, the decision in the *Lynde* Case must be here controlling and treated as overruling the *Barber* Case, since it will be found, upon examination of the New Jersey law which governed the New Jersey decree considered in the *Lynde* Case, that such law conferred no greater discretion upon the New Jersey court of chancery as to the enforcement of past-due instalments of future alimony than will be found to be possessed by the New York courts as to the decree here in question. But this is aside from the issue for decision, since the question here is not whether the doctrine expounded in the *Lynde* Case was there misapplied as a result of a misconception of the New Jersey law, but what was the doctrine which the case announced. And, answering that question, not only by the light of reason, but by the authoritative force of the ruling in the *Barber* Case, which had prevailed for so many years, and by the reasoning expressed in the *Lynde* Case, we think the conclusion is inevitable that the *Lynde* Case cannot be held to have overruled the *Barber* Case, and therefore that the two cases must be interpreted in harmony, one with the other, and that on so doing it results: First, that, generally speaking, where a decree is rendered for ali-

mony and is made payable in future instalments, *the right to such instalments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the instalments, since, as declared in the Barber Case, "alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is." Second, that this general rule, however, does not obtain where, by the law of the state in which a judgment for future alimony is rendered, the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the instalments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the instalments becoming due.

It follows, therefore, from the statement which we have made of the case, that the New York judgment which was relied upon came within the general rule, and, therefore, that the action of the supreme court of errors of Connecticut in refusing to enforce it was in conflict with the full faith and credit clause, unless it be, as a result of the law of the state of New York, the judgment for future alimony in that state, even as to past-due instalments, was so completely within the discretion of the courts of that state as to bring it within the exceptional rule embodied in the second proposition. A consideration of this subject brings us to an investigation of the second question, which we have previously stated.

Second. *The finality of the New York judgment as to past-due instalments for future alimony under the law of the state of New York.*

The conception of the statute law of the state of New York and of the decisions of the [18] courts of that state, interpreting *that law, which led the supreme court of errors of Connecticut to conclude that the enforcement of the judgment before it was so completely subject to the discretion of the court which had rendered it as not to entitle it to enforcement in virtue of the full faith and credit clause, was thus stated in its opinion:

"The nature, operation, and effect, within the state of New York, of orders like that in question, directing payments *in futuro* to a wife by a husband living in judicial separation, and passed in 1899, pursuant to the then provisions of statute, have been well settled by the repeated decisions of the courts of that jurisdiction. They have been

declared to be tentative provisions, which remain at all times within the control of the court issuing them, and subject at any time to modification or annulment. *Tonjes v. Tonjes*, 14 App. Div. 542, 43 N. Y. Supp. 941. The right of modification or annulment which is thus reserved to the court is one which extends to overdue and unsatisfied payments as well as to those which may accrue in the future. *Sibley v. Sibley*, 66 App. Div. 532, 73 N. Y. Supp. 244; *Goodsell v. Goodsell*, 94 App. Div. 443, 88 N. Y. Supp. 161; *Kiralfy v. Kiralfy*, 36 Misc. 407, 73 N. Y. Supp. 708; *Wetmore v. Wetmore*, 34 Misc. 640, 70 N. Y. Supp. 604. The amount awarded 'does not exist as a debt in favor of the wife against the husband, in the sense of indebtedness as generally understood.' *Tonjes v. Tonjes*, supra. The order is not one 'which simply directs the payment of a sum of money,' and not such an one as can have enforcement by execution. *Weber v. Weber*, 93 App. Div. 149, 152, 87 N. Y. Supp. 519. The special remedies provided in §§ 1772 and 1773 for the enforcement of the orders are exclusive. *Weber v. Weber*, supra; *Branth v. Branth*, 20 N. Y. Civ. Proc. Rep. 33, 13 N. Y. Supp. 360. No judgment in another court can be entered upon them. *Branth v. Branth*, supra."

But we are unable to assent to the view thus taken of the statute law of New York, or to concede the correctness of the effect attributed by the court to the New York decisions which were referred to.

*The provisions of the Code of Civil [19] Procedure of New York, pertinent to be considered in determining the scope and effect of judgments for separation and alimony rendered by the courts of New York, are copied in the margin.†

*In considering the meaning of these [20] provisions, it must be borne in mind that the settled rule in New York is that the courts of that state have only the jurisdiction over the subject of divorce, separation, and alimony conferred by statute, and that the authority to modify or amend a judgment awarding divorce and alimony must be found in the statute or it does not exist. *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, 463; *Livingston v. Livingston*, 173 N. Y.

†Provisions of N. Y. Code of Civil Procedure in force in 1899.

Sec. 1762. For what causes action may be maintained.—In either of the cases specified in the next section, an action may be maintained by a husband or wife against the other party to the marriage, to procure a judgment separating the parties from bed and board forever, or for a limited time, for either of the following causes:

1. The cruel and inhuman treatment of the plaintiff by the defendant.

377, 61 L.R.A. 800, 93 Am. St. Rep. 600, 66 N. E. 123.

21] *Other than the provision in § 1767, authorizing the revocation of a judgment for separation upon the joint application of the parties, the power of the court to vary or modify a judgment for alimony, if it existed in 1899, was to be found in § 1771. It is 22] certain that authority is *there given to the courts of New York to modify or vary a decree for alimony by the following:

"The court may, by order, upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, vary or modify such directions. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice, as the court, in its discretion, may deem proper, after presentation to the court of satisfactory proof that justice requires such an application should be entertained."

But it is equally certain that nothing in this language expressly gives power to revoke or modify an instalment of alimony which had accrued prior to the making of an application to vary or modify, and every

reasonable implication must be resorted to against the existence of such power, in the absence of clear language manifesting an intention to confer it. The implication, however, which arises from the failure to expressly confer authority to retroactively modify an allowance of alimony is fortified by the provisions which are expressed. Thus, the methods of enforcing payment of the future alimony awarded, provided by the statute, all contemplate the collection and paying over as a matter of right of the instalments as they accrue, as long as the judgment remains unmodified, or, at least, until application has been made or permission to make one in pursuance to the statute has been accorded. And the force of this suggestion is accentuated when it is considered that it was not unusual in New York to resort to executions as upon a judgment at law to enforce the collection of unpaid instalments of alimony. *Wetmore v. Wetmore*, 149 N. Y. 520, 527, 33 L.R.A. 708, 52 Am. St. Rep. 752, 44 N. E. 169. Indeed, as in principle, if it be that the power to vary or modify operates retroactively and may affect past-due instalments so as to relieve of the obligation to pay such instalments, *it would follow, in [23 the nature of things, that the power would

2. Such conduct on the part of the defendant towards the plaintiff as may render it unsafe and improper for the former to cohabit with the latter.

3. The abandonment of the plaintiff by the defendant.

4. Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.

Sec. 1763. *Id.*; in what cases.—Such an action may be maintained in either of the following cases:

1. Where both parties are residents of the state when the action is commenced.

2. Where the parties were married within the state and the plaintiff is a resident thereof when the action is commenced.

3. Where the parties, having been married without the state, have become residents of the state, and have continued to be residents thereof at least one year, and the plaintiff is such a resident when the action is commenced.

Sec. 1766. Support, maintenance, etc., of wife and children.—Where the action is brought by the wife, the court may, in the final judgment of separation, give such directions as the nature and circumstances of the case require. In particular, it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties, and the court may, in such an action, render a judgment compelling the defendant to make the provision specified in this section, where, under the

circumstances of the case, such a judgment is proper, without rendering a judgment of separation.

Sec. 1767. Judgment for separation may be revoked.—Upon the joint application of the parties, accompanied with satisfactory evidence of their reconciliation a judgment for a separation forever, or for a limited period, rendered as prescribed in this article, may be revoked at any time by the court which rendered it, subject to such regulations and restrictions as the court thinks fit to impose.

Sec. 1769. Alimony, expenses of action, and costs; how awarded.—Where an action is brought, as prescribed in either of the last two articles, the court may, in its discretion, during the pendency thereof, from time to time, make and modify an order or orders requiring the husband to pay any sum or sums of money necessary to enable the wife to carry on or defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties. The final judgment in such an action may award costs in favor of or against either party, and an execution may be issued for the collection thereof, as in an ordinary case; or the court may, in the judgment or by an order made at any time, direct the costs to be paid out of any property sequestered or otherwise in the power of the court.

Sec. 1771. Custody and maintenance of children and support of plaintiff.—Where an action is brought by either husband or

exist to increase the amount allowed, it is additionally impossible to imply such authority in the absence of provisions plainly compelling to such conclusion. Beyond all this, when it is considered that no provision is found looking to the repayment by the wife of any instalments which had been collected from the husband, in the event of a retroactive reduction of the allowance, it would seem that no power to retroactively modify was intended.

A brief consideration of the state of the law of New York concerning the power to modify allowanees for alimony prior to the enactment of the provisions as to modification in question, and the rulings of the court of last resort of New York on the subject of such power, we think will serve to further establish the impossibility, in reason, of supposing that the statutory provisions in question conferred the broad and absolute power of retroaction as to past-due instalments of alimony which the court below assumed to exist. Prior to 1894, the courts of New York did not possess the power to modify a judgment in the case either of an absolute divorce or of a judicial separation, except in respect to the custody, etc., of the children of the marriage. *Erkenbrach v. Erkenbrach*, 96 N. Y. 456. In the year

1894, the statute was amended to permit the court to vary or modify the provision for the support of the wife upon her application alone, on notice to the husband. Laws of 1894, chap. 728. Subsequently, § 1771, which, by the amendment of 1894, conferred power upon the application of the wife to vary or modify the allowance, was enlarged to read as it stood in 1899, when the action was brought in which the judgment in question was rendered; that is, so as to confer authority upon the court to vary or modify an allowance of alimony on the application of either party. Laws of 1895, chap. 891.

But in view of the well-settled doctrine prevailing in *New York, that no power [24 exists to modify a judgment for alimony, absolute in terms, unless conferred by statute, and the practice of treating the right to collect accrued instalments of alimony as vested and subject to be enforced by execution, and in view of the further fact that decrees for alimony in New York, where authority to modify was not expressly conferred by statute, or was not reserved in the decree at the time of rendition, created vested rights not subject to either judicial or legislative control (*Livingston v. Livingston*, supra), we think it becomes quite

wife, as prescribed in either of the last two articles, the court must, except as otherwise expressly prescribed in those articles, give, either in the final judgment or by one or more orders made from time to time before final judgment, such directions as justice requires between the parties for the custody, care, education, and maintenance of any of the children of the marriage; and where the action is brought by the wife, for the support of the plaintiff. The court may, by order, upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, annul, vary, or modify such directions. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice, as the court, in its discretion, may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained.

Sec. 1772. Support, maintenance, etc., of wife and children. Sequestration.—Where a judgment rendered, or an order made, as prescribed in this article, or in either of the last two articles, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion, also direct him to give reasonable security, in such a manner and within such a time as it thinks proper, for the payment from time to time of the sums of money required for that purpose. If he

fails to give the security, or to make any payment required by the terms of such a judgment or order, whether he has or has not given security therefor, or to pay any sum of money which he is required to pay by an order, made as prescribed in § 1769 of this act, the court may cause his personal property, and the rents and profits of his real property, to be sequestered, and may appoint a receiver thereof. The rents and profits, and other property, so sequestered, may be, from time to time, applied, under the direction of the court, to the payment of any of the sums of money specified in this section, as justice requires.

Sec. 1773. Id.; when enforced by punishment for contempt.—Where the husband makes default in paying any sum of money specified in the last section, as required by the judgment or order directing the payment thereof, and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced by means of the proceedings prescribed in the last section, or by resorting to the security, if any, given as therein prescribed, the court may, in its discretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in title third of chapter seventeenth of this act. Such an order to show cause may also be made, without any previous sequestration, or direction to give security, where the court is satisfied that they would be ineffectual.

clear that the mere enlargement of the power of the court so as to permit modification of the allowance for alimony upon the application of the husband did not confer the authority to change or set aside the rights of the wife in respect to instalments which were overdue at the time application was made by the husband to modify the decree. And although we have been referred to and can find no decision of the court of last resort of New York dealing with the subject, the view we have taken, as an original question, of the Code provision in question, accords with that of the first department of the appellate division of the supreme court of the state of New York, announced in a decision rendered in 1903. *Goodsell v. Goodsell*, 82 App. Div. 65, 81 N. Y. Supp. 806. Nor do we find that the New York decisions relied upon by the lower court, and cited by it to sustain its conclusion that "the right of modification or annulment which is thus reserved to the court is one which extends to overdue and unsatisfied payments as well as to those which may accrue in the future," have even a tendency to that effect. The cases cited and relied on are *Sibley v. Sibley*, 66 App. Div. 552, 73 N. Y. Supp. 244; *Goodsell v. Goodsell*, 94 App. Div. 443, 88 N. Y. Supp. 161; *Kiralfy v. Kiralfy*, 36 Misc. 407, 73 N. Y. Supp. 708; and *Wetmore v. Wetmore*, 34 Misc. 640, 70 N. Y. Supp. 604.

The *Sibley* Case was decided in 1901 by the appellate division of the supreme court of New York, first department. The case [25] was not concerned with a decree *for the payment of permanent alimony. It related to the failure, during the pendency of an action for separation, to comply with an order for the payment of temporary alimony and counsel fees. Whether such order was made *ex parte* or upon notice does not appear. Among other things, the appeal presented the question of the propriety of the denial of a motion to modify the order directing the payment of alimony and counsel fees by reducing the amount directed to be paid. The order appealed from was affirmed, without prejudice, however, to the right of the appellant "to renew his application when he returns to this state and subjects himself to the jurisdiction of the court." No intimation is given in the opinion as to whether the power to reduce the amount of alimony and counsel fees could be exerted so as to have a retroactive effect. The decision in the *Goodsell* Case was made in 1904 by the appellate division, first department, and concerned a denial at special term of a motion to punish the defendant for contempt in not paying the difference between certain payments, made as alimony by agreement between the parties, and the

amount ordered to be paid in the final judgment awarding an absolute divorce. The appellate court declined to consider the question of whether the defendant was in contempt until a report had been made by the referee who had been appointed to determine the financial ability of the defendant to pay. There was no intimation as to the extent of the power to modify an allowance of alimony. A year prior, however, in the same litigation (82 App. Div. 65), the same court, as we have already stated, decided that the provisions of the New York Code giving power to modify an allowance of alimony could only have a prospective operation. It was said (p. 70):

"It may, we think, be given full force and effect by ascribing to the legislature the intention of authorizing the courts to vary or modify the allowance of alimony from *the time of the adjudication that [26 such variation or modification is proper, without making the same retroactive."

The *Kiralfy* Case was a decision of the New York special term, rendered in December, 1901. The matter acted upon was a motion to amend a final decree of divorce by reducing the amount of alimony to a sum not merely less than that awarded by the decree, but less than the sum which the defendant had been paying under agreement with his wife. The motion was granted, but it was clearly given a prospective operation only. *Wetmore v. Wetmore* was also decided in 1901 by the New York special term. What was held was merely that the court would not relieve the defendant, who had persistently evaded a decree of absolute divorce, in which there had been awarded future alimony for the support of the wife and children. There is no discussion as to the extent of the power to modify decrees of divorce in respect to alimony, and a modification of a decree as to the amount of alimony to be paid, which is referred to in the course of the proceedings, plainly had only a prospective operation.

Contenting ourselves in conclusion with saying that, as pointed out in *Lynde v. Lynde*, although mere modes of execution provided by the laws of a state in which a judgment is rendered are not, by operation of the full faith and credit clause, obligatory upon the courts of another state in which the judgment is sought to be enforced, nevertheless, if the judgment be an enforceable judgment in the state where rendered, the duty to give effect to it in another state clearly results from the full faith and credit clause, although the modes of procedure to enforce the collection may not be the same in both states.

It follows that the judgment of the Supreme Court of Errors of Connecticut must

be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

And it is so ordered.

27] *GEORGE C. RANKIN,† Receiver of the Berlin National Bank, and the Berlin National Bank, Plffs. in Err.,

v.

JOHN EMIGH and O. L. Atkins.

(See S. C. Reporter's ed. 27-36.)

Error to state court—scope of review—questions of fact.

1. Findings of fact of a state court are binding on the Federal Supreme Court on a writ of error to the state court.

[For other cases, see Appeal and Error, 2175-2208, in Digest Sup. Ct. 1908.]

National banks—powers—ultra vires as defense—insolvency.

2. Those portions of the collections on account of sales of butter actually coming into the hands of the receiver of a national bank which had virtually acquired and operated through its officers an insolvent creamery company doing business under an arrangement by which the proceeds of sales, less a stated compensation, were to be divided *pro rata* among those furnishing the milk, may be recovered by the latter, even though the transaction may have been beyond the powers of the bank, and they are further entitled to participate *pro rata* as general creditors to the extent that the proceeds of such sales had been diverted and appropriated by the bank.

[For other cases, see Banks, IV. g, in Digest Sup. Ct. 1908.]

[No. 144.]

Argued April 15, 18, 1910. Decided May 31, 1910.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment which affirmed a judgment of the Circuit Court of Green Lake County, in that state, in favor of certain milk producers in an action to recover the proceeds

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On estoppel or ratification of transactions *ultra vires*—see note to Central Transp. Co. v. Pullman's Palace Car Co. 35 L. ed. U. S. 55.

On estoppel of corporation to set up plea of *ultra vires*—see note to Miller v. American Mut. Acci. Ins. Co. 20 L.R.A. 765.

On the right of a bank to engage in business to save debt—see note to the decision of the state court in the principal case, as reported in 27 L.R.A.(N.S.) 243.

†Substituted as plaintiff in error for P. R. Earling.

54 L. ed.

of sales of butter from the receiver of a national bank which had taken over the operation of an insolvent creamery company, and to participate *pro rata* as general creditors to the extent that such proceeds had been diverted and appropriated by the bank. Affirmed.

See same case below, 134 Wis. 565, 27 L.R.A.(N.S.) 243, 115 N. W. 128.

The facts are stated in the opinion.

Mr. Rufus S. Simmons argued the cause, and, with Messrs. Frank J. R. Mitchell and S. C. Irving, filed a brief for plaintiffs in error:

A national bank cannot undertake to operate a butter factory and engage in the manufacture and sale of butter, or be held to have assumed any obligations in that business.

California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; First Nat. Bank v. Converse, 200 U. S. 425, 427-441, 50 L. ed. 537, 538-543, 26 Sup. Ct. Rep. 306; Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, 299-301, 50 L. ed. 1036, 1039, 1040, 26 Sup. Ct. Rep. 613; Cooper v. Hill, 36 C. C. A. 402, 94 Fed. 587; Sumner v. Marey, 3 Woodb. & M. 113, Fed. Cas. No. 13,609; Edward P. Allis Co. v. Standard Nat. Bank, 110 Fed. 49; Gause v. Commonwealth Trust Co. 196 N. Y. 157, 24 L.R.A.(N.S.) 967, 89 N. E. 476; State v. Bank of Hemingford, 58 Neb. 820, 80 N. W. 50; Merchants' Bank v. Baird, 17 L.R.A.(N.S.) 526, 90 C. C. A. 338, 160 Fed. 645; Davis v. Elmira Sav. Bank, 161 U. S. 275, 290, 40 L. ed. 700, 703, 16 Sup. Ct. Rep. 502.

The milk patrons had notice of a fact which put them upon inquiry.

Bispham, Eq. 2d ed. ¶268, p. 333; 2 Pom. Eq. Jur. 3d ed. ¶ 608; Cordova v. Hood, 17 Wall. 1, 8, 21 L. ed. 587, 589; Wood v. Carpenter, 101 U. S. 135, 139, 141, 25 L. ed. 807-809; Kennedy v. Green, 3 Myl. & K. 719, 21 Eng. Rul. Cas. 820.

The funds of the bank could not be appropriated to any such claim or trust as asserted here.

Davis v. Elmira Sav. Bank, 161 U. S. 275, 283-290, 40 L. ed. 700, 701-703, 16 Sup. Ct. Rep. 502; First Nat. Bank v. Selden, 62 L.R.A. 559, 56 C. C. A. 532, 120 Fed. 215.

Shareholders are not liable to contribute to the claims of creditors based on an *ultra vires* act.

Schrader v. Manufacturers' Nat. Bank, 133 U. S. 67, 75, 33 L. ed. 564, 567, 10 Sup. Ct. Rep. 238.

All creditors of a national bank must share alike in funds raised from stockholders' liability.

Richmond v. Irons, 121 U. S. 27, 48, 49, 30 L. ed. 864, 871, 7 Sup. Ct. Rep. 788.

The equities on the side of the bank's *intra vires* creditors and the public are paramount to any alleged equities of the *ultra vires* milk patrons.

Thomas v. Richmond, 12 Wall. 349, 356, 20 L. ed. 453, 457; Easton v. Iowa, 188 U. S. 220, 229, 230, 238, 47 L. ed. 452, 456, 457, 459, 23 Sup. Ct. Rep. 288; Davis v. Elmira Sav. Bank, 161 U. S. 275, 40 L. ed. 790, 16 Sup. Ct. Rep. 502; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393, 406-409, 36 L. ed. 738, 753-755, 12 Sup. Ct. Rep. 953; Harriman v. Northern Securities Co. 197 U. S. 244, 295, 296, 49 L. ed. 739-763, 25 Sup. Ct. Rep. 493; Chapman v. Douglas County, 107 U. S. 348, 356, 27 L. ed. 378, 381, 2 Sup. Ct. Rep. 62; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 58, 59, 60, 35 L. ed. 55, 68, 69, 11 Sup. Ct. Rep. 478; Parkersburg v. Brown, 106 U. S. 487, 503, 27 L. ed. 238, 245, 1 Sup. Ct. Rep. 442; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co. 118 U. S. 290, 317, 30 L. ed. 83, 94, 6 Sup. Ct. Rep. 1094; Litchfield v. Ballou, 114 U. S. 190, 194, 29 L. ed. 132, 134, 5 Sup. Ct. Rep. 820; Bissell v. Michigan S. & N. I. R. Cos. 22 N. Y. 305; Bank of Chattanooga v. Bank of Memphis, 9 Heisk. 415; State v. Bank of Hemmingford, supra; 2 Morse, Banks & Banking, 4th ed. 734b, 738, 746, 749b; Merchants' Bank v. Baird, supra.

The alleged trust had an unlawful origin, because founded on the violation of the bank act.

Lewin, Tr. 1st Am. ed. **20, 94; Davis v. Elmira Sav. Bank, 161 U. S. 275, 290, 40 L. ed. 700, 16 Sup. Ct. Rep. 502.

A trust will not be allowed if it interferes with the rights of others.

Litchfield v. Ballou, 114 U. S. 190, 195, 29 L. ed. 132, 134, 5 Sup. Ct. Rep. 820; 1 Perry, Trusts, 4th ed. §§ 171, 175.

The milk patrons, because they had notice, concurred in the alleged breach of trust, and are estopped to claim innocence and injury, or assert any alleged equity.

2 Lewin, Tr. 1st Am. ed. *918.

The loss should fall on the milk patrons, who were responsible for the loss.

Friedlander v. Texas & P. R. Co. 130 U. S. 416, 425, 32 L. ed. 991, 994, 9 Sup. Ct. Rep. 570.

Plaintiffs' cases merely decide that when a trust is established, trust funds may be followed.

Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Boyle v. Northwestern Nat. Bank, 125 Wis. 498, 1 L.R.A. (N.S.) 1110, 110 Am. St. Rep. 844, 103 N. W. 1123, 104 N. W. 917.

There was no intention to create a bailment in this case.

Butterfield v. Lathrop, 71 Pa. 230; Laflin & R. Powder Co. v. Burkhardt, 97 U. S. 110, 116, 24 L. ed. 973, 974; Chisholm v. Eagle Ore Sampling Co. 75 C. C. A. 472, 144 Fed. 673; Harriman v. Northern Securities Co. 197 U. S. 244, 291-294, 49 L. ed. 739, 761-763, 25 Sup. Ct. Rep. 493.

The relation was that of debtor and creditor, and not a trust relation.

Marine Bank v. Fulton County Bank, 2 Wall. 252, 17 L. ed. 785; National Bank v. Milard, 10 Wall. 152, 155, 156, 19 L. ed. 897, 899.

Notice to officers or directors of the bank, which came to their knowledge while acting as officers of the creamery, cannot be imputed to the bank, because their interest in one was adverse to their interest in the other.

Seixas v. Citizens' Bank, 38 La. Ann. 436; Re European Bank, L. R. 5 Ch. 362; 4 Thomp. Corp. § 5214; Seaverns v. Presbyterian Hospital, 173 Ill. 419, 64 Am. St. Rep. 125, 50 N. E. 1079; Higgins v. Lansingh, 154 Ill. 388, 40 N. E. 362; Lowe v. Ring, 106 Wis. 656, 82 N. W. 571, 115 Wis. 580, 92 N. W. 238.

Notice and knowledge of certain directors of the bank, which came to them individually, and not while acting as a board, that certain other directors were operating the creamery, was not notice to the bank, and does not make the act of the directors the act of the bank.

3 Thomp. Corp. §§ 3906, 3908; 1 Morse, Banks & Banking, 4th ed. § 124; First Nat. Bank v. Drake, 35 Kan. 576, 57 Am. Rep. 193, 11 Pac. 445; Edwards v. Carson Water Co. 21 Nev. 491, 34 Pac. 381; Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 381-383, 33 L. ed. 157, 160, 161, 9 Sup. Ct. Rep. 770; New London Bank v. Ketchum, 64 Wis. 11, 24 N. W. 468; Western Nat. Bank v. Armstrong, 152 U. S. 346, 351, 38 L. ed. 470, 472, 14 Sup. Ct. Rep. 572.

Where there is no duress or oppression, and where public policy would not be promoted by requiring the money or property to be returned, and the parties are truly *in pari delicti*, a court of equity will not relieve either party.

1 Story, Eq. Jur. 13th ed. § 298; Harriman v. Northern Securities Co. 197 U. S. 296, 49 L. ed. 763, 25 Sup. Ct. Rep. 493; Bryant v. Peck & W. Co. 154 Mass. 461, 28 N. E. 678.

In all acts which are unlawful on account of their immorality, or because they are hostile to public policy, the parties to the act are *in pari delicto*.

Worcester v. Eaton, 11 Mass. 377; Jones 218 U. S.

v. Merinethshire Permanent Ben. Bldg. Soc. [1892] 1 Ch. 185.

The suppression of illegal contracts is far more likely in general to be accomplished by leaving the parties without remedy against each other.

Atwood v. Fisk, 101 Mass. 364, 100 Am. Dec. 124.

Mr. J. C. Thompson argued the cause, and, with Mr. E. F. Kileen, filed a brief for defendants in error:

Where a factor, commission man, or agent disposes of the property of third parties on a commission basis, and collects the money for such third parties, and deposits the same in a bank for ultimate distribution to the true owners, (a) the relation between such middleman and those for whom he is acting is a fiduciary or trust relation; (b) the third parties are the beneficial or equitable owners of such fund; (c) the beneficial or equitable owners of such funds may, by an action in equity, establish their title, and recover possession of such funds in full, in whomsoever's hands the same may be found and identified within the equitable rule of identification; (d) a bank or depositary, if it has notice of the equitable ownership of the funds, cannot apply the same to the payment of an overdraft or note of the broker, factor, or agent, even though such deposit is kept in the individual name of such broker.

Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Emigh v. Earling, 134 Wis. 565, 27 L.R.A. (N.S.) 243, 115 N. W. 128; Boyle v. Northwestern Nat. Bank, 125 Wis. 498, 1 L.R.A. (N.S.) 1110, 110 Am. St. Rep. 844, 103 N. W. 1123, 104 N. W. 917.

Mere bookkeeping cannot change the rights of the parties.

American Exch. Nat. Bank v. Loretta Gold & S. Min. Co. 165 Ill. 103, 56 Am. St. Rep. 236, 46 N. E. 202; Hyland v. Roe, 111 Wis. 368, 87 Am. St. Rep. 873, 87 N. W. 252; Commercial Nat. Bank v. Armstrong, 148 U. S. 57, 58, 37 L. ed. 366, 368, 13 Sup. Ct. Rep. 533.

Where a third party knowingly participates in the handling of the trust or the diversion of the trust funds, it is liable personally to the *cestui que trust*, and becomes in fact a trustee *de son tort*, and liable to the same extent as the original trustee.

Duckett v. National Mechanics' Bank, 86 Md. 403, 39 L.R.A. 84, 63 Am. St. Rep. 513, 38 Atl. 983; 2 Pom. Eq. Jur. §§ 1047, 1048, 1079, p. 656; Perry, Tr. §§ 217, 245, 828, 846; Harrigan v. Gilchrist, 121 Wis. 281, 99 N. W. 909.

These fundamental principles in regard
54 L. ed.

to the liability of persons participating in a breach of trust, or intermeddling with the management of the trust, apply as well to banks as to all others.

3 Am. & Eng. Enc. Law, 2d ed. p. 832; Duckett v. National Mechanics' Bank, 86 Md. 406, 39 L.R.A. 84, 63 Am. St. Rep. 513, 38 Atl. 983; Swift v. Williams, 68 Md. 236, 11 Atl. 835; Bank of Greensboro v. Clapp, 76 N. C. 482; Gray v. Johnston, L. R. 3 H. L. 1; Dunnean v. Jaudon, 15 Wall. 165, 21 L. ed. 142; Lowry v. Commercial & F. Bank, Taney, 310, Fed. Cas. No. 8,581; Mechanics' Bank v. Seton, 1 Pet. 299, 309, 7 L. ed. 152, 156; Covington v. Anderson, 16 Lea, 310; McKee v. Lamon, 159 U. S. 317, 40 L. ed. 165, 16 Sup. Ct. Rep. 11; Pearce v. Dill, 149 Ind. 136, 48 N. E. 788.

Where a bank officer is acting as president or director of another concern, or as trustee or executor of an estate, the knowledge acquired in the latter capacity is imputed to his bank, according to the better rule.

5 Cyc. Law & Proc. p. 461, note 21; Gaston v. American Exch. Nat. Bank, 29 N. J. Eq. 98.

The bank is charged with the knowledge acquired by its cashier, president, or other officers, pertaining to transactions within the scope of the bank's business, although such knowledge be acquired in another transaction than that to which it relates.

5 Cyc. Law & Proc. p. 460.

No matter what form writings may take, the true agreement can always be shown. A writing never shuts out parol evidence except as to the parties to it; that is, the rule in regard to permitting parol testimony to vary the terms of a written instrument applies only to the parties and their privies. It has no application to strangers.

21 Am. & Eng. Enc. Law, 2d ed. p. 1103.

So, too, an arrangement in form made with an officer of the bank in his own private name can always be shown by parol to have been made by him as an officer of, or agent of, or as acting for, the bank.

Northern Nat. Bank v. Lewis, 78 Wis. 475, 47 N. W. 834.

Results rather than motives are significant as to determining liability.

Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 417, 34 L. ed. 726, 11 Sup. Ct. Rep. 118.

The defense of *ultra vires* cannot be set up against a liability founded upon a wrong, fraud, or tort. This fundamental proposition applies to national banks as well as to any other corporation.

Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229; First Nat. Bank v. Graham, 100 U. S. 699, 702, 25 L. ed. 750, 751; Salt Lake City v. Hollister, 118 U. S. 256, 30 L. ed. 176, 6

Sup. Ct. Rep. 1055; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146, 7 Sup. Ct. Rep. 1286; *Johnston Fife Hat Co. v. National Bank*, 4 Okla. 17, 44 Pac. 192; *Wright v. Stewart*, 130 Fed. 914, 77 C. C. A. 499, 147 Fed. 328; *Nevada Bank v. Portland Nat. Bank*, 59 Fed. 338; *Interstate Nat. Bank v. Claxton*, 97 Tex. 569, 65 L.R.A. 820, 104 Am. St. Rep. 885, 80 S. W. 605; 5 Cyc. Law & Proc. 478; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. Rep. 261; *Chesapeake & O. R. Co. v. Howard*, 178 U. S. 153, 160, 44 L. ed. 1015, 1017, 20 Sup. Ct. Rep. 880; *New York C. & H. R. R. Co. v. United States*, 212 U. S. 481, 493, 53 L. ed. 613, 621, 29 Sup. Ct. Rep. 304; *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528; *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 544, 43 L. ed. 543, 547, 19 Sup. Ct. Rep. 296.

The taking over of the capital stock of the Jenne Creamery Company by the bank's officers, and their carrying on the business in the interest of the bank, was not *ultra vires*, but was a legitimate and proper (though in this case possibly injudicious) method of attempting to collect the large amounts due the bank at the time the arrangement was made.

5 Cyc. Law & Proc. p. 492; *Lowe v. Ring*, 106 Wis. 647, 82 N. W. 571, 115 Wis. 575, 92 N. W. 238; 5 Cyc. Law & Proc. p. 591; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448; 3 Am. & Eng. Enc. Law, 2d ed. p. 1800; *Reynolds v. Simpson*, 74 Ga. 454; *John A. Roebling Sons' Co. v. First Nat. Bank*, 30 Fed. 744; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 366, 42 L. ed. 198, 200, 17 Sup. Ct. Rep. 831; *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122-128, 23 L. ed. 679-681; *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep. 306.

Federal courts have long compelled receivers of national banks to return trust funds wrongfully withheld, but traced into the receiver's hands.

Richardson v. New Orleans Debenture Redemption Co. 52 L.R.A. 67, 42 C. C. A. 619, 102 Fed. 780; *Richardson v. Louisville Bkg. Co.* 36 C. C. A. 307, 94 Fed. 442; *Massey v. Fisher*, 62 Fed. 958; *Frelinghuysen v. Nugent*, 36 Fed. 239; *Peters v. Bain*, 133 U. S. 670, 33 L. ed. 696, 10 Sup. Ct. Rep. 354; *Richardson v. Olivier*, 53 L.R.A. 113, 44 C. C. A. 468, 105 Fed. 277; *Scott v. Armstrong*, 146 U. S. 499, 510, 36 L. ed. 1059, 1063, 13 Sup. Ct. Rep. 148; *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 57, 58, 37 L. ed. 363, 366, 367, 13 Sup. Ct. Rep. 533.

The fact that the milk furnished by the patrons was made into butter and then sold

does not change the fiduciary relation, nor prevent the creamery from standing in the relation of a factor to the patrons.

12 Am. & Eng. Enc. Law, 2d ed. p. 630; 19 Cyc. Law & Proc. p. 121; *First Nat. Bank v. Schween*, 127 Ill. 573, 11 Am. St. Rep. 174, 20 N. E. 681; *State ex rel. Parker v. Thompson*, 120 Mo. 12, 25 S. W. 346; *Shaw v. Ferguson*, 78 Ind. 547; *Burton v. Goodspeed*, 69 Ill. 237; *Boyle v. Northwestern Nat. Bank*, 125 Wis. 498, 1 L.R.A. (N.S.) 1110, 110 Am. St. Rep. 844, 103 N. W. 1123, 104 N. W. 917; *Briere v. Taylor*, 126 Wis. 347, 105 N. W. 817.

*Mr. Justice White delivered the [28 opinion of the court:

To reverse a judgment of the supreme court of Wisconsin (134 Wis. 565, 27 L.R.A. (N.S.) 243, 115 N. W. 128), affirming a judgment of the circuit court of Green Lake county, this writ of error is prosecuted.

The Berlin National Bank, doing business in the city of Berlin, Green Lake county, Wisconsin, being insolvent, its doors were closed by the Comptroller of the Currency on November 17, 1904. P. R. Earling was subsequently appointed and qualified as receiver. On November 27, 1906, John Emigh and O. L. Atkins, as assignees of a large number of persons, commenced this action in the state court against the receiver and the bank. It was, in substance, averred that large quantities of milk had been furnished by the assignors of the plaintiffs to a creamery known as the Jenne Creamery Company, under agreements that all the milk supplied should be converted into butter, the butter sold, and the proceeds, less a sum agreed upon as a compensation for the services rendered, should be divided *pro rata* among those furnishing the milk. It was alleged that the creamery, during the period covered by the claim, was, in fact, owned by and had been operated by the bank, and that when the doors of the bank were closed, there were outstanding unpaid checks for about \$400, for collections made for account of those who had supplied milk between April and September, 1904, and that a large amount had been collected and not paid over for the proceeds of butter made from milk furnished during October and the first half of November, 1904. The prayer was that plaintiffs recover from the receiver such portion of the collections as had come into the hands of the receiver, and as to the proceeds, which had been diverted by the bank, that plaintiffs be recognized as general creditors, entitled to participate *pro rata* in the *distribution of the assets of the bank. [29 The defendants separately answered, and, except as to the allegations regarding the in-

corporation of the bank, its insolvency, and the appointment of a receiver, took issue upon the averments of the complaint.

The cause was tried by the court. The facts, as found, are thus summarized:

For some time prior to October 1, 1902, the Jenne Creamery Company, a Wisconsin corporation, having its principal place of business in the city of Berlin, carried on the business of making butter and other dairy products with milk furnished by patrons in Green Lake and other counties. The corporation for these purposes, besides operating its plant at Berlin, leased various other creamery plants in the vicinity. At one time the business was carried on by a firm known as D. J. Jenne & Company, and after the organization of the Jenne Creamery Company the creamery business was solely carried on by that corporation, the members of the firm of Jenne & Company, however, owning all the stock of the creamery company. The milk which the company separated was furnished by numerous producers under agreements by which, for a stated compensation, the creamery company agreed to make all the milk it received into butter, to sell the same, collect the proceeds, and to divide them *pro rata* among the milk owners, less the compensation agreed upon. The business did not prosper. On October 1, 1902, there were outstanding unpaid checks of the company, drawn on the Berlin bank in favor of milk producers, to the extent of about \$8,000, there being no funds on hand to the credit of the creamery company in the bank, available to pay the checks. On the same date one of the firm of D. J. Jenne & Company owed the bank \$2,200, which was unsecured, and besides was indebted to other creditors for at least \$2,600. The firm of D. J. Jenne & Company also owed the bank \$5,000. Evidently in contemplation of securing the payment of these various debts, and to prevent the loss which would be occasioned by the bankruptcy of the creamery company, and upon the expectation that the situation might be relieved by carrying on the business under a new management, an arrangement was made between the Jennes and the Berlin bank. By this arrangement the entire stock of the creamery was assigned to Brown, the cashier of the bank, and two other officers of the bank, who, while thus becoming in form the owners of the stock, really held it for account of the bank. The property of the partnership of Jenne & Company and the property of the individual members of the firm was transferred to Brown. In order to bring about these transfers the bank agreed to pay the outstanding checks drawn against it by the creamery company in favor of the milk producers. Under the

arrangement, the business continued to be carried on in the name of the Jenne Creamery Company, although from the facts which we have just stated, it is apparent, as said by the supreme court of Wisconsin, "that the use of Brown's name was only formal, and that the continuance in form of the corporation was only for convenience of bookkeeping and dealing with the patrons." Brown acted as manager of the business apparently for the creamery company, signing and indorsing checks in the name of that corporation as such manager, etc.

The producers of the milk were not parties to the transfer made by the Jennes to the bank. No formal notification to them was given of the fact that the bank in effect owned the stock of the corporation and was virtually carrying on the business, no new contracts were made with them in the name of the bank as the owner of the creamery, but, so far as they were concerned, the affairs of the creamery company were, in form, conducted as they had been previously carried on, the producers continuing without interruption to furnish their milk as they had been in the habit of doing under the agreements previously made.

The operation of the business after the transfer was not profitable. The bank realized a few thousand dollars from the sale of the individual property of Jenne, but when the bank ceased to do business, in November, 1904, the account of the creamery company was apparently exhausted, and the bank had not recouped itself for the payments made of the \$8,000 of checks outstanding in October, 1902. Besides, when the bank failed there were outstanding checks for \$406.97, issued between April and October, 1904, and no settlement had been made with those who had supplied milk during the month of October and part of November, 1904, prior to the suspension of the bank. Referring to the proceeds of the butter made from the milk delivered by the patrons of the creamery during October and November, 1904, the trial court, as stated by the supreme court of Wisconsin, found "that bank drafts had been received into the bank for such butter. Such drafts ran to the Jenne Creamery Company, and were indorsed by Brown, the cashier, and mingled with other moneys of the bank. The total amount was \$2,520.46. It was found by the court, upon careful analysis of the accounts, that at all times after the receipt of any of said drafts the bank had on hand an amount of money and cash items exceeding said total, and such an amount was turned over to the receiver upon his taking possession. It also traced a considerable share of said drafts

into the hands of the bank's correspondents at other cities, by which they had been collected and credited to the bank, and in each case it was found that there remained a credit account with that correspondent larger than the amount of such drafts sent to and collected by it, which credit balance was turned over to the receiver after his appointment."

Upon the facts by it found, the trial 32] court adjudged that \$2,520.46 should be paid to the plaintiffs out of the funds in the hands of the receiver, and that as to the sum of the outstanding checks given for the proceeds of butter sold prior to October, 1904, the plaintiffs were entitled to participate *pro rata* with the other general creditors in the distribution of the assets of the bank. As already stated, the supreme court of Wisconsin affirmed the judgment.

The Federal question relied on is in substance that the Berlin bank, as a national bank, had no power to operate a creamery, and could not, therefore, lawfully incur liability on account of such operation, and hence the judgment of the state court is repugnant to the following sections of the Revised Statutes: 5133 and 5136 (U. S. Comp. Stat. 1901, pp. 3454, 3455), which prohibit a national banking association from doing other than a banking business; 5134 and 5190 (U. S. Comp. Stat. 1901, pp. 3454, 3486), which prohibit such an association from transacting the business of a bank in any other place than where its banking house is located and that specified in its organization certificate; 5145, which requires the affairs of such association to be managed by not less than five directors; and 5236 and 5242 (U. S. Comp. Stat. 1901, pp. 3508, 3517), which require ratable dividends and prohibit all transfers with a view to preference. It is true that there are other assignments of alleged error, but we put them at once out of view, as they in substance but assert that the court below erred in affirming the judgment of the trial court because certain of the facts found were not sustained by the evidence,—contentions which are not open to our inquiry, as it is elementary that, on error to a state court of last resort in a case of this character, the findings of fact of the state court are binding on us.

The trial court found as a fact, that after the transfer of the creamery property in October, 1902, some of the patrons were informed that the officers and directors of the bank were individually interested in the creamery, but that they were acting for the 33] bank was not made known, and it was also represented to such patrons that the creamery was in better condition than ever before, and such was generally believed by

the patrons to be a true statement of the condition of affairs until after the failure of the defendant bank. The supreme court, however, evidently did not consider these circumstances material. It held that whatever the form of the transaction, the Berlin bank acquired the creamery property from the Jenne Creamery Company in October, 1902; that it operated the same thereafter until the bank ceased doing business; that it "took the milk furnished by the patrons, made the same into butter, and sold it and collected the proceeds;" and that, by virtue of the agreements under which the milk was furnished, the proceeds of the sale of butter "belonged to the patrons, and was received by the bank for them, and under a duty to pay it to them." It also decided that when the bank failed on demand to pay over the collections for the butter sold prior to October, 1904, represented by outstanding checks, an indebtedness to the owners of the money arose. From the facts as found by the trial court, the supreme court concluded that the receiver had received, in actual money, or in credits with correspondents, the \$2,520.46 belonging to the patrons collected for the butter made from the milk supplied in October and November, 1904, and that the receiver did not receive such sum as moneys of the bank upon any trust to distribute to the creditors of the bank but held it as trustee for the owners. In declining to consider whether, as contended, it was beyond the power of the bank to engage in the creamery business, the court said:

"No authority has been cited, and we think none can be, to deny the power of a banking corporation, or any other corporation, to disgorge property of another which it had got into its possession by any means whatever under a duty to disgorge. It may have had no legal power to take the 34 steps by which the money of these plaintiffs' assignors came to its hands; but having taken such steps and obtained their money, no such absurdity exists as a legal obstacle to its surrendering it. It would be a reproach to the law to hold any such doctrine of inequity. *Beloit v. Heineman*, 128 Wis. 398, 401, 107 N. W. 334."

As we are bound by the findings of fact made below, and as the construction which the court gave to the contracts under which the milk was furnished is also binding, since such construction presents no question of a Federal nature, it follows that all the contentions relied upon to procure a reversal of the judgment must rest upon the assumption that, although the milk was received under contracts of bailment, and the proceeds arising were the property of the milk producers, and were held by the bank

for them, nevertheless the judgment was wrong, because the bank, under the national banking law, exceeded its powers when it virtually required the stock of the creamery and operated the same through its officers. But when the contentions thus come to be considered in their ultimate aspect, their unsoundness is demonstrated by the decision rendered at this term in *Citizens' Cent. Nat. Bank v. Appleton*, 216 U. S. 196, ante, 443, 30 Sup. Ct. Rep. 364. We say this, even conceding, for the sake of the argument, the *ultra vires* nature of the transaction as contended for. Although it would suffice to refer to that case as decisive here, in view of the importance of the subject, we briefly advert to the facts of the case to make apparent how absolutely conclusive the ruling there made is upon the contention here presented. One Samuel owed to the Central National Bank \$10,000. Evidently the bank was not only unwilling to lend Samuel more money, but called upon him to pay off his existing indebtedness. Under these circumstances it was arranged that if Samuel could borrow \$12,000 from [35] the Cooper Exchange Bank, and would use \$10,000 of the amount to pay his debt to the Central National Bank, that bank would guarantee the repayment of the loan if made by the Cooper Exchange Bank, thus giving Samuel some further accommodation, and at the same time placing the Central National Bank in funds to the extent of its outstanding loan to Samuel. The loan upon the guaranty was made. Upon the bankruptcy of Samuel and the failure to pay the loan made by the Cooper Exchange Bank, the latter bank sued the Central National Bank to recover under the guaranty. In the state courts, while ultimately the *ultra vires* nature of the guaranty was not denied, recovery was allowed to the extent of the \$10,000, the amount actually received by the Central National Bank of the moneys of the Cooper Exchange Bank. This court, without in any respect questioning that the state court was correct in holding that the contract of guaranty was *ultra vires* of the national bank act, nevertheless affirmed the judgment below. Reviewing and commenting upon the rulings in *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; and *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 136, 43 L. ed. 108, 18 Sup. Ct. Rep. 808, it was held although restitution of property obtained under a contract which was illegal, because *ultra vires*, cannot be adjudged by force of the illegal contract, 54 L. ed.

yet, as the obligation to do justice rests upon all persons, natural and artificial, if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation. That this ruling is here applicable is plainly manifested by the fact which we have previously pointed out, that the relief afforded by the court below simply gave to the producers so much of their property as was actually in the hands of the receiver, and awarded them a right to recover as general creditors of the [36] bank to the extent only that their property had been received and appropriated by the bank.

Affirmed.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, Plff. in Err.,

v.

SPENCER MELTON.

(See S. C. Reporter's ed. 36-57.)

Error to state court—frivolousness of
Federal question.

1. A writ of error to review a judgment of the highest court of a state will not be dismissed on the ground that the Federal question relied upon to confer juris-

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kiple v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On necessity of color of merit in Federal question to sustain writ of error to state court—see note to *Offield v. New York, N. H. & H. R. Co.* 51 L. ed. U. S. 231.

On review of decisions of state courts presenting the question of full faith and credit—see note to *Allen v. Alleghany Co.* 49 L. ed. U. S. 551.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621, and *State v. Loomis*, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

On validity of statutes abrogating fellow-servant rule—see note to *Bradford Constr. Co. v. Heflin* 12 L.R.A. (N.S.) 1040.

diction has been so conclusively foreclosed by prior decisions of the Federal Supreme Court as to cause it to be frivolous, where analysis and exposition are necessary in order to make clear the decisive effect of such prior decisions upon the issue presented, and there is some conflict in the opinions of the various state courts of last resort upon the question, and a division of opinion in the court below.

[For other cases, see Appeal and Error, 1110-1137, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — how raised — full faith and credit.

2. The full faith and credit clause of the Federal Constitution must be pleaded, or the attention of the court below directed to the fact that, in connection with the proper construction of a statute of another state, reliance was placed upon that clause, in order to present a Federal question for review in the Federal Supreme Court by writ of error to a state court.

[For other cases, see Appeal and Error, 1168-1248, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — full faith and credit.

3. The exercise by a state court of its independent judgment in interpreting the statute of another state upon which the cause of action is based can present no question under the full faith and credit clause of the Federal Constitution for review in the Federal Supreme Court by writ of error to a state court, where there is no local statute controlling the construction of statutes of other states, and no settled construction of the statute by the courts of the state enacting it is pleaded or proved.

[For other cases, see Appeal and Error, 1423-1427, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification of railway employees — police power.

4. The modification of the fellow-servant rule as to railway employees, made by Ind. act of March 4, 1893, § 1, does not offend against the equal protection of the laws clause of the Federal Constitution because construed as applying to all employees doing work essential to enable the carrying on of railway operations, and not as limited to those engaged in or about the movement of trains, but such general classification of railway employees is a proper exercise of the police power.

[For other cases, see Constitutional Law, 286-291, in Digest Sup. Ct. 1908.]

[No. 180.]

Argued April 28, 29, 1910. Decided May 31, 1910.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Hopkins County, in that state, in favor of plaintiff in an action founded upon the Indiana employers' liability law. Affirmed.

See same case below, 127 Ky. 276, 105 S. W. 366, 110 S. W. 233, 112 S. W. 618.

The facts are stated in the opinion.

Mr. Benjamin D. Warfield argued the cause, and, with Mr. Henry Lane Stone, filed a brief for plaintiff in error:

All that this court has decided is that it is competent to provide a right of action in favor of railroad employees who are exposed to the hazards of operating railroads, when no similar legislation is enacted in behalf of persons engaged in other than railroad pursuits.

Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

The statute as construed and explained in Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033; Bedford Quarries Co. v. Bough, 168 Ind. 671, 14 L.R.A. (N.S.) 418, 80 N. E. 529; Indianapolis Traction & Terminal Co. v. Kinney, 171 Ind. 612, 23 L.R.A. (N.S.) 711, 85 N. E. 954; American Car & Foundry Co. v. Inzer, 172 Ind. 56, 87 N. E. 722; and Indianapolis Street R. Co. v. Kane, 169 Ind. 40, 80 N. E. 841, 81 N. E. 721,—imposes liability upon railroads, and in behalf of their employees, only. Every other employer of labor in Indiana, except a railroad, is protected from liability to employees by the common-law defenses of fellow servants and assumed risks.

Southern Indiana R. Co. v. Harrell, 161 Ind. 689, 63 L.R.A. 460, 68 N. E. 262; Indianapolis & G. Rapid Transit Co. v. Foreman, 162 Ind. 85, 102 Am. St. Rep. 185, 69 N. E. 669; New Pittsburgh Coal & Coke Co. v. Peterson, 136 Ind. 398, 43 Am. St. Rep. 327, 35 N. E. 7.

It is contrary to the 14th Amendment to the Constitution of the United States for a state legislature to enact statutes aimed against one class of persons only, and leaving all other classes of persons subject to the more favorable rules of the common law, unless the basis of the attempted classification rests upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and is not made arbitrarily and without such basis.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764.

Unless the statute is limited by construction so as to exclude defendant in error from its operation, it is unconstitutional and void.

Deppe v. Chicago, R. I. & P. R. Co. 36 Iowa, 52; *Akeson v. Chicago*, B. & Q. R. Co. 106 Iowa, 54, 75 N. W. 676; *Lavellee v. St. Paul*, M. & M. R. Co. 40 Minn. 249, 41 N. W. 974; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156; *Jemming v. Great Northern R. Co.* 96 Minn. 302, 1 L.R.A.(N.S.) 696, 104 N. W. 1079; *Missouri, K. & T. R. Co. v. Medaris*, 60 Kan. 151, 55 Pac. 875; *Chicago, K. & W. R. Co. v. Pontins*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *Chicago, R. I. & P. R. Co. v. Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363; *Givens v. Southern R. Co.* (Miss.) 22 L.R.A.(N.S.) 971, 49 So. 180; *Ballard v. Mississippi Cotton Oil Co.* 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; *Indianapolis Traction & Terminal Co. v. Kinney*, supra; *Cleveland, C. C. & St. L. R. Co. v. Foland (Ind.)* 91 N. E. 594.

This court will construe the statute in the light of the decisions of the supreme court of Indiana, in order to render the statute constitutional.

Tullis v. Lake Erie & W. R. Co. 175 U. S. 353, 44 L. ed. 194, 20 Sup. Ct. Rep. 136; *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. ed. 289; *Com. v. International Harvester Co.* 131 Ky. 551, 115 S. W. 706; *Story*, Eq. Pl. 8th ed. § 24, p. 18; *Owings v. Hull*, 9 Pet. 607, 624, 625, 9 L. ed. 246, 252, 253.

The court of appeals of Kentucky refused to give full faith and credit to a public act of Indiana.

Finney v. Guy, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558; *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430; *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397; *American Exp. Co. v. Mullins*, 212 U. S. 311, 53 L. ed. 525, 29 Sup. Ct. Rep. 381, 15 A. & E. Ann. Cas. 536.

This court can and will consider any Indiana case construing and fixing the limits of the Indiana statute, which the court of appeals of Kentucky expressly considered.

San José Land & Water Co. v. San José Ranch Co. 189 U. S. 179, 47 L. ed. 766, 23 Sup. Ct. Rep. 487; *Bank of Commerce v. Tennessee*, 163 U. S. 416, 41 L. ed. 211, 16 Sup. Ct. Rep. 1113; *Andrews v. Eastern Oregon Land Co.* 203 U. S. 129, 51 L. ed. 121, 27 Sup. Ct. Rep. 42; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Burt v. Smith*, 203 U. S. 134, 135, 51 L. ed. 126, 127, 27 Sup. Ct. Rep. 37.

Since it appears both in the opinion of the court and in the dissenting opinion, which have been made a part of this record, 54 L. ed.

that the lower court did, in fact, take judicial notice of the Indiana decisions in undertaking to arrive at the interpretation placed upon the statute in question by the highest court of the enacting state, this court will assume it did so rightfully.

Renaud v. Abbott, 116 U. S. 285, 29 L. ed. 631, 6 Sup. Ct. Rep. 1194.

It is the right and duty of this court to construe for itself a statute or decision which has been proved by a witness, and whose testimony has been received as to the meaning of such a statute or decision.

Eastern Bldg. & L. Asso. v. Williamson, 189 U. S. 122, 47 L. ed. 735, 23 Sup. Ct. Rep. 527.

Hence, on a writ of error from this court to review the judgment of the highest court of one state, construing a statute of another state, this court has the undoubted right to construe for itself the statute under which the action is brought, and will give the greatest weight and consideration to the opinions of the court of last resort of the state which enacted the statute, in order to determine whether the courts of the state of the forum have correctly construed and interpreted the statute.

Givens v. Southern R. Co. supra.

The doctrine of *Gulf, C. & S. F. R. Co. v. Ellis*, supra, was reaffirmed by this court as recently as February 21, 1910, in *Southern R. Co. v. Greene*, 216 U. S. 400, ante, 536, 30 Sup. Ct. Rep. 287.

Messrs. Benjamin D. Warfield, Harry Lane Stone, and Clifton J. Waddill also filed a brief for plaintiff in error, in opposition to the motion to dismiss or affirm.

Mr. James W. Clay argued the cause, and, with Messrs. William L. Gordon, William J. Cox, Maurice K. Gordon, and J. F. Clay, filed a brief for defendant in error:

In the absence of pleading and proof, the Kentucky court of appeals was not required to take judicial notice of, and was not bound by, any decision of the supreme court of Indiana, construing or applying, or refusing to apply, the statute in question.

Eastern Bldg. & L. Asso. v. Ebaugh, 185 U. S. 114, 121, 46 L. ed. 830, 833, 22 Sup. Ct. Rep. 566; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398; *Glenn v. Garth*, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; *Lloyd v. Matthews*, 155 U. S. 223, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; *Banholzer v. New York L. Ins. Co.* 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972; *Allen v. Alleghany Co.* 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. Rep. 311; *Finney v. Guy*, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558;

Adams Exp. Co. v. Walker, 119 Ky. 127, 67 L.R.A. 412, 83 S. W. 106; *Roots v. Merriwether*, 8 Bush, 400.

In numerous cases the supreme court of Indiana has upheld the constitutionality of the statute in question, in so far as it applies to railroads, and in two cases its validity as applied to railroads has been upheld by this court.

Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse*, 168 Ind. 438, 78 N. E. 1033; *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; *Pittsburgh, C. C. & St. L. R. Co. v. Ross*, 169 Ind. 3, 80 N. E. 845, 212 U. S. 560, 53 L. ed. 652, 29 Sup. Ct. Rep. 688.

The state may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

The true test is not the comparative danger, but was the employee, at the time of injury, in the class prescribed by the legislature, did the classification embrace all within the same class, and is the classification based upon a reasonable ground, and not a mere arbitrary selection? If these three things concur, then the court will uphold the validity of the statute as applied to him, and permit a recovery; nor will it make a comparison of dangers, or consider the facts of the particular injury.

Chicago, R. I. & P. R. Co. v. Stahley, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.* 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208, 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857.

In cases decided both before and after the *Kinney Case*, the supreme court of Indiana and the court of appeals of Indiana, the latter court being the court of last resort in the particular cases cited, have applied the statute to cases similar in principle to this case.

Indianapolis Street R. Co. v. Kane, 169 Ind. 40, 80 N. E. 841, 81 N. E. 721; *Baltimore & O. S. W. R. Co. v. Walker*, 41 Ind. App. 588, 84 N. E. 730; *Cleveland, C. C. & St. L. R. Co. v. Foland* (Ind. App.) 88 N. E. 787.

There are numerous state statutes and decisions of state courts applying similar statutes to similar cases, and upholding their constitutionality as thus applied.

Georgia R. Co. v. Ivey, 73 Ga. 504; *Georgia R. & Bkg. Co. v. Miller*, 90 Ga. 571, 16 S. E. 939; *Georgia R. & Bkg. Co. v. Hicks*, 95 Ga. 301, 22 S. E. 613; *Campbell v. Cook*, 86 Tex. 630, 40 Am. St. Rep. 878, 26 S. W. 486; *Galveston, H. & S. A. R. Co. v. Mohrmann*, 42 Tex. Civ. App. 374, 93 S. W. 1090; *Sherman v. Texas & N. O. R. Co.* 99 Tex. 571, 91 S. W. 561; *Texas & P. R. Co. v. Carlin*, 60 L.R.A. 462, 49 C. C. A. 605, 111 Fed. 777, 189 U. S. 354, 47 L. ed. 849, 23 Sup. Ct. Rep. 585; *Hancock v. Norfolk & W. R. Co.* 124 N. C. 222, 32 S. E. 679; *Rutherford v. Southern R. Co.* 56 S. C. 446, 35 S. E. 136; *Mott v. Southern R. Co.* 131 N. C. 234, 42 S. E. 601; *Sigman v. Southern R. Co.* 135 N. C. 181, 47 S. E. 420; *Nicholson v. Transylvania R. Co.* 138 N. C. 516, 51 S. E. 40; *Kiley v. Chicago, M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 311, 120 N. W. 756; *Chesapeake & O. R. Co. v. Hoffman*, 109 Va. 44, 63 S. E. 432.

Mr. Justice White delivered the opinion of the court:

For personal injuries, Spencer Melton recovered a judgment against the plaintiff in error in the circuit court of Hopkins county, Kentucky. The court of appeals affirmed the judgment (127 Ky. 276, 105 S. W. 366, 110 S. W. 233, 112 S. W. 618), whereupon this writ of error was prosecuted.

Melton, a carpenter, was injured on March 21, 1905, while in the employ of the railway company. He was one of a construction crew, composed of a foreman and six men, who usually did what is described as bridge carpentering. On the date mentioned the crew was engaged, alongside the track of the railway company at Howell, Indiana, in constructing the foundation of a coal tippie at which the engines might coal. A bent or frame of timber, composed of heavy pieces fastened together, and intended to be used as part of the foundation of the tippie, which was lying flat upon the ground, was being raised for the purpose of placing it in the foundation. The lifting was accomplished by means of a block and tackle. A pulley was fastened by an iron chain to an upright piece of timber, and through the pulley a rope passed, which was attached at one end to the bent, so that, on hauling on the rope at the other end, the bent or frame *was slowly lifted up. Most of the men [44

were engaged in hauling on the rope, while the foreman and Melton, under his orders, were standing beneath the bent, and were engaged in placing props under the bent to prevent its lowering, when the strain upon the

rope passing through the pulley was relaxed. While Melton was in this position a link of the chain which held the pulley at the top of the upright post broke, and the bent fell to the ground with Melton underneath, inflicting upon him serious and permanent injuries. The chain which broke was furnished by the foreman of the gang, and had been put in position under his directions.

Melton was a resident of Hopkins county, Kentucky, and he there commenced this action. The right to recover was based upon the charge that the injury was occasioned through the furnishing by the corporation of unsafe tools to do the work of raising the bent. Besides generally controverting the cause of the injuries, as alleged, the answer of the company set up the defenses of contributory negligence and assumption of the risk. Thereafter Melton was allowed to file an amendment to his petition. By the amendment it was substantially alleged that he was injured without any fault on his part, and solely owing to a defect in the condition of the works or tools connected with or in use in the business of the defendant, and that such defect was the result of negligence on the part of the foreman, who was the person intrusted with the duty of keeping such tools or works in a proper condition, and the accident was also charged to have been caused by the negligent orders of the foreman, to whose directions Melton was bound to conform. The sufficiency of the facts alleged to entitle to recovery was expressly based upon the provisions of the first and second subsections of § 1 of an act of the legislature of Indiana of March 4, 1893, known as the employers' liability statute, reading as follows:

45] *“(Ses. 1. Be it enacted by the general assembly of the state of Indiana, that every railroad . . . operating in this state shall be liable in damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases:

“First. When such injury was suffered by reason of any defect in the condition of ways, works, plant, tools, and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person intrusted by it with the duty of keeping such way, works, plant, tools, or machinery in proper condition.

“Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform, and did conform.”

The court, on the motion of the railway

company, having required Melton to determine whether to rely upon the common law or the statute, he elected to base his right to recover on the statute. Thereupon the railway company answered the amended petition, and therein stated as follows:

“Defendant says that the said Indiana statute pleaded cannot and does not apply to the facts of this case, and plaintiff cannot rely thereon; and that under the law of Indiana, as to the character of the work then in hand, the plaintiff was a fellow servant with the said foreman of the construction crew, for whose negligence the defendant is not liable.”

Before trial, permission being granted, the railway company, by an additional amendment, defended on the ground that the Indiana statute relied upon, if held applicable to the facts alleged, was repugnant to the Constitution of Indiana and to the equal protection clause of the 14th Amendment. The averments on this subject were *lengthy, and concluded as follows: [46 “Defendant distinctly raises the Federal question that the said statute, in so far as made to apply to the facts in this case, is violative of said provision of the Constitution of the United States and void.” The provision referred to, as shown by the context, was the equal protection clause of the 14th Amendment.

On the trial, counsel for the railway company offered as evidence of the common law of the state of Indiana on the subject of fellow servants the opinions of the supreme court of Indiana in the following cases: *New Pittsburgh Coal & Coke Co. v. Peterson* (filed October 31, 1893), 136 Ind. 398, 43 Am. St. Rep. 327, 35 N. E. 7; *Southern Indiana R. Co. v. Harrell* (filed October 9, 1903), 161 Ind. 689, 63 L.R.A. 460, 68 N. E. 262; *Indianapolis & G. Rapid Transit Co. v. Foreman* (filed January 29, 1904), 162 Ind. 85, 102 Am. St. Rep. 185, 69 N. E. 669.

At the close of the evidence for plaintiff, and also upon the conclusion of all the evidence, the railway company unsuccessfully moved the court to peremptorily instruct the jury to find in its favor for the following reasons:

“1. There is no evidence of actionable negligence proven.

“2. The Indiana statute upon which this action is based does not apply to the facts proven.

“3. In so far as the terms of the Indiana statute apply to the facts proven, they are unconstitutional and void. They are discriminatory against defendant and deny it the equal protection of the law. They are violative of the Constitution of Indiana and of § 1, article 14 of the Constitution of the

United States, being § 1 of the 14th Amendment thereto.

"4. The said Indiana statutes were not intended to be enforced out of the state of Indiana, and are against the policy of the state of Kentucky, and not enforceable in a Kentucky forum."

The railway company, in its request for instructions, which were refused, and to 47] which refusals it excepted, *substantially asked that the general principles of the common law of Indiana as to fellow servant and assumption of the risk, as exemplified by the Indiana decisions which it had offered in evidence, be applied to the case. The court, on the contrary, in the instructions which it gave, substantially applied the provisions of the Indiana statute, as by it construed. In the motion for a new trial fifteen reasons were stated, those which made reference to the statute or to the Constitution of the United States being the following:

"14. The court erred in applying the Indiana statute to the facts of this case. The court erred in enforcing the Indiana statute in a Kentucky forum.

"15. The court erred in upholding and applying the Indiana statute pleaded in this case, when same, in so far as applicable to the facts proven in this case, is unconstitutional and void. It is discriminatory against defendant, and denies it the equal protection of the law. It is violative of the Constitution of the state of Indiana and of § 1 of article 14 of the Constitution of the United States, which guarantees to defendant the equal protection of the law."

The court below held that the supreme court of Indiana had construed the statute as applicable both to persons and corporations operating railroads. It further held that the statute embraced the case in hand because Melton came within the category of persons injured in the operation of a railroad, as "the construction of a coal tippie is . . . essential to the operation of a railroad." As thus construed, the repugnancy of the statute to the equal protection clause of the Constitution of the United States was considered. It was decided that, for the purpose of abrogating or modifying the common-law doctrine of fellow servant, it was competent for the lawmaking power of a state, without offending against the equal protection clause, to classify railroad em- 48] ployees because of *the hazard attached to their vocation, and that a statute doing this need not be confined to employees who were engaged in and about the mere movement of trains, but could also validly include other employees doing work essential to be done to enable the carrying on of railroad operations.

Thus, referring to the alleged distinction between railroad operatives engaged in train movement and those who were not, the court said:

"We are unable to see the force of this distinction. A railroad cannot be run without bridges; bridges cannot be built without carpenters. The work of a bridge carpenter on a railroad is perhaps no less perilous than the work of an operative on one of its trains. Coal tipples are no less essential to the operating of a railroad than bridges, because the engines cannot be operated without coal. The construction of a coal tippie is therefore essential to the operating of a railroad. As has been well said, the legislature cannot well provide for all subjects in one act. Legislation must necessarily be done in detail, and an act regulating railroads violates no constitutional provision because it is made to apply only to railroads. Indianapolis Street R. Co. v. Kane, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721; Schoolcraft v. Louisville & N. R. Co. (Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.) 92 Ky. 233, 14 L.R.A. 579, 17 S. W. 567; Chicago, R. I. & P. R. Co. v. Stahley, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363; Callahan v. St. Louis Merchants' Bridge Terminal R. Co. 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208, 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857; Georgia R. Co. v. Ivey, 73 Ga. 504."

The railway company asked a rehearing for the sole purpose of a reconsideration of what was referred to as the very important Federal question involved, viz., "the unconstitutionality of the Indiana statute, as applied to the facts of this case." The court permitted the question whether a rehearing should be granted to be orally argued, and, after such argument, in a brief opinion denied the request. Two members of the court, however, dissented, on the ground that the statute as construed was repugnant to the equal protection clause of the 14th *Amendment. This writ of error was [49 then prosecuted, and the only reference to the Constitution of the United States made in the assignment of error filed with the application for the writ was that embraced in the contention that the Indiana statute could not be constitutionally applied to the facts without causing the statute to be repugnant to the 14th Amendment.

We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful

analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations: (a) because analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; (b) because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the 14th Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; and (c) because, while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power, consistently with the equal protection of the law clause, to classify railroad employees actually engaged in the hazardous work of moving [50] trains, *such examination will also disclose that there is some conflict of view as to whether a statute on that subject as broad as is the statute under review, as construed below, is consistent with the clause, thus additionally serving to point to the necessity of analyzing and considering the subject anew instead of treating it as being so obviously foreclosed as not to permit an examination of the subject.

Coming to the merits, we at once premise that we are not concerned with the construction affixed by the court below to the Indiana statute, unless it be that that construction offends against some Federal right properly asserted and open to our consideration. In the argument at bar in behalf of the railway company two rights of this character are insisted upon. First, it is said that the court below, in applying the statute, has caused it to embrace a class of employees which the statute did not include, and thereby gave it a wrongful construction, in violation of the full faith and credit clause of the Constitution of the United States. Second, that, in any event, the statute as construed is repugnant to the equal protection clause of the 14th Amendment. We separately dispose of these propositions.

The full faith and credit clause. The contentions as to this proposition rest upon the assumption that it has been conclusively settled by the supreme court of Indiana that the statute only changed the general rule

prevailing in that state in respect to the doctrine of fellow servant as to railroad employees actually engaged in the hazard of train service, and therefore did not include an employee engaged in the character of work which Melton was performing when injured, and that to give the statute a contrary meaning was to violate the full faith and credit clause. If, however, the premise upon which the proposition rests, and the legal deduction based upon that premise, be, for the sake of the argument, conceded, the contention is, nevertheless, without merit, because of the *failure of the railway company to plead [51] or in any adequate way call the attention of the court below to the fact that, in connection with the proper construction of the statute, the benefit of the due faith and credit clause of the Constitution of the United States was relied on. We say this because the statement which we have previously made of the case fails to show from first to last, even up to and including the application for rehearing, the assertion of any claim to the protection of the full faith and credit clause. Indeed, that statement not only shows a failure to make such claim, but discloses such direct and express action on the part of the railway company as justly to give rise to the inference that a reliance upon any claim of Federal right resulting from the full faith and credit clause was not thought to be involved in the case. We say this because the frequent and reiterated assertions of Federal right, based solely upon the equal protection clause of the 14th Amendment, sustain such conclusion.

Further, even if, for the sake of the argument only, the failure to plead the full faith and credit clause, or to direct the attention of the court below to the fact that reliance was placed upon that clause, could be supplied upon the theory that, as the cause of action was based upon an Indiana statute, by implication the due faith and credit clause was necessarily involved, nevertheless the contention would be without merit. This follows because, as pointed out in *Finney v. Guy*, 189 U. S. 335, 340, 47 L. ed. 839, 843, 23 Sup. Ct. Rep. 558, and *Allen v. Allegheny Co.* 196 U. S. 458, 463, 49 L. ed. 551, 555, 25 Sup. Ct. Rep. 311, it is not true to say that necessarily in every case where the court of one state is called upon to determine the proper construction of a statute of another state, a question under the Constitution of the United States arises. Although the Indiana statute was at issue and its meaning was necessarily involved, the duty of construing it rested upon the court below. The general rule is that, in the absence

*of a statute to the contrary, if a settled construction by the court of last resort

of a state enacting a statute is relied upon to control the judgment of the court of another state in interpreting the statute, such settled construction must be pleaded and proved. *Eastern Bldg. & L. Asso. v. Ebaugh*, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566, and cases cited. As, however, it is not asserted that there was a statute of Kentucky controlling the courts of that state in construing the statutes of other states, and as there was no pleading or proof as to the existence of any such settled construction, it follows that there is nothing presented, which can be held to have deprived the court below of its power to exercise its independent judgment in interpreting the statute. Our duty, of course, is confined to determining whether error was committed by the court below as to the Federal questions involved; and as it is impossible to predicate error as to matters not pleaded or proved in the court below, which were essential to be pleaded and proved, it follows that the contention concerning the denial of the protection of the full faith and credit clause furnishes no ground for reversal. *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 495, 47 L. ed. 273, 274, 23 Sup. Ct. Rep. 194.

The equal protection of the law clause. That the 14th Amendment was not intended to and does not strip the states of the power to exert their lawful police authority is settled, and requires no reference to authorities. And it is equally settled—as we shall hereafter take occasion to show—as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority, therefore that clause is not offended against simply because, as the result of the exercise of the power to classify, some inequality may be occasioned. That is to say, as the power to classify is not taken away by the operation of the equal protection of the law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition.

It is beyond doubt foreclosed that the Indiana statute does not offend against the equal protection clause of the 14th Amendment, because it subjects railroad employees to a different rule as to the doctrine of fellow servant from that which prevails as to other employments in that state. *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Pittsburg, C. & St. L. R. Co. v. Ross*, 212 U. S. 560, 53 L. ed. 652, 29 Sup. Ct. Rep. 688. But while conceding this, the argument is that classification of railroad employees for the purpose of the doctrine of fellow servant can only, consistently with equality and uniform-

ity, embrace such employees when exposed to dangers peculiarly resulting from the operation of a railroad, thus affording ground for distinguishing them for the purpose of classification from coemployees not subject to like hazards or employees engaged in other occupations. The argument is thus stated: "Plaintiff in error does not question the right of the legislature of Indiana to classify railroads in order to impose liability upon them for injuries to their employees incident to railroad hazards, but it does insist that, to make this a constitutional exercise of legislative power, the liability of the railroads must be made to depend upon the character of the employment, and not upon the character of the employer." Thus stated, the argument tends to confuse the question for decision, since there is no contention that the statute as construed bases any classification upon some supposed distinction in the person of the employer. The idea evidently intended to be expressed by the argument is, that although, speaking in a general sense, it be true that the hazards arising from the operation of railroads are such that a classification of railroad employees is justified, yet, as in operating railroads some employees are subject to risks peculiar to such operation, and others to risks which, *however serious they may [54 be, are not, in the proper sense, risks arising from the fact that the employees are engaged in railroad work, the legislative authority in classifying may not confound the two by considering in a generic sense the nature and character of the work performed by railroad employees collectively considered, but must consider and separately provide for the distinctions occasioned by the varying nature and character of the duties which railroad operatives may be called upon to discharge. In other words, reduced to its ultimate analysis the contention comes to this: that by the operation of the equal protection clause of the 14th Amendment, the states are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be; but, on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the persons and things coming within the general class provided for. When the proposition is thus accurately fixed, it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the assumption that the equal protection clause of the 14th Amendment has a scope and effect upon the lawful authority of the states contrary to the doctrine maintained by this court without deviation. This follows, since

the necessary consequence of the argument is to virtually challenge the legislative power to classify, and the numerous decisions upholding that authority. To this destructive end it is apparent the argument must come, since it assumes that however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class. A brief [55] reference to some of the cases *dealing with the power of a state to classify will make the error of the contention apparent.

In *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 294, 42 L. ed. 1043, 18 Sup. Ct. Rep. 594, while declaring that the power of a state to distinguish, select, and classify objects of legislation was, of course, not without limitation, it was said, "necessarily this power must have a wide range of discretion." After referring to various decisions of this court, it was observed:

"There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

Again considering the subject in *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281, it was reiterated that the legislature of a state has necessarily a wide range of discretion in distinguishing, selecting, and classifying, and it was declared that it was sufficient to satisfy the demand of the Constitution if a classification was practical, and not palpably arbitrary.

In *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159, a statute of Minnesota, providing that the liability of railroad companies for damages to employees should not be diminished by reason of accident occurring through the negligence of fellow servants, was held not to discriminate against any class of railroads, or to deny the equal protection of the laws because of a proviso which excepted employees engaged in construction of new and unopened railroads. In the course of the opinion the court said (p. 598): "The whole case is put on the proviso, and the argument with regard to that is merely one of the many attempts to impart an overmathematical nicety to the prohibitions of the 14th Amendment." These principles were again applied in *Martin v. Pittsburg & L. E. R. Co.* 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100. 8 A. & E. Ann. Cas. 87, [56] and the doctrines were also fully *con-

sidered and reiterated at this term in *Southwestern Oil Co. v. Texas*, 217 U. S. 114, ante, 688, 30 Sup. Ct. Rep. 496.

And coming to consider the concrete application made of these general principles in the decisions of this court which have construed the statute here in question, and statutes of the same general character enacted in states other than Indiana, we think, when rightly analyzed, it will appear that they are decisive against the contention now made. It is true that in the *Tullis Case*, which came here on certificate, the nature and character of the work of the railroad employee who was injured was not stated, and that reference in the course of the opinion was made to some state cases, limiting the right to classify to employees engaged in the movement of trains. But that it was not the intention of the court to thereby intimate that a classification, if not so restricted, would be repugnant to the equal protection clause of the 14th Amendment, will be made clear by observing that the previous case of *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585, was cited approvingly, in which, under a statute of Kansas classifying railroad employees, recovery was allowed to a bridge carpenter employed by the railroad company, who was injured while attempting to load timber on a car. And in the opinion in the *Pontius* case there was approvingly cited a decision of the court of appeals of the eighth circuit (*Chicago, R. I. & P. R. Co. v. Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 362), wherein it was held that, under the same statute, an employee injured in a roundhouse while engaged in lifting a driving rod for attachment to a new engine could recover by virtue of the statute. All this is made plainer by the ruling in *St Louis Merchants' Bridge Terminal R. Co. v. Callahan*, 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857, where, upon the authority of the *Tullis* case, the court affirmed a judgment of the supreme court of Missouri, which held that recovery might be had by a section hand upon a railroad, who, while engaged in warning passers-by in a street beneath *an overhead [57] bridge, was struck by a tie thrown from the structure.

While, as we have previously said, it is true there are state decisions dealing with statutes classifying railroad employees sustaining the restricted power to classify which is here insisted upon, we do not think it is necessary to review them or to notice those tending to the contrary. They are referred to in the opinions rendered in the court below. Nor do we think our duty in this respect is enlarged because, since the judgment below was rendered, the court of

last resort in Indiana (*Indianapolis Traction Co. v. Kinney*, 171 Ind. 612, 23 L.R.A. (N.S.) 711, 85 N. E. 954, and *Cleveland, C. C. & St. L. R. Co. v. Foland*, decided April 20, 1910, 91 N. E. 594) has, upon the theory that it was necessary to save the statute in question from being declared repugnant to the equality clause of the state Constitution and the 14th Amendment, unequivocally held that the statute must be construed as restricted to employees engaged in train service.

Affirmed.

SHEVLIN-CARPENTER COMPANY and
John F. Irwin, Plffs. in Err.,
v.
STATE OF MINNESOTA.

(See S. C. Reporter's ed. 57-70.)

Statutes—*who may question validity.*

1. Persons sued for double damages imposed by a statute for making a casual and involuntary trespass by cutting or assisting to cut timber upon state lands cannot complain that because of the further penal features of the law applicable to those offending against its provisions they are subject to be put twice in jeopardy for the same offense.

[For other cases, see Statutes, I. d. 3, in Digest Sup. Ct. 1908.]

Constitutional law—*due process of law—punishing involuntary trespass—police power.*

2. The subjection to double damages and fine or imprisonment under a state statute of one making a casual and involuntary trespass upon state lands by cutting timber thereon without a valid and existing permit does not deny due process of law, but may be justified as a valid exercise of the police power, although the trespasser may have had reasonable grounds for believing that authority had been granted, and honestly acted on such belief.

[For other cases, see Constitutional Law, IV. d; IV. c, in Digest Sup. Ct. 1908.]

[No. 139.]

Argued April 6, 1910. Decided May 31, 1910.

NOTE.—As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

For a discussion of the police power generally—see notes to *State v. Marshall*, 1 L.R.A. 51; *Electric Improv. Co. v. San Francisco*, 13 L.R.A. 131; *State v. Schlemmer*, 10 L.R.A. 135; and *Barbier v. Connolly*, 28 L. ed. U. S. 923.

930

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed, with a reduction from treble to double damages, a judgment of the District Court of St. Louis County, in that state, awarding damages for an involuntary trespass made by cutting or assisting to cut timber on state lands. Affirmed.

See same case below, 102 Minn. 470, 113 N. W. 634, 114 N. W. 738.

The facts are stated in the opinion.

Mr. Frank B. Kellogg argued the cause, and, with Messrs. Newel H. Clapp, R. J. Powell, and George W. Morgan, filed a brief for plaintiffs in error:

Where an invalid provision in a statute was the inducement to the act, or where the provisions of the act are so intimately connected with each other as to warrant the belief that the legislature intended them as a whole, then the whole statute must fall.

Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 635, 39 L. ed. 1108, 1125, 15 Sup. Ct. Rep. 912; *Poindexter v. Greenhow*, 114 U. S. 270, 304, 29 L. ed. 185, 197, 5 Sup. Ct. Rep. 903, 962; *Huber v. Martin*, 127 Wis. 412, 3 L.R.A. (N.S.) 653, 115 Am. St. Rep. 1023, 105 N. W. 1031, 1135, 7 A. & E. Ann. Cas. 400; *Meyer v. Berlandi*, 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513; *Com. v. Hana*, 195 Mass. 262, 11 L.R.A. (N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 A. & E. Ann. Cas. 514; *Oregon R. & Nav. Co. v. Smalley*, 1 Wash. 206, 23 Am. St. Rep. 143, 23 Pac. 1008; *Texas & P. R. Co. v. Mahaffey*, 98 Tex. 392, 84 S. W. 646; *Sutherland*, Stat. Constr. §§ 173-178.

This court is concluded by the construction of the statute adopted by the supreme court of Minnesota.

Gatewood v. North Carolina, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 167; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; *Smiley v. Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289.

In determining whether or not an action is civil or criminal in its nature, the form of action is immaterial. The test is whether it is to punish a public offense or to redress a private injury.

United States v. McKee, 4 Dill. 128, Fed. Cas. No. 15,688; *Coffey v. United States*, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Lees v. United States*, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; *United States v. One Distillery*, 43 Fed. 852;

218 U. S.

United States v. Shapleigh, 4 C. C. A. 237, 12 U. S. App. 26, 54 Fed. 126; Atchison, T. & S. F. R. Co. v. United States, 27 L.R.A. (N.S.) 756, 96 C. C. A. 646, 172 Fed. 194.

Plaintiffs in error may properly raise this objection of being twice in jeopardy.

Moore v. Illinois, 14 How. 13, 14 L. ed. 306.

An examination of that class of cases which hold that exemplary damages may not be allowed in a civil action where defendant is also liable to be criminally prosecuted for the same acts will show that it has been uniformly determined that the imposition of such damages subjected the defendant to double punishment for an offense in spite of the fact that he had not yet suffered the second punishment. It was enough that he might. In the following cases the defendant had not yet been proceeded against criminally, yet the court refused to allow the imposition of punitive damages:

Fay v. Parker, 53 N. H. 390, 16 Am. Rep. 270; Austin v. Wilson, 4 Cush. 273, 50 Am. Dec. 766; Taber v. Hutson, 5 Ind. 325, 61 Am. Dec. 96; Koerner v. Oberly, 56 Ind. 287, 26 Am. Rep. 34; Schafer v. Smith, 63 Ind. 228.

The present case is readily distinguishable from those cases in which it is held that only those may complain that a statute is unconstitutional who belong to the class whose rights are menaced.

Lee v. New Jersey, 207 U. S. 67, 52 L. ed. 106, 28 Sup. Ct. Rep. 22; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736.

A statute which places persons twice in jeopardy for the same offense does not satisfy the requirements of due process of law, and further deprives them of a privilege and immunity guaranteed under the Federal Constitution.

Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; Ex parte Ulrich, 42 Fed. 587; Moore v. Illinois, supra.

Where, for the same offense, a person is subject to two punishments, which may be inflicted in different proceedings, he is put twice in jeopardy; and it is immaterial that one of the proceedings is civil in form.

Coffey v. United States and United States v. McKee, supra; United States v. Gates, Fed. Cas. No. 15,191; United States v. One Distillery, 43 Fed. 846; United States v. Shapleigh, supra.

That there are implied limitations upon the power of the legislature, growing out of the essential nature of our government, which are now embraced in the provisions of the 14th Amendment, is declared by many courts.

Bardwell v. Collins (Bardwell v. Ander-

son) 44 Minn. 97, 9 L.R.A. 152, 20 Am. St. Rep. 547, 46 N. W. 315; State ex rel. Blaisdell v. Billings, 55 Minn. 467, 43 Am. St. Rep. 524, 57 N. W. 206, 794; State ex rel. Wheeler v. Foley, 30 Minn. 350, 15 N. W. 375; Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 97 N. W. 454; Wilkinson v. Leland, 2 Pet. 627, 7 L. ed. 542; University of Maryland v. Williams, 9 Gill & J. 365, 31 Am. Dec. 72; Powers v. Bergen, 6 N. Y. 358; Goshen v. Stonington, 4 Conn. 209, 10 Am. Dec. 121; Young v. McKenzie, 3 Ga. 31; Ex parte Martin, 13 Ark. 198, 58 Am. Dec. 321; Henry v. Dubuque & P. R. Co. 10 Iowa, 543; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356.

It is well settled that it is outside the power of the state to take private property even for a public use without compensation.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 236, 41 L. ed. 979, 984, 17 Sup. Ct. Rep. 581; Scarl v. School Dist. No. 2, 133 U. S. 553, 33 L. ed. 740, 10 Sup. Ct. Rep. 374; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43.

The requirements of due process of law are not satisfied merely by prescribing a form of procedure in court.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

The judgment obtained in this action, in taking from the plaintiffs in error a sum twice as great as the value of the timber which, in good faith, they obtained from the state, deprives them of property for which they have received no equivalent, and which the legislature cannot take as a penalty, since the act for which it is taken is one which is not in its nature punishable. To allow the judgment to stand would in effect allow a confiscation of their property.

Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 395, 31 Pac. 177; Catril v. Union P. R. Co. 2 Idaho, 576, 21 Pac. 416; Crescent Liquor Co. v. Platt, 148 Fed. 894.

The object of the statute was not a proper one for the exercise of the police power.

Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207.

Assuming that the object of the statute was one which might properly be effectuated by an exercise of the police power, nevertheless this statute cannot be upheld as a reasonable or appropriate exercise of the power.

Mugler v. Kansas, 123 U. S. 623, 669, 31 L. ed. 205, 213, 8 Sup. Ct. Rep. 273; Welch

v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; Denver & R. G. R. Co. v. Outcalt and Catril v. Union P. R. Co. supra.

Mr. George T. Simpson argued the cause and, with Messrs. Charles S. Jelley and Lyndon A. Smith, filed a brief for defendant in error:

The construction placed upon the act at bar by the Minnesota court controls, as to whether, as so construed, the act is in conflict with the Constitution of the United States.

State v. Shevlin-Carpenter Co. 99 Minn. 158, 108 N. W. 935, 9 A. & E. Ann. Cas. 634, 102 Minn. 470, 113 N. W. 634, 114 N. W. 738; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 456, 33 L. ed. 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Gatewood v. North Carolina, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 167; Oakes v. Mase, 165 U. S. 363, 41 L. ed. 746, 17 Sup. Ct. Rep. 345; Lessingwell v. Warren, 2 Black, 599, 17 L. ed. 261.

The court will consider only the Federal questions presented to, and passed on by, the state supreme court.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 112-115, 53 L. ed. 431-433, 29 Sup. Ct. Rep. 227; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176.

Criminal liability under the statute is not here for review. Plaintiffs in error are not under arrest, are not in that "class," and double jeopardy under the Federal Constitution was never presented to the state court.

Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736; Lee v. New Jersey, 207 U. S. 67, 52 L. ed. 106, 28 Sup. Ct. Rep. 22.

Plaintiffs in error never complained that the statute was not enforced in accordance with "those general rules which our system of jurisprudence prescribes." Therefore, inquiry may be directed only as to whether the act is "within the legitimate sphere of legislative power."

Missouri P. R. Co. v. Humes, 115 U. S. 512-519, 29 L. ed. 463-465, 6 Sup. Ct. Rep. 110.

Under like circumstances between individuals, the legislature has the power to provide for double damages (Boetcher v. Staples, 27 Minn. 308, 38 Am. Rep. 295, 7 N. W. 263; Brown v. Evans, 8 Sawy. 488, 17 Fed. 912; Smith v. Bagwell, 19 Fla. 117, 45 Am. Rep. 12; Hendrickson v. Kingsbury, 21

Iowa, 379; Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582; Mayer v. Frobe, 40 W. Va. 246, 22 S. E. 58); and where the state is a party, to eliminate the question of intent (Clark & M. Crimes, p. 103; Com. v. Murphy, 165 Mass. 66, 30 L.R.A. 734, 52 Am. St. Rep. 496, 42 N. E. 504; Com. v. Wentworth, 118 Mass. 441; R. v. Woodrow, 15 Mees. & W. 404; Halstead v. State, 41 N. J. L. 552, 32 Am. Rep. 247; Com. v. Connelly, 163 Mass. 539, 40 N. E. 862; State v. Kelly, 54 Ohio St. 166, 43 N. E. 163; State v. Smith, 10 R. I. 258; State v. Huff, 89 Me. 521, 36 Atl. 1000; State v. Ziehfeld, 23 Nev. 304, 34 L.R.A. 784, 62 Am. St. Rep. 800, 46 Pac. 802; People v. Waldvogel, 49 Mich. 337, 13 N. W. 620; People v. Roby, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365; State v. Presnell, 34 N. C. [12 Ired. L.] 103; State v. Quaekenbush, 98 Minn. 515, 108 N. W. 953; Trompen v. Verhage, 54 Mich. 304, 20 N. W. 53; Newton v. Gordon, 72 Mich. 642, 40 N. W. 921; Kerr v. O'Connor, 63 Pa. 341; Chiekering v. Lord, 67 N. H. 555, 32 Atl. 773; State v. Hartfiel, 24 Wis. 60; United States v. Leathers, 6 Sawy. 27, Fed. Cas. No. 15,581; People v. Christian, 144 Mich. 247, 107 N. W. 919; State v. Dorman, 9 S. D. 528, 70 N. W. 848).

Double jeopardy under a state statute is not within the protection of the 14th Amendment.

Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14.

Double jeopardy is not here, because there never has been a criminal prosecution against the plaintiffs in error on the facts in this case, and now there can never be such criminal prosecution, because the statute of limitations has run.

State v. Buckman, 95 Minn. 272, 104 N. W. 240, 289; Lee v. New Jersey; New York ex rel. Hatch v. Reardon; and Seaboard Air Line R. Co. v. Seegers,—supra.

*Mr. Justice McKenna delivered the [62] opinion of the court:

This case involves the consideration of the validity under the Constitution of the United States of the imposition of double damages under an act of the state of Minnesota for a "casual and involuntary trespass," made by cutting or assisting to cut timber upon the lands of the state. The act is set out in the margin.†

†Sec. 7. If any person, firm, or corporation, without a valid and existing permit therefor, cuts, or employs or induces any other person, firm, or corporation to cut or assist in cutting, any timber of whatsoever description, on state lands, or removes or carries away, or employs, or induces, or assists any other person, firm, or corporation to remove or carry away, any

The action was brought to recover the sum of \$51,324.42 for timber cut by plain-
[63] tiffs in error from certain lands of "the state "without a valid and existing permit." The question in the case revolves around this permit and the extensions of it alleged by plaintiffs in error to have been given.

The findings of the court show the following facts: The state sold at public auction, in accordance with the statute, the timber on the lands to John F. Irwin, one of the plaintiffs in error, acting for himself and as agent of the Shevlin-Carpenter Company, and a permit was issued by the auditor and land commissioners of the state, which contained the following clause: "That no extension of time of this permit shall be granted except as provided in § 24, chapter 163, General Laws 1895." The section provides that no permit shall be issued to cover more than two seasons, and no permit shall be extended except by unanimous consent of the board of timber commissioners, and under no circumstances shall an extension be granted for more than one year, and then only for good and sufficient reasons. Irwin gave bond as required by law. On the 7th of May, 1902, the permit was extended until the 1st of June, 1903. At the time the permit was extended, the sum of \$1,307, as required by law, was paid by plaintiffs in error into the treasury of the state, that sum being 25 per cent of the appraised value of the timber. In the winter of the years 1903-'4, plaintiffs in error, knowing that there had been one extension of the permit, and that that extension had expired, entered upon the land and cut and removed therefrom 2,444,020 feet of timber, which it was agreed was worth \$6 per thousand feet, board measure. After the timber was cut, the surveyor general of the lumber district scaled and returned the amount of the same to the auditor of the state, which officer erroneously computed the amount due from the plaintiffs in error at the contract price of stumpage value thereof, as if the

permit were still in force, finding the same to be \$18,574.39. *This amount was [64 paid to the state, and no part of it has been returned.

From these facts the court deduced the conclusion that the permit expired on the 1st of June, 1902, and that the extension thereof expired on the 1st of June, 1903, and that after the latter date it was of no effect and absolutely void, and was known to be so to plaintiffs in error when they cut the timber in controversy, and that their entry upon the lands was in violation of the law. They were adjudged wilful violators of the law, and damages were assessed against them at treble the value of the timber; to wit, \$43,992.36. The court, however, decided that a deduction should be made from that sum of \$16,997, money paid by plaintiffs in error to the state after the permit had expired. There were other sums of money, with the disposition of which we are not concerned. Judgment was entered against plaintiffs in error for the sum of \$26,995.17. The supreme court affirmed the conclusion of the trial court, that the permit had expired, and that the cutting and removing of the timber were illegal, but disagreed with that court as to the character of the trespass. The supreme court said: "The finding of the trial court that appellant was guilty of a wilful trespass is not sustained by the evidence. On the contrary, the record conclusively shows that appellant had reasonable ground for believing authority had been granted, and honestly acted on such belief." [102 Minn. 479, 113 N. W. 638.] The court hence decided that the judgment should only have been for double, not treble, damages, saying: "Being of opinion that in this action the state is limited to a recovery of double damages, and the timber cut having been paid for, the judgment is necessarily to the value as found." The case was remanded with directions to reduce the judgment to \$14,664.12. In all other respects it was affirmed.

such timber or other property, he shall be liable to the state in treble damages, if such trespass is adjudged to have been wilful; but double damages only in case the trespass is adjudged to have been casual and involuntary, and shall have no right whatsoever to any remuneration or allowance for labor or expenses incurred in removing such other property, cutting such timber, preparing the same for market, or transporting the same to or towards market.

Whoever cuts or removes, or employs or induces any other person, firm, or corporation to cut or remove, any timber or other property from state lands, contrary to the provisions of this act, or without conforming in each and every respect thereto, shall be guilty of a felony, and upon conviction

thereof shall be punished by a fine not exceeding one thousand (1,000) dollars, or by imprisonment in the state prison not exceeding two (2) years, or by both, in case the trespass is adjudged to have been wilful.

Whenever any timber so cut is intermingled with any other timber, or whenever other property taken from state lands is intermingled with other property, the state may seize and sell the whole quantity so intermingled, pursuant to the provisions of section forty (40) of this act, and such other timber or property shall be presumed to have been also cut from state lands.

Providing the intermingling of timber above referred to shall only apply to cases having been adjudged as wilful trespass. [Gen. Laws 1895, chap. 163, p. 352.]

On the question of the validity of the law under the 14th Amendment of the Constitution of the United States, the court said: "On a former appeal upon demurrer to the complaint (99 Minn. 158, 108 N. W. 935, 9 A. & E. Ann. Cas. 634), the constitutional questions were raised, and it was there held that the act was constitutional, and that in case of trespass the state might recover either the double value of the property taken, or treble its value, according to whether the facts constituted a casual or involuntary, or a wilful and unlawful trespass. We adhere to that decision, and for the reasons set forth in the opinion then filed."

This statement of the facts and the rulings of the courts of Minnesota exhibit the controversy, the state contending that the penalties of the statute are incurred by a casual or involuntary trespass; the plaintiffs in error insisting that to attach that consequence to acts done in good faith violates the due process clause of the 14th Amendment of the Constitution of the United States.

Another contention is made by plaintiffs in error. The statute makes one who cuts or removes timber contrary to the provisions of the act, or "without conforming in each and every respect thereto," guilty of a felony, and prescribes a fine or imprisonment, or both, in case the trespass is adjudged to have been wilful. To avail themselves of an objection to these provisions, plaintiffs in error insist that they are not separable from the provision for double and treble damages, and the statute becomes therefore unconstitutional, for under it the plaintiffs in error are subject to be put twice in jeopardy for the same offense.

The argument made to sustain the contention that the act must be considered single, and that to treat its provisions as separable would destroy its integrity and defeat the purpose of the legislature, is somewhat elaborate. Its basic elements are that the statute is penal, and its provisions for damages and for fine and imprisonment are punishments for the same act of wrong-
[66] doing, designed as such, and intended to be inseparable, and that the statute therefore subjects an offender to a double jeopardy. And this though the two punishments "may be inflicted in different proceedings;" it being contended that "it is immaterial that one of the proceedings is civil in form." This being the consequence of the statute, it is insisted that it "does not satisfy the requirements of due process of law," and deprives plaintiffs in error "of a privilege and immunity guaranteed under the Federal Constitution."

The argument may be answered by denying its assumptions. The purpose of the act does not depend upon the inseparableness of its punishment. Its purpose, of course, was to protect the timber lands of the state, and some sanctions of the purpose there necessarily had to be. Double or treble damages and criminal punishment were selected, but they have no such dependence on each other, no such relation to the purpose of the act, as to demonstrate that both forms were necessary to it, or that one would not have been selected if the other could not have been. But, it is contended, this conclusion is not open to this court to make, for the "sufficient and compelling reason" that the supreme court of the state has decided to the contrary. To sustain this conclusion, plaintiffs in error quote certain contentions of the attorney general of the state, made in the supreme court, and the reply of the court to the contentions. They do not support the conclusion deduced from them. It was urged by the attorney general that only wilful trespassers were subject to fine and imprisonment, but if such punishment could be held applicable to "casual and involuntary" trespassers, and the act be decided unconstitutional as to that class, nevertheless it could be adjudged constitutional as to wilful trespassers. The court replied that the provision for fines and imprisonment was applicable to both classes of trespassers.

As to the punishments, the court [67] intimated that they were independent. Replying to the contention that to sustain this action would subject plaintiffs in error to the jeopardy of a second punishment, the court said that plaintiffs in error were "probably a little premature in raising the point." And further said, "it might come with some force if presented in a criminal prosecution after recovery in a civil action." In this we concur. In other words, plaintiffs in error cannot base a defense upon an anticipation of what may never occur. To permit this would discharge them from all liability, for the defense, if good at all, would be good against whatever action might be brought. Necessarily there must be a first jeopardy before there can be a second, and only when a second is sought is the constitutional immunity from double punishment threatened to be taken away. An occasion for the defense of double jeopardy may occur if the state of Minnesota should proceed criminally against plaintiffs in error. We do not mean to say, however, that it will be justified. We do not mean to say that the state law subjects an offender against its provisions to a double jeopardy. Nor do we mean to imply that even if it have such effect, the 14th

Amendment of the Constitution of the United States may be invoked against it. Of that question we reserve opinion.

The next contention of plaintiffs in error is that "both the provisions of § 7 make a casual and involuntary trespasser liable to the state in double damages, and that declaring his act a felony violates the 14th Amendment," because those provisions "eliminate altogether the question of intent," and that the "elimination of intent as an element of an offense is contrary to the requirements of due process of law." To support the contention, plaintiffs in error attack the power of a legislature to make an innocent act a crime, and say that the "principle that the legislature cannot, by its mere fiat, make an act otherwise innocent a crime, and punish-68] able as such, is one to *which this court will give effect, even though it be not expressly enunciated by the Constitution." The principle as thus expressed is very general, and takes no account of whether a law have prospective or retrospective operation. It would seem, therefore, to destroy the well-recognized distinction between *mala in se* and *mala prohibita*. The principle contended for is probably not intended to be taken so broadly, and its generality is further limited by concession that it may have exceptions "where so-called criminal negligence supplies a place of criminal intent, or where, in a few instances, the public welfare has made it necessary to declare a crime, irrespective of the actor's intent." A concession of exceptions would seem to destroy the principle. If the principle gets its life or its protection from the 14th Amendment, it cannot be destroyed by the legislature upon any conception of the public welfare. The Constitution declares the principle upon which the public welfare is to be promoted, and opposing ones cannot be substituted. *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.

It will be seen that the foundation of the arguments of plaintiffs in error is that their trespass was an innocent act. There is some ambiguity as to what is meant by "innocence." They quote Mr. Justice Chase in *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648. It was there said that "a law that punished a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law," could not "be considered a rightful exercise of legislative power." But it was said: "The legislature may enjoin, permit, forbid, and punish; they may declare new crimes and establish rules of conduct for all its citizens in future cases." In other words, innocence cannot be asserted of an action which violates ex-54 L. ed.

isting law, and ignorance of the law will not excuse. The law in controversy has no *ex post facto* element or effect in it. It was existing law when the trespass of plaintiffs in error *was committed, and a tres- [69 pass is a legal wrong, not an innocent act. There is no element of deception or surprise in the law. When the permit was issued, plaintiffs in error knew the limitations of it, and they took it at the risk and consequences of transgression. The state sought to guard against its wilful or accidental abuse. Permits had been abused and the lands of the state despoiled of their timber. The offenders were difficult to detect, or, if detected, the character of their acts, whether wilful, accidental, or involuntary, equally difficult to establish; and the state, the supreme court said, had been "defrauded and robbed of large sums of money." Double and treble damages and a criminal prosecution were provided to meet the situation. It would be strange, indeed, if it were not within the competency of the legislature. To hold otherwise would take from the legislature the power to adjust legislation to evils as they arise and to the ways by which they may be effected. We held in *St. John v. New York*, 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 A. & E. Ann. Cas. 909, that a state did not offend the equality clause of the 14th Amendment by taking as a basis of classification the ways by which a law may be defeated. That case was applied in *District of Columbia v. Brooke*, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560, to sustain a statute which provided a criminal proceeding against resident owners of property for neglecting to connect their property with sewers, and civil proceedings against nonresident owners for a like neglect.

We do not understand the position of plaintiffs in error to be that a legislature may not prescribe a larger measure of damages than simple compensation, but that anything in excess of such compensation is punishment, and cannot be constitutionally prescribed where there is no "conscious intent" to do wrong. And yet plaintiffs in error except from the principle "certain instances within the police power," overlooking that the principle, if it exist at all, must be universal. It is true that the police *power of a state is the least limitable [70 of its powers, but even it may not transcend the prohibition of the Constitution of the United States. If, as contended, intent is an essential element of crime, or, more restrictively, if intent is essential to the legality of penalties, it must be so, no matter under what power of the state they are prescribed. Plaintiffs in error, while considering there may be exceptions to the principle

contented for in the exercise of the police power, urge that the legislation in controversy is not of that character. The supreme court of the state, however, expressed a different view. It decided that the legislation was in effect an exercise of the police power, and cited a number of cases to sustain the proposition that public policy may require that in the prohibition or punishment of particular acts it may be provided that he who shall do them shall do them at his peril, and will not be heard to plead in defense good faith or ignorance. Those cases are set forth in the opinion of the court, and some of them reviewed.

We will not repeat them. It was recognized that such legislation may, in particular instances, be harsh, but we can only say again what we have so often said, that this court cannot set aside legislation because it is harsh.

We have considered only the basic principle of the contention of plaintiffs in error, and have not attempted to follow the details of their argument by which they support it, or the cases which they cite to illustrate it. The cases are subject to the exceptions we have given.

Judgment affirmed.

Mr. Justice Harlan concurs in the result.

71] *J. ALEXANDER CHILES, Plff. in Err.,
v.
CHESAPEAKE & OHIO RAILWAY COMPANY.

(See S. C. Reporter's ed. 71-78.)

Commerce — congressional inaction — separating white and negro passengers.

Congressional inaction is equivalent to a declaration that a carrier may, by its regu-

NOTE.—On the rights of negro passengers—see note to *Ex parte Plessy*, 18 L.R.A. 639.

Right of carrier, independent of statute, to separate passengers on account of race.

The right of a carrier, independently of statute, to make reasonable rules for the separation of passengers belonging to different races, observing the conditions of equality of accommodations, has repeatedly been sustained. *Bowie v. Birmingham R. & Electric Co.* 125 Ala. 397, 50 L.R.A. 632, 82 Am. St. Rep. 247, 27 So. 1016; *Bradford v. St. Louis, I. M. & S. R. Co.* (Ark.) 124 S. W. 516; *Ohio Valley R. Co. v. Lander*, 104 Ky. 431, 47 S. W. 344, 882; *Chilton v. St. Louis & I. M. R. Co.* 114 Mo. 88, 19 L.R.A.

936

lations, separate white and negro interstate passengers.

[For other cases, see *Commerce*, 68-80, 318-320, in *Digest Sup. Ct.* 1908.]

[No. 158.]

Argued April 18, 1910. Decided May 31, 1910.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Fayette County, in that state, in favor of the carrier in an action by an interstate negro passenger for damages for his eviction from a car set apart exclusively for white persons. Affirmed.†

See same case below, 125 Ky. 299, 11 L.R.A. (N.S.) 286, 101 S. W. 386.

The facts are stated in the opinion.

Mr. J. Alexander Chiles, *in propria persona*, argued the cause, and, with Messrs. B. E. Smith, W. L. Ricks, and Albert S. White, filed a brief for plaintiff in error.

Mr. John T. Shelby argued the cause, and, with Messrs. Henry T. Wickham and Henry Taylor Jr., filed a brief for defendant in error.

*Mr. Justice McKenna delivered the [72 opinion of the court:

Plaintiff in error is a colored man. He bought a first-class ticket from defendant in error, a corporation engaged in operating a line of railroad from the city of Louisville, state of Kentucky, and the city of Cincinnati, state of Ohio, to the city of Washington, District of Columbia. The ticket entitled him to ride from Washington to Lexington, Kentucky.

The train which he took at Washington did not run through to Lexington, and he changed to another train at Ashland, Kentucky, going into a car which, it is alleged,

†Motion for leave to present a petition for rehearing denied October 17, 1910.

269, 21 S. W. 457; *Britton v. Atlanta & C. Air-Line R. Co.* 88 N. C. 536; *West Chester & P. R. Co. v. Miles*, 55 Pa. 209, 93 Am. Dec. 744; *Smith v. Chamberlain*, 38 S. C. 529, 19 L.R.A. 710, 17 S. E. 371; *Chesapeake, O. & S. W. R. Co. v. Wells*, 85 Tenn. 613, 4 S. W. 5.

But the rules of the carrier must not subject negro passengers to unjust discrimination and compel them to accept unequal accommodations. *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641; *Coger v. North West Union Packet Co.* 37 Iowa, 145.

None of these cases seem to have involved the separation of interstate passengers, but that the carrier's power extends to them is now first decided.

under the rules and regulations of defendant in error, was set apart exclusively for white persons. From this car he was required to remove to a car set apart exclusively for the transportation of colored persons.

He removed under protest, and only after a police officer had been summoned by defendant in error. Subsequently he brought this action in the circuit court of Fayette county, Kentucky. The case was tried to a jury, which rendered a verdict against him. A motion for a new trial was overruled. He appealed to the court of appeals of the state, and the action and judgment of the trial court were affirmed.

The assignments of error in this court depend upon the contention that plaintiff in error was an interstate passenger, and was entitled to a first-class passage from Washington to Lexington, and that therefore the act of defendant in error, in causing him to be removed from the car at Ashland, was a violation of his rights, and subjected the railroad company to damages.

The court of appeals of the state made the case turn on a narrow ground; to wit, the right which, it was decided, a railroad company had "to establish such rules and regulations as will require white and colored [73] passengers, *although they may be interstate, to occupy separate compartments upon the train." The court, however, said that there could be no discrimination in the accommodations.

The court found the facts of the removal of plaintiff, and the character of the car to which he was required to remove, as follows:

"This Lexington train is made up of four coaches: the first, and the one nearest the engine, being a combined baggage, mail, and express car; the second is a passenger coach, divided by board partitions into three compartments; one of these compartments, located in the end of the car, is set apart for colored passengers; the middle compartment is for the use of colored passengers who smoke; and the end compartment is for the accommodation of white persons who smoke; the third car is a passenger coach intended for the use of white ladies and gentlemen; the fourth car is a sleeping car that runs through from Washington to Lexington. Appellant, when he attempted to get on the Lexington train, was told by the brakeman to go in the colored apartment. This he declined to do, and walked in and took a seat in the third coach, set apart for the exclusive use of white passengers. In a few moments the conductor came in and asked the appellant, in obedience to a rule of the company, to go forward in the apartment set apart for colored passengers, but he

refused to do so, stating that he had bought a through first-class ticket from Washington to Lexington, and was an interstate passenger who knew his rights, and that the separate-coach law of Kentucky did not apply to him, and declared his intention of retaining the seat he occupied. Thereupon the conductor summoned a policeman, who also requested appellant to go in the other car, and, upon his refusal, he was informed that he would be compelled to leave the car in which he was seated. Appellant, yet insisting upon his right to remain in the *car in which he was, followed the policeman into the colored passenger coach." [74] [125 Ky. 302, 101 S. W. 386.]

The court further said:

"There is really no material issue of fact involved in the case. No force or violence, or rude or oppressive conduct, was employed by the agents of appellee in removing appellant from the car in which he was seated to the car set apart for colored persons. And except that the car into which he was removed is divided by partitions into three compartments, it was substantially equal in quality, convenience, and accommodation to the car in which he first seated himself, and the compartment into which appellant was directed to go was clean and ample for his accommodation, and equipped with the same convenience as the other passenger coach on the train from which he was ejected."

In this the court came to the same conclusion as the jury. Plaintiff in error insists that this conclusion put out of view his rights as an interstate commerce passenger. Both courts ignored such rights, he contends, the trial court, in refusing instructions that were requested and in its ruling on the trial, and the court of appeals, in affirming the judgment which was based upon the verdict.

We need not set out the instructions nor the rulings. The complaint of the action of the court rests upon the contention that, as against an interstate passenger, the regulation of the company in providing different cars for the white and colored races is void. There is a statute of Kentucky which requires railroad companies to furnish separate coaches for white and colored passengers, but the court of appeals of the state put the statute out of consideration, declaring that it had no application to interstate trains, and defendant in error does not rest its defense upon that statute, but upon its rules and regulations. Plaintiff in error makes some effort to keep the statute in the case, and says that the trial court, by its ruling upon *testimony and by its [75] instructions, confined "the jury only to the lesser motive" of defendant's "wrongful

act." In other words, as we understand plaintiff in error, confined the jury to the consideration of the regulations of the railroad company, and withdrew from its consideration the effect of the statute under which, it is said, the conductor declared he acted. But by this we understand plaintiff in error to illustrate that his rights as an interstate passenger were denied. We are, therefore, brought back to the question what his rights as such passenger were.

The elements of that question have been considered and passed on in a number of cases. And we must keep in mind that we are not dealing with the law of a state attempting a regulation of interstate commerce beyond its power to make. We are dealing with the act of a private person, to wit, the railroad company; and the distinction between state and interstate commerce we think is unimportant.

In *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547, the court passed on an act of the state of Louisiana, which required those engaged in the transportation of passengers among the states to give all passengers traveling within that state, upon vessels employed in such business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and subjected to an action for damages the owner of such vessel who excluded colored passengers on account of their color from the cabin set apart for whites during the passage. It was held that the act was a regulation of interstate commerce and was void. The court said, by Chief Justice Waite, after stating that the power of regulating interstate commerce was exclusively in Congress, "This power of regulation may be exercised without legislation as well as with it." And that, "by refraining from action, Congress, in effect, adopts as its own regulations 76] those which the common *law or the civil law, where that prevails, has provided for the government of such business." The court further said, quoting from *Welton v. Missouri*, 91 U. S. 282, 23 L. ed. 350, that "inaction [by Congress] . . . is equivalent to a declaration that interstate commerce shall remain free and untrammelled." And added: "Applying that principle to the circumstances of this case, congressional inaction left Beason [the shipowner] at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat while pursuing her voyage within Louisiana or without as seemed to him most for the interest of all concerned." This language is pertinent to the case at bar, and demonstrates that the contention of the plaintiff in error is untenable. In other words, demonstrates that the interstate commerce clause of the Constitution

does not constrain the action of carriers, but, on the contrary, leaves them to adopt rules and regulations for the government of their business, free from any interference except by Congress. Such rules and regulations, of course, must be reasonable, but whether they be such cannot depend upon a passenger being state or interstate. This also is manifest from the cited case. There, as we have seen, an interstate colored passenger was excluded from the privileges of the cabin set apart for white persons by a regulation of the carrier, and where the colored passenger's right to be was attempted to be provided by a state statute. The statute was declared invalid, because it attempted to force a carrier to do the very thing which plaintiff in error complains was not done in the case at bar; to wit, permit him to ride in the place set apart for white passengers. In other words, the statute was struck down because it interfered with the regulations of the carrier as to interstate passengers. This court commented on the case subsequently in *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 590, 33 L. ed. 784, 785, 2 Inters. Com. Rep. 801, 802, 10 Sup. Ct. Rep. 348, 349, and said: "Obviously, whether interstate passengers of one race should, in any portion *of their journey, be compelled [77 to share their cabin accommodations with passengers of another race, was a question of interstate commerce, and to be determined by Congress alone." We have seen that it was decided in *Hall v. DeCuir* that the inaction of Congress was equivalent to the declaration that a carrier could, by regulations, separate colored and white interstate passengers.

In *Plessy v. Ferguson*, 163 U. S. 540, 41 L. ed. 257, 16 Sup. Ct. Rep. 1138, a statute of Louisiana which required railroad companies to provide separate accommodations for the white and colored races was considered. The statute was attacked on the ground that it violated the 13th and 14th Amendments of the Constitution of the United States. The opinion of the court, which was by Mr. Justice Brown, reviewed prior cases, and not only sustained the law, but justified as reasonable the distinction between the races on account of which the statute was passed and enforced. It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, "the established usages, customs, and traditions of the people," and the "promotion of their comfort and the preservation of the public peace and good order," this must also be the test of the reasonableness of the regulations of a carrier, made for like purpose and to

secure like results. Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable. See also *Chesapeake & O. R. Co. v. Kentucky*, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101.

The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers has been discussed so much that we are relieved from further enlargement upon it. We may refer to Mr. Justice Clifford's concurring opinion in *Hall v. DeCuir* for a review *of the cases. They are also cited in *Plessy v. Ferguson* at page 550. We think the judgment should be affirmed.

It is so ordered.

Mr. Justice Harlan dissents from the opinion and judgment.

STANDARD OIL COMPANY, Plff. in Err.,
v.
ABRAHAM BROWN.

(See S. C. Reporter's ed. 78-87.)

Evidence — variance.

1. The variance, if any, between evidence that a servant employed in a dimly lighted stable, who had never been advised of the existence of a hole in the ceiling, nor of its purpose, was struck by a bale of straw dropped through the hole by a fellow employee, without warning, and allegations that the employer's negligence consisted in failing to discharge its duty not to permit hay and feed to be passed through the hole without proper warning and timely notice, is not fatal, where defendant made no objection to the testimony, but replied to it by testimony of like kind, and did not indicate in what way the proof varied from the pleadings, nor move for a continuance.

[For other cases, see Evidence, XIII/ b, in Digest Sup. Ct. 1908.]

Master and servant — duty to warn or instruct.

2. A master does not discharge his duty to employees working in a dimly lighted stable, where he does not inform them of the dangers to them from the customary use of a hole in the ceiling to pass or drop hay or feed to the floor below.

[For other cases, see Master and Servant, II. a, 1, in Digest Sup. Ct. 1908.]

NOTE.—On master's duty to warn or instruct—see notes to *James v. Rapides Lumber Co.* 44 L.R.A. 33, and *Mather v. Rillston*, 39 L. ed. U. S. 465.

On the duty of master to adopt rules to protect servant, or to warn him of dangers not reasonably to be apprehended—see note to *Ahern v. Amoskeag Mfg. Co.* 21 L.R.A. (N.S.) 89.
54 L. ed.

Master and servant — concurring negligence of master and fellow servant.

3. The negligence of a fellow servant does not exclude the master's liability if the latter's failure to warn an employee working on the floor of a dimly lighted stable of the danger to him from the customary use of a hole in the ceiling to toss or drop hay or feed to the floor below contributed to the injury.

[For other cases, see Master and Servant, II. d, 3, in Digest Sup. Ct. 1908.]

Appeal — review of facts.

4. The facts, and the conclusions to be drawn from them, are for the jury, and cannot be reviewed by the Federal Supreme Court upon writ of error.

[For other cases, see Appeal and Error, VIII. I, 2, in Digest Sup. Ct. 1908.]

Appeal — modifying requested instructions — assumption of risk.

5. Substituting the word "would" for "could" in a requested instruction to the effect that an employee assumed the ordinary risks not only actually known to him, but so far as they could have been known to him by the exercise of ordinary care on his part, and that if he knew, or by the exercise of care and prudence could have known, of the defect, he could not recover, is not reversible error.

[For other cases, see Appeal and Error, 5142, 5143, in Digest Sup. Ct. 1908.]

Appeal — refusing requested instructions — credibility of witness.

6. A judgment on a verdict will not be reversed because of the refusal to instruct the jury that the personal interest of a party exercising his statutory privilege to testify in his own behalf should be considered as affecting his credibility.

[For other cases, see Appeal and Error, 5127-5135, in Digest Sup. Ct. 1908.]

[No. 168.]

Argued April 22, 25, 1910. Decided May 31, 1910.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of plaintiff in an action to recover damages for personal injuries alleged to have been received by reason of defendant's negligence. Affirmed.

See same case below, 31 App. D. C. 371.

The facts are stated in the opinion.

On negligence of fellow servant concurring with failure of master to establish proper rules or regulations for conduct of business—see note to *Schwarzschild & S. Co. v. Weeks*, 4 L.R.A. (N.S.) 516.

On credibility of witnesses or parties testifying as question for jury—see note to *Missouri, K. & T. R. Co. v. Collier*, 88 C. C. A. 143.

Messrs. A. Leftwich Sinclair and Joseph J. Darlington argued the cause and filed a brief for plaintiff in error:

To entitle a plaintiff to go to the jury, the evidence offered in support of his pleadings must conform closely to the allegations thereof.

13 Enc. Pl. & Pr. p. 910; Hetzel v. Baltimore & O. R. Co. 7 App. D. C. 524; Ar- rick v. Fry, 8 App. D. C. 125; Boone v. Chiles, 10 Pet. 177, 9 L. ed. 388; Foster v. Goddard, 1 Black, 518, 17 L. ed. 232.

Where a plaintiff has charged particular negligence, proof of other and different acts or omissions as a ground of liability will constitute a fatal variance.

Shanke v. United States Heater Co. 125 Mich. 346, 84 N. W. 283; Brown v. Miller (Tex. Civ. App.) 62 S. W. 547; Missouri, K. & T. R. Co. v. Shockman, 59 Kan. 774, Appx. 52 Pac. 446; Waldhier v. Hannibal & St. J. R. Co. 71 Mo. 514; Pennington v. De- troit, G. H. & M. R. Co. 90 Mich. 505, 51 N. W. 634; Batterson v. Chicago & G. T. R. Co. 49 Mich. 184, 13 N. W. 508; Alford v. Dan- nenberg, 177 Ill. 331, 52 N. E. 485; Toledo, W. & W. R. Co. v. Foss, 88 Ill. 551; Chi- cago & A. R. Co. v. Mock, 72 Ill. 141; Lake Street Elev. R. Co. v. Collins, 118 Ill. App. 270; Long v. Doxey, 50 Ind. 385; Current v. Missouri P. R. Co. 86 Mo. 62; Ischer v. St. Louis Bridge Co. 95 Mo. 261, 8 S. W. 367; Sayward v. Carlson, 1 Wash. 29, 23 Pac. 830; Brown v. Hershey Land & Lumber Co. 65 Mo. App. 162; Thomas v. Louisville & N. R. Co. 18 Ky. L. Rep. 164, 35 S. W. 910; Pry- or v. Louisville & N. R. Co. 90 Ala. 32, 8 So. 55; Louisville & N. R. Co. v. Guyton, 47 Fla. 188, 36 So. 84; The Elton, 73 C. C. A. 467, 142 Fed. 367; Labatt, Mast. & S. § 859, note 1 (a); Port Royal & A. R. Co. v. Tompkins, 83 Ga. 759, 10 S. E. 356; Kane v. Joliet, 103 Ill. App. 195; Seltzer v. W. H. Davenport Fire Arms Co. 74 Conn. 46, 49 Atl. 852; Higgins v. Wilmington, 3 Penn. (Del.) 356, 51 Atl. 1; Bloomington v. Good- rich, 88 Ill. 558; Ayers v. Chicago, 111 Ill. 406; Box v. Chicago, R. I. & P. R. Co. 107 Iowa, 660, 78 N. W. 694; Lieuallen v. Mos- grove, 33 Or. 282, 54 Pac. 200, 664.

There is a fatal variance where the evi- dence, instead of proving the tort alleged, proves or tends to prove another tort.

22 Enc. Pl. & Pr. p. 568.

Where there is no evidence sustaining counts in a declaration as to the defendant's negligence, he is entitled to an instruction that no recovery can be had under the counts.

Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412.

A declaration for negligent injury should aver the fact and the manner of negligence.

Marquette, H. & O. R. Co. v. Marcott, 41

Mich. 433, 2 N. W. 795; 14 Enc. Pl. & Pr. pp. 335, 336.

Persons standing in such a relation to one another as did the plaintiff and Coleman are fellow servants.

Northern P. R. Co. v. Dixon, 194 U. S. 338, 48 L. ed. 1006, 24 Sup. Ct. Rep. 683; New England R. Co. v. Conroy, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85; Northern P. R. Co. v. Poirier, 167 U. S. 49, 42 L. ed. 73, 17 Sup. Ct. Rep. 741; Oakes v. Mase, 165 U. S. 363, 41 L. ed. 746, 17 Sup. Ct. Rep. 245; Central R. Co. v. Keegan, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; North- ern P. R. Co. v. Hambly, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166; Randall v. Bal- timore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; Baltimore Eleva- tor Co. v. Neal, 65 Md. 438, 5 Atl. 338; Won- der v. Baltimore & O. R. Co. 32 Md. 411, 3 Am. Rep. 143; Adams v. Iron Cliffs Co. 78 Mich. 271, 18 Am. St. Rep. 441, 44 N. W. 270; Hogan v. Central P. R. Co. 49 Cal. 128.

One who enters into the employment of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment.

Northern P. R. Co. v. Dixon; New Eng- land R. Co. v. Conroy; Northern P. R. Co. v. Poirier; Central R. Co. v. Keegan; Balti- more & O. R. Co. v. Baugh; Tuttle v. De- troit, G. H. & M. R. Co. and Randall v. Baltimore & O. R. Co.,—supra; Carter v. McDermott, 29 App. D. C. 145, 10 L.R.A. (N.S.) 1103, 10 A. & E. Ann. Cas. 601; Looney v. Metropolitan R. Co. 24 App. D. C. 510; Wonder v. Baltimore & O. R. Co. supra; Maryland Clay Co. v. Goodnow, 95 Md. 330, 51 Atl. 292; State use of Moret v. South Baltimore Car Works, 99 Md. 461, 58 Atl. 447; Hous- ton & T. C. R. Co. v. Conrad, 62 Tex. 627; Hogan v. Smith, 125 N. Y. 774, 26 N. E. 742; Little Rock & M. R. Co. v. Barry, 43 L.R.A. 349, 28 C. C. A. 644, 56 U. S. App. 37, 84 Fed. 944; Pease v. Chicago & N. W. R. Co. 61 Wis. 163, 20 N. W. 908; New York, C. & St. L. R. Co. v. Perrigney, 138 Ind. 414, 34 N. E. 233, 37 N. E. 976; Trewatha v. Bu- chanan Gold Min. & Mill. Co. 96 Cal. 494, 28 Pac. 751, 31 Pac. 561.

A man of mature age, offering himself to pursue a particular employment, represents himself to have had the necessary experience, and cannot, after an injury, be heard to say that he should have been instructed by his employer in the performance of his duties.

Hayzel v. Columbia R. Co. 19 App. D. C. 369; Chicago, R. I. & P. R. Co. v. Clark, 108 Ill. 113; Regan v. Palo, 62 N. J. L. 30, 41

Atl. 364; *Sunney v. Holt*, 15 Fed. 880; *Louisville & N. R. Co. v. Boland*, 96 Ala. 626, 18 L.R.A. 260, 11 So. 667.

If the declaration in the present case does not aver, as in the case last cited, that the immediate cause of the accident was the negligence of the plaintiff's coemployee, it is only because the defendant in error, as above pointed out, has been allowed, over objection, to recover upon a cause of action different from that alleged in his declaration. But, whether apparent upon the face of the declaration or otherwise, the law governing the right to recover is the same where, as in this case, the fact is as unquestioned as if pleaded.

American Bridge Co. v. Seeds, 11 L.R.A. (N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605; *Garnett v. Phoenix Bridge Co.* 98 Fed. 192; *McGough v. Bates*, 21 R. 1. 213, 42 Atl. 873; *Brown v. Hershey Land & Lumber Co.* supra; *Carr v. North River Constr. Co.* 48 Hun, 266; *Kevern v. Providence Gold & S. Min. Co.* 70 Cal. 392, 11 Pac. 740; *Henry v. St. Louis, K. C. & N. R. Co.* 76 Mo. 288, 43 Am. Rep. 762; *Norfolk & W. R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496; *Lutz v. Atlantic & P. R. Co.* 6 N. M. 496, 16 L.R.A. 819, 30 Pac. 912; *Enright v. Toledo, A. A. & N. M. R. Co.* 93 Mich. 409, 53 N. W. 536; *Hayes v. Western R. Corp.* 3 Cush. 270; *Borek v. Michigan Bolt & Nut Works*, 111 Mich. 129, 69 N. W. 254; *Maryland Clay Co. v. Goodnow*, supra; *Cooley, Torts*, 3d ed. 103, 104; *Missouri, K. & T. R. Co. v. Greenwood*, 40 Tex. Civ. App. 252, 89 S. W. 810.

Where injuries are sustained by an employee through the negligence both of the coemployee and of the master, the latter is not liable, unless, without his negligence, the accident would not have happened.

Whittaker v. Delaware & H. Canal Co. 49 Hun, 400, 3 N. Y. Supp. 576; *Hall v. Cooperstown & S. V. R. Co.* 49 Hun, 373, 3 N. Y. Supp. 584; *McCabe v. Brainard*, 17 App. Div. 45, 44 N. Y. Supp. 964.

Although the machinery is defective, so that otherwise a recovery might be had for an injury received, yet, if the promoting cause of the injury is the negligence of a fellow servant, no recovery can be had.

Gilman v. Eastern R. Corp. 10 Allen, 233, 87 Am. Dec. 635; *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 258; *Memphis & C. R. Co. v. Thomas*, 51 Miss. 637; *Hayes v. Western R. Corp.* supra.

Where the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause; and he must also fail if it is just as probable

that they were caused by the one as by the other, as the plaintiff is bound to make out his case by the preponderance of the evidence.

Scarles v. Manhattan R. Co. 101 N. Y. 662, 5 N. E. 66.

In an action for personal injuries alleged to have resulted from the failure of the master properly to warn and instruct the servant, a recovery can be had only where the master's negligence was the proximate cause of the injury.

26 Cyc. Law & Proc. p. 1169.

There was no reasonable duty upon the defendant to anticipate that Coleman would throw down an unopened bale of straw through the opening without giving warning to his coemployees,—negligently,—especially when Coleman, at that time, had been throwing down straw through the opening without negligence, for about six years.

American Bridge Co. v. Seeds; *Little Rock & M. R. Co. v. Barry*; and *Garnett v. Phoenix Bridge Co.*,—supra; *Fairbanks, M. & Co. v. Walker*, 88 C. C. A. 78, 160 Fed. 896; *Morgan Constr. Co. v. Frank*, 86 C. C. A. 168, 158 Fed. 964; *Kentucky Bloek Cannel Coal Co. v. Nance*, 91 C. C. A. 82, 165 Fed. 44; *Fowler v. Chicago & N. W. R. Co.* 61 Wis. 159, 21 N. W. 40; *Siddall v. Pacific Mills*, 162 Mass. 378, 38 N. E. 969; *Karr Supply Co. v. Kroenig*, 167 Ill. 560, 47 N. E. 1051; 26 Cyc. Law & Proc. p. 1170; *Klos v. Hudson River Ore & Iron Co.* 77 App. Div. 566, 79 N. Y. Supp. 156; *Leubke v. Chicago, M. & St. P. R. Co.* 63 Wis. 91, 53 Am. Rep. 266, 23 N. W. 136; *Lundquist v. Duluth Street R. Co.* 65 Minn. 387, 67 N. W. 1006; *Southern P. Co. v. Pool*, 160 U. S. 438, 40 L. ed. 485, 16 Sup. Ct. Rep. 338; *Northern P. R. Co. v. Charles*, 162 U. S. 363, 40 L. ed. 1001, 16 Sup. Ct. Rep. 848; *Martin v. Atchison, T. & S. F. R. Co.* 166 U. S. 403, 41 L. ed. 1052, 17 Sup. Ct. Rep. 603.

The duty to instruct and warn as to dangers arising from the execution of the general details of the work is generally held to pertain to the duties of the servants as between themselves, so that a failure or negligence in regard thereto is that of a fellow servant, exempting the master from liability.

26 Cyc. Law & Proc. pp. 1338, 1339; *Miller v. Central R. Co.* 69 N. J. L. 413, 55 Atl. 245; *Jenkins v. Richmond & D. R. Co.* 39 S. C. 507, 39 Am. St. Rep. 750, 18 S. E. 182; *State use of Moret v. South Baltimore Car Works*, 99 Md. 471, 58 Atl. 447; *Kemmerer v. Manhattan R. Co.* 81 Hun, 444, 31 N. Y. Supp. 82; *Hussey v. Coger*, 112 N. Y. 614, 3 L.R.A. 559, 8 Am. St. Rep. 787, 20 N. E. 556; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Potter v. New York C. & H. R. R. Co.* 136 N. Y. 77, 32 N. E. 603; *Melehert v. Smith Brewing Co.* 140 Pa. 448, 21 Atl. 755;

Zurn v. Tetlow, 134 Pa. 213, 19 Atl. 504; Allison Mfg. Co. v. McCormick, 118 Pa. 519, 4 Am. St. Rep. 613, 12 Atl. 273; Keats v. National Heeling Mach. Co. 13 C. C. A. 221, 21 U. S. App. 656, 65 Fed. 940; Michigan C. R. Co. v. Smithson, 45 Mich. 212, 7 N. W. 791; Kolm v. McNulta, 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298.

The declaration should have averred and the proof should have tended to show, that the existence or the use of the opening in question for the purpose of throwing down straw from the stable loft constituted negligence.

District of Columbia v. Moulton, 182 U. S. 576, 45 L. ed. 1237, 21 Sup. Ct. Rep. 840.

The master is under no obligation to instruct or warn the servant as to normal or ordinary risks.

Labatt, Mast. & S. § 239; Wood, Mast. & S. § 382; 26 Cyc. Law & Proc. pp. 1177-1180.

Before the master can be held liable on the ground of a breach of the duty to warn or instruct, he must be shown to have had knowledge, actual or constructive, of the servant's ignorance and inability to appreciate the danger alleged to exist.

Missonri P. R. Co. v. Watts, 63 Tex. 549; Rooney v. Sewall Cordage Co. 161 Mass. 160, 36 N. E. 789; 26 Cyc. Law & Proc. p. 1167; Yeager v. Burlington, C. R. & N. R. Co. 93 Iowa, 1, 61 N. W. 215; Klochinski v. Shores Lumber Co. 93 Wis. 417, 67 N. W. 934; Way v. Illinois C. R. Co. 40 Iowa, 341; Crown v. Orr, 140 N. Y. 450, 35 N. E. 648; Osborne v. Lehigh Valley Coal Co. 97 Wis. 27, 71 N. W. 814.

The employer is not an insurer. It is the duty of the employees to use reasonable care to ascertain the ordinary perils of the service which they voluntarily enter, and they are presumed to take service with knowledge of such perils as are open and obvious.

O'Neal v. Chicago & I. Coal R. Co. 132 Ind. 110, 31 N. E. 669; Wood v. Heiges, 83 Md. 257, 34 Atl. 872; McCafferty v. Lewando's French Dyeing & Cleansing Co. 194 Mass. 412, 120 Am. St. Rep. 562, 80 N. E. 460; Butler v. Frazee, 25 App. D. C. 392; McDugan v. New York C. & H. R. R. Co. 10 Misc. 336, 31 N. Y. Supp. 135; Murphy v. Rockwell Engineering Co. 70 N. J. L. 374, 57 Atl. 444.

It was of the highest importance to have the jury understand and appreciate that the defendant was not an insurer of the plaintiff's safety while at work for it. No proposition of law is more firmly established.

Northern P. R. Co. v. Dixon and Baltimore & O. R. Co. v. Baugh, *supra*; Armour v. Hahn, 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433; Butler v. Frazee; Wood v. Heiges; State use of Moret v. South Baltimore Car Works; and O'Neal v. Chicago &

I. Coal R. Co.,—*supra*; Harley v. Buffalo Car Mfg. Co. 142 N. Y. 31, 36 N. E. 813; Brown v. Hershey Land & Lumber Co. *supra*; Wharton, Neg. § 205.

When such reasonable and ordinary care has been taken to protect servants from injury as a reasonably prudent man would take under the circumstances, the master has performed the full measure of his duty.

2 Thomas, Negl. 2d ed. 1407; Biddiscomb v. Cameron, 35 App. Div. 561, 55 N. Y. Supp. 127, affirmed in 161 N. Y. 637, 57 N. E. 1104; Chicago & E. I. R. Co. v. Garner, 78 Ill. App. 281; Chicago & E. R. Co. v. Lee, 17 Ind. App. 215, 46 N. E. 543; Jones v. New York C. & H. R. R. Co. 22 Hun, 284; Cobb v. Welcher, 75 Hun, 283, 26 N. Y. Supp. 1068; Service v. Shonenman, 196 Pa. 63, 69 L.R.A. 792, 79 Am. St. Rep. 689, 46 Atl. 292; Carlson v. Phoenix Bridge Co. 132 N. Y. 273, 30 N. E. 750; Belleville Pump & Skein Works v. Bender, 69 Ill. App. 189; Southern Indiana R. Co. v. Moore, 29 Ind. App. 52, 63 N. E. 863; Lanza v. Legrand Quarry Co. 115 Iowa, 299, 88 N. W. 805; Pittsburgh & C. R. Co. v. Sentmeyer, 92 Pa. 276, 37 Am. Rep. 684; Gormully & I. Mfg. Co. v. Olsen, 72 Ill. App. 32; Chicago, B. & Q. R. Co. v. Oyster, 58 Neb. 1, 78 N. W. 359; Texas Mexican R. Co. v. King, 14 Tex. Civ. App. 290, 37 S. W. 34; Gulf, C. & S. F. R. Co. v. Beall (Tex. Civ. App.) 43 S. W. 605; Southern R. Co. v. Mauzy, 98 Va. 692, 37 S. E. 285; Coppins v. New York C. & H. R. R. Co. 43 Hun, 26; Cooley, Torts, 3d ed. 1139.

Courts frequently instruct juries that they are authorized to take into consideration the interest of a party to a suit in determining his credibility, in both civil and criminal cases.

11 Enc. Pl. & Pr. p. 315; Reagan v. United States, 157 U. S. 301, 39 L. ed. 709, 15 Sup. Ct. Rep. 610.

The right of the parties to have the jury instructed on the law applicable to the case, clearly and pointedly, so as to leave no reasonable ground for misapprehension or mistake, is settled beyond question. It is the duty of the trial judge, when requested, to give in charge any requested instruction which is correct as a proposition of law and applicable to the issues, and a violation of duty by the court in this regard is reversible error.

11 Enc. Pl. & Pr. pp. 213, 214; Thorwegan v. King, 111 U. S. 549, 28 L. ed. 514, 4 Sup. Ct. Rep. 529; Livingston v. Maryland Ins. Co. 7 Cranch, 507, 3 L. ed. 421; District of Columbia v. Gray, 1 App. D. C. 500.

Messrs. W. Gwynn Gardiner and Creed M. Fulton argued the cause, and, with Messrs. A. E. L. Leckie and Joseph W. Cox, filed a brief for defendant in error:

No variance between the allegations in the

pleading and the proof offered to sustain it shall be deemed material unless it be of a character to mislead the opposite party in maintaining his action or defense on the merits.

Nash v. Towne, 5 Wall. 689, 18 L. ed. 527; *Liverpool & L. & G. Ins. Co. v. Gunther*, 116 U. S. 113, 29 L. ed. 575, 6 Sup. Ct. Rep. 306; *Baltimore & P. R. Co. v. Cumberland*, 176 U. S. 232, 238, 44 L. ed. 447, 451, 20 Sup. Ct. Rep. 380; *Grayson v. Lynch*, 163 U. S. 468, 479, 41 L. ed. 230, 234, 16 Sup. Ct. Rep. 1064.

Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them.

Richmond & D. R. Co. v. Powers, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748; *McDermott v. Severe*, 202 U. S. 600-604, 50 L. ed. 1162-1166, 26 Sup. Ct. Rep. 709; *Davidson S. S. Co. v. United States*, 205 U. S. 187, 51 L. ed. 764, 27 Sup. Ct. Rep. 480.

We start with a strong presumption that fair-minded men may draw from the testimony different conclusions from those contended for by the plaintiff in error, and this court will not interfere with the judgment unless there was no evidence upon which the finding of the jury could be predicated.

Davidson S. S. Co. v. United States, supra.

It is the duty of the master to warn and instruct his servant as to the dangers of which he knows, or ought, in the exercise of reasonable care and diligence, to know, and of which the servant has no knowledge, actual or constructive.

26 Cyc. Law & Proc. p. 1165.

For this court now to set aside the verdict of the jury, approved as it has been by the trial and appellate courts, would be to exercise the functions of triers of fact; when, under the law, such questions are committed to the determination of a jury.

Davidson S. S. Co. v. United States, 205 U. S. 187, 195, 51 L. ed. 764-768, 27 Sup. Ct. Rep. 480.

The following cases, more or less similar to the case at bar, illustrate applications of the rule as to the liability of the master for failure to discharge nondelegable duties he owes to his servants:

McGovern v. Central Vermont R. Co. 123 N. Y. 280, 25 N. E. 373; *Hogarth v. Poasset Mfg. Co.* 167 Mass. 225, 45 N. E. 629; *Wheeler v. Wason Mfg. Co.* 135 Mass. 294; *The Anchoria*, 56 C. C. A. 452, 120 Fed. 1017; *Atkins v. Merriek Thread Co.* 142 Mass. 431, 8 N. E. 241; *Pratt v. Prouty*, 153 Mass. 334, 54 L. ed.

26 N. E. 1002; *Ciriack v. Merchants' Woolen Co.* 146 Mass. 190, 4 Am. St. Rep. 307, 15 N. E. 579; *Musick v. Jacob Dold Packing Co.* 58 Mo. App. 322; *Fredenburg v. Northern C. R. Co.* 114 N. Y. 582, 11 Am. St. Rep. 697, 21 N. E. 1049.

If the plaintiff's testimony was true, and it must have been found by the jury to be true, there was no contributory negligence on his part.

Mather v. Rillston, 156 U. S. 391, 400, 39 L. ed. 464, 470, 15 Sup. Ct. Rep. 464.

The duty to inform and instruct is one of the absolute duties of the master, which cannot be delegated so that the master will be relieved of liability for the negligent non-performance thereof.

26 Cyc. Law & Proc. p. 1167; *Wheeler v. Wason Mfg. Co.* supra; *Mercantile Trust Co. v. Pittsburgh & W. R. Co.* 53 C. C. A. 207, 115 Fed. 479; *Louisville & N. R. Co. v. Miller*, 43 C. C. A. 436, 104 Fed. 124.

The proximate cause of an injury of this kind is a question for the jury.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; 13 Cyc. Law & Proc. p. 27.

If we concede, for the argument, negligence on the part of the fellow servant, still, the defendant was not, as a matter of law, relieved from liability, if there was evidence from which the jury could find that it was guilty of negligence, and that its negligence contributed to the injury.

Grand Trunk R. Co. v. Cummings, supra; *Wilmington Star Min. Co. v. Fulton*, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210; *Deserant v. Cerillos Coal R. Co.* 178 U. S. 409, 44 L. ed. 1127, 20 Sup. Ct. Rep. 967; *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397; *Gila Valley, G. N. R. Co. v. Lyon*, 203 U. S. 465, 473, 51 L. ed. 276, 280, 27 Sup. Ct. Rep. 145.

When it is the duty of the master to give notice of a risk or danger, it is only when the plaintiff has knowledge, actual or constructive, of such risk or danger, that it can be held that a failure of a fellow servant to give the specific warning in the special instance is the sole proximate cause, and that the master is relieved from liability for failure to discharge his duty.

26 Cyc. Law & Proc. pp. 1168, 1170; *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 307, 96 Fed. 713.

Mr. Justice McKenna delivered the opinion of the court:

This action was brought in the supreme court of the District of Columbia for damages for injuries alleged to have been re-

ceived by defendant in error while in the employment of plaintiff in error and through its negligence.

The case was tried to a jury, which rendered a verdict in favor of the defendant in error in the sum of \$6,500, upon which judgment was duly entered. It was affirmed by the court of appeals.

The assignments of error are based on certain instructions asked by the company which the trial court refused to give, the chief of which requested the court to direct the jury to find a verdict for the company upon the following grounds: (1) There was a fatal variance between the pleadings and the proof. (2) The injury to defendant in error was not caused by the negligence of the company, but by the negligence of a fellow servant or his own contributory negligence.

The first ground is the principal one discussed by counsel, and turns upon a consideration of the declaration and the proof.

An outline of the facts contained in the opinion of the court of appeals is as follows:

82] *"The plaintiff entered the employ of the defendant in January, 1904, as an oil tank wagon driver. His duties required him to take a team and wagon from defendant's barn in the morning, and, after using it during the day in the delivery of oil, return it to the barn in the evening. The plaintiff was required to groom his team in addition to his duties of delivering oil. The barn in which the horses were kept was 30 feet wide and 50 feet long. It contained two rows of stalls, one on either side, with a space of 12 feet between, extending the full length of the barn. In the ceiling, above the space between the stalls and about the middle of the barn, there was an opening 4 feet square, surrounded on the floor of the loft above by a wooden inclosure or box about 4 feet high. In the loft was stored baled straw, which was used for bedding the horses.

"It further appears that for about nine years one Coleman had been employed by the defendant, and among his duties was that of bedding the horses; that, during the period of his employment, Coleman had been accustomed to throw bales of straw through the opening in the ceiling from the loft to the floor below. In doing so it was necessary to lift the bale up to the top of the box or inclosure in the loft and push it over, so that it would fall through the opening. Plaintiff received the injuries complained of on February 2, 1904, by being struck by a bale of straw dropped by Coleman from the loft through said opening.

*
 "There was evidence adduced at the trial

to show that plaintiff had never been advised by the defendant, or any of the defendant's employees, either of the existence of the opening in the ceiling or the purpose for which it was used. Plaintiff testified to this effect, and further, that during the period of his employment,—less than two weeks,—he was required to leave the barn with his wagon *to deliver oil at 6 [83 o'clock in the morning, and that he did not complete the delivery of the oil and return to the barn until 6 or 7 o'clock in the evening. At the time of year that he was employed,—in January,—he left the barn before daylight in the morning and returned after dark in the evening. It also appears that the barn was poorly lighted, there being but a small oil lamp at each end of the passageway between the stalls.

"The witness Coleman testified that he not only notified plaintiff of the use made of the opening in the ceiling, but warned him before throwing down the bale of straw that injured him." [31 App. D. C. 372, 377.]

Defendant in error denied "that Coleman either called his attention to the hole, or explained its use, or gave him any warning on the evening of the accident. Coleman is not corroborated by any of the employees, as to his custom of calling out to persons before throwing straw through the opening."

The declaration contained four counts, in the first three of which, with some verbal variations, it is alleged that it was the company's duty to have the "hole or opening" in the ceiling of the stable so guarded that the bales of hay in the loft above would not fall or pass through and fall upon defendant in error, or upon those engaged in the performance of their duties in the stable. This duty, it is alleged, was neglected, and a bale of hay was allowed to fall through the hole on the defendant in error.

Those counts may be dismissed from consideration, as defendant in error does not contend that the proof corresponds to them.

The fourth count, it is insisted, has such correspondence, and expresses the grounds upon which the case was tried. The following are the pertinent allegations of that count:

"It became and was also the duty of the said defendant not to permit the said hay and feed to be thus passed through the said hole or opening without proper warning *or timely notice to those employed in [84 the stable below . . . and to give its employees engaged in handling or placing the hay and feed as aforesaid, as well as to those who were employed in the stable below, such proper and necessary instructions with respect to the dangers of passing the hay and feed through the said hole or opening, and the performance of their respective

duties, as to prevent injury and danger to the lives and limbs of the employees engaged in the stable below; yet the defendant . . . did not . . . do any of the duties that it was called upon to discharge in the premises, but, wholly disregarding its said duties in the premises, did carelessly and negligently allow a bale of . . . hay to fall or pass, or be thrown through the said hole or opening, without any notice or warning or signal or instruction of any kind to plaintiff," etc.

The rule is familiar and elementary that the pleadings and proof must correspond, but a rigid exactitude is not required. In *Nash v. Towne*, 5 Wall. 689, 698, 18 L. ed. 527, 528, it is said that modern decisions in regard to the correspondence between the pleadings and the proof are more liberal and reasonable than former ones, and states the rule to be by statute in the Federal courts "to give judgment according to law and the right of the cause." It was observed that it is the established "general rule in the state tribunals that no variance between the allegations of a pleading and the proofs offered to sustain it shall be deemed material, unless it be of a character to mislead the opposite party in maintaining his action or defense on the merits." The final comment of the court is that irrespective of those statutes, however, no variance ought ever to be regarded as material where the allegation and proof substantially correspond. See also *Liverpool & L. & G. Ins. Co. v. Gunther*, 116 U. S. 113, 29 L. ed. 575, 6 Sup. Ct. Rep. 306; *Baltimore & P. R. Co. v. Cumberland*, 176 U. S. 232, 238, 44 L. ed. 447, 451, 20 Sup. Ct. Rep. 380.

In the case at bar, the company could not 85] have been *misled. It made no objection to the testimony of the plaintiff (defendant in error here). It replied to it by testimony of like kind. It did not indicate in what way the proof varied from the pleadings, nor move for a continuance. Moreover, we think the pleadings, though inartificially drawn, were sufficient to notify the company that one of the grounds of action was its omission of duty to inform those whose employment made it necessary to be in the stable, of the danger to them of the use to which the hole was put. And that such use was dangerous is demonstrated. Indeed, it should not have needed the experience of the present case to make the danger clear to the company. The company was familiar with the stable, its construction, and what that construction required. One just employed might not know either, and his time of service might keep both from his knowledge. 54 L. ed.

And such is the contention in this case, which the verdict of the jury sustained. A dimly lighted stable before daylight and a dimly lighted stable after daylight, with a hole in its ceiling, through which bales of hay could be tossed or dropped, seems to us as not to fulfil the duty of a master to those servants who have not been informed of the practice, and the performance of whose duties subjected them to the danger which might result. Let it be granted that Coleman was a fellow servant of defendant in error, and was negligent; it was nevertheless for the jury to say whether the fault of the company contributed to the injury, *Kreigh v. Westinghouse, C. K. & Co.* 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. Rep. 619. If the plaintiff had had knowledge of the situation and its dangers, he might have needed no warning from Coleman, and might have been protected by the care which such knowledge would have induced.

The negligence of a fellow servant was sought to exonerate the master for his neglect in *Grace & H. Co. v. Kennedy*, 40 C. C. A. 69, 99 Fed. 679. In reply to it the court said, by Circuit Judge Shipman:

"The defect in the argument is a con- [86 tinuance of the omission to recognize the ordinary necessity for the protection of the employees, and that the absolute duty of the master to provide a safe place is not avoided by the neglect of his representative or servants to do the things which will obviously prevent the known original danger."

In the discussion so far we have assumed that the company had knowledge of the use to which Coleman had put the hole. Counsel, however, attacks the assumption, and meets it by saying that the company could not anticipate that Coleman would throw down an unopened bale of straw without giving warning to his employees, especially as it is further urged, he had been throwing down straw through the opening without negligence for about six years. But what the facts were in such regard and what conclusions were to be drawn from them were for the jury and cannot be reviewed here.

Error is assigned upon the refusal of the court to give instructions which presented the following propositions: (1) That the company was not an insurer of the safety of defendant while in its employment, "nor of the absolute or even reasonable safety of its stable." (2) That the presumption of law is that plaintiff contracted with reference to the risks, hazards, and dangers ordinarily incident to the business of his em-

ployment as the company conducted it at the time he entered its services. And that (this was an independent instruction) the salary or compensation received by the defendant in error was the consideration for such risks. (3) There was no evidence that Coleman was incompetent, and that his competency must be presumed.

It is not necessary to give a detailed attention to these instructions. The court, in its charge to the jury, expressed the legal principles of the case which were applicable to the testimony.

The company also asked another instruction, the substance *of which was as follows: That defendant in error assumed the ordinary risks not only actually known to him, but so far as they *could* (italics ours) have been known to him by the exercise of ordinary care on his part, and that if he knew, or by the exercise and prudence *could* have known, of the existence of the hole, then he could not recover. The court gave the instruction, but substituted the word "would" for "could."

The court was further requested to instruct the jury that they must look to the interest of the witnesses, and that where a witness is interested "the temptation is strong to color, pervert, or withhold the facts." An application was made of this to defendant in error, and it was requested that the jury be told that the law permitted him to testify in his own behalf, and that he having availed himself of the privilege, it was for them to determine how far his testimony was credible, and that his personal interest should be considered in weighing his evidence and in determining how far it was worthy of credit. The instruction was refused.

But little comment is needed on the contention that there is reversible error in the action of the court. It would be going very far to reverse the judgment on the supposition that the jury would have seen a different meaning in the word "could" than they saw in the word "would," and in consequence would have imputed a greater knowledge to defendant in error of the risks of his employment. And it would be going equally far to reverse the verdict because the jury did not have especially impressed on it, in the language counsel chose to employ, that interest may affect the credibility of witnesses. We are not prepared to say that a party to an action, by testifying, exercises a privilege which may be emphasized as affecting his credibility.

Judgment affirmed.

***INTERSTATE COMMERCE COM- [88
MISSION, Appt.,**

v.

**CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY et al. (No.
663.)**

**BURNHAM, HANNA, MUNGER DRY
GOODS COMPANY et al., Appts.,**

v.

**CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY et al. (No.
664.)**

(See S. C. Reporter's ed. 88-112.)

**Interstate Commerce Commission —
powers — reducing through rates.**

1. A reduction in that part of the through rates on Atlantic seaboard shipments to Missouri river cities which applies to the haul between the Mississippi and Missouri rivers is not beyond the power of the Interstate Commerce Commission, as introducing a new system of rate making by artificially apportioning the country into zones tributary to given trade centers, in order to build up or protect certain distributing centers at the expense of others, where the Commission, by its order, intended only to correct through rates which it found upon complaint were unreasonable in themselves, by substituting therefor reasonable rates.

[For other cases, see Interstate Commerce Commission, 15-33, in Digest Sup. Ct. 1908.]

**Interstate Commerce Commission —
judicial review of finding — presumption.**

2. Findings of the Interstate Commerce Commission that certain through rates are unreasonable in themselves carry with them a presumption of correctness.

[For other cases, see Appeal and Error, 4905-4908; Evidence, 552, 553; Interstate Commerce Commission, 8-10, in Digest Sup. Ct. 1908.]

[Nos. 663, 664.]

Argued April 5, 6, 1910. Decided May 31, 1910.

APPEALS from the Circuit Court of the United States for the Northern District of Illinois to review decrees enjoining the enforcement of an order of the Interstate Commerce Commission, reducing through rates on Atlantic seaboard shipments to Missouri river cities. Reversed and remanded for dismissal.†

See same case below, 171 Fed. 680.

The facts are stated in the opinion.

Messrs. Wade H. Ellis and Luther M. Walter argued the cause, and, with Mr. Edwin P. Grosvenor, filed a brief for appellant in No. 663:

Congress itself has power to fix the rates

†Leave granted on May 31, 1910, to present petitions for rehearing herein within thirty days.

to be charged by railroads engaged in interstate commerce.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa* (*Chicago, B. & Q. R. Co. v. Cntts*) 94 U. S. 155, 24 L. ed. 94; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Prentiss v. Atlantic Coast Line R. Co.* 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 266, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; *Willeox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 A. & E. Ann. Cas. 1034; *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Northern Securities Co. v. United States*, 193 U. S. 197, 368, 48 L. ed. 679, 713, 24 Sup. Ct. Rep. 436.

Congress may confer upon a commission the power to ascertain whether rates in force conform to the standard fixed by Congress, and if they do not, then to prescribe such rates as will conform to this standard.

Stone v. Farmers' Loan & T. Co. supra; *Tilley v. Savannah, F. & W. R. Co.* 4 Woods, 427, 5 Fed. 641; *Chicago & N. W. R. Co. v. Dey*, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; *Georgia R. & Bkg. Co. v. Smith*, 70 Ga. 694; *Atlantic Exp. Co. v. Wilmington & W. R. Co.* 111 N. C. 472, 18 L.R.A. 393, 4 Inters. Com. Rep. 294, 32 Am. St. Rep. 805, 16 S. E. 393; *McWhorter v. Pensacola & A. R. Co.* 24 Fla. 471, 2 L.R.A. 504, 12 Am. St. Rep. 220, 5 So. 129; *Steenerson v. Great Northern R. Co.* 69 Minn. 353, 72 N. W. 713; *Noyes, Am. R. Rates*, 207; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 494, 42 L. ed. 243, 251, 17 Sup. Ct. Rep. 896.

It is no new departure in legislation for Congress to confer upon commissions, boards, or individual officers the power to determine the existence of facts or conditions upon which depends the operation of a statute.

54 L. ed.

Marshall Field & Co. v. Clark, 143 U. S. 693, 36 L. ed. 310, 12 Sup. Ct. Rep. 495; *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616.

The fixing of rates is a legislative act. A rate prescribed by the rule of Congress, and an order of the Commission in conformity therewith, becomes the law, and cannot be set aside by the courts unless it violates constitutional rights.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 8, 18, 53 L. ed. 371, 378, 382, 29 Sup. Ct. Rep. 148; *Prentiss v. Atlantic Coast Line R. Co.* supra; *Willeox v. Consolidated Gas Co.* 212 U. S. 19, 41, 53 L. ed. 382, 395, 29 Sup. Ct. Rep. 192; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Noyes, Am. R. Rates*, pp. 203, 204; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 397, 38 L. ed. 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Interstate Commerce Commission v. Illinois C. R. Co.* 215 U. S. 452, ante, 280, 30 Sup. Ct. Rep. 155; *Baltimore & O. R. Co. v. United States*, 215 U. S. 481, 494, ante, 292, 297, 30 Sup. Ct. Rep. 164; *Interstate Commerce Commission v. Chicago & A. R. Co.* 215 U. S. 479, 481, ante, 291, 292, 30 Sup. Ct. Rep. 163; *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282, 53 L. ed. 186, 29 Sup. Ct. Rep. 55; *Southern R. Co. v. Tift*, 206 U. S. 428, 51 L. ed. 1124, 27 Sup. Ct. Rep. 709; *Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission*, 206 U. S. 142, 51 L. ed. 995, 27 Sup. Ct. Rep. 648; *Steenerson v. Great Northern R. Co.* supra.

Mr. John Lee Webster argued the cause, and, with Mr. John H. Atwood, filed a brief for appellant in No. 664:

The railroads tried the case upon the theory that the order discriminates between persons and localities. On this issue the railroad companies have no interest.

Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; *Clark v. Kansas City*, 176 U. S. 114-118, 44 L. ed. 392-397, 20 Sup. Ct. Rep. 284; *Albany County v. Stanley*, 105 U. S. 305, 26 L. ed. 1044; *Alcott v. American Straw-board Co.* 237 Ill. 62, 86 N. E. 685.

The intervening co-complainants have no right to be heard to complain of the order of the Interstate Commerce Commission, or to have the benefit of an injunction, for the reason that their remedy in the first instance, if the rates ordered were injurious or discriminatory against them, was to apply to the Commission by petition in the regular way, for an investigation of the facts.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426-439, 51 L. ed. 553-558, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648-675, 44 L. ed. 309-319, 20 Sup. Ct. Rep. 209; Tift v. Southern R. Co. 138 Fed. 760; Clement v. Louisville & N. R. Co. 153 Fed. 981.

Cities in the Central Traffic Association territory are not, as a matter of legal right, entitled to the benefit of the reduction in rates ordered by the Commission between the Mississippi and Missouri rivers.

Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. Rep. 687; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Interstate Commerce Commission v. Nashville, C. & St. L. R. Co. 57 C. C. A. 224, 120 Fed. 934; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co. 21 L.R.A.(N.S.) 982, 94 C. C. A. 217, 168 Fed. 161, 16 A. & E. Ann. Cas. 613.

What constitutes discrimination is a question of fact.

Interstate Commerce Commission v. Southern P. Co. 123 Fed. 601; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197-220, 40 L. ed. 940-948, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144-170, 42 L. ed. 414-424, 18 Sup. Ct. Rep. 45; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, *supra*.

Mere difference in rates is not necessarily unreasonable discrimination.

Interstate Commerce Commission v. Louisville & N. R. Co. and East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, *supra*; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Interstate Commerce Commission v. Nashville, C. & St. L. R. Co. *supra*.

It is not all discriminations or preferences that fall within the meaning of the statute; only such as are unjust or unreasonable.

Interstate Commerce Commission v. Baltimore & O. R. Co. *supra*; Texas & Pae. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 219, 220, 40 L. ed. 940, 947, 948, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

Messrs. John Lee Webster, John H. Atwood, and George T. Bell, also filed a brief for intervening appellants:

A court should not look behind a decree or order for the motives or purposes of the body making it.

Doyle v. Continental Ins. Co. 94 U. S. 535, 541, 24 L. ed. 148, 151; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, ante, 280, 30 Sup. Ct. Rep. 155.

The Commission had no jurisdiction to inquire into the reasonableness or unreasonableness of the local rates, as such, between the Mississippi and Missouri rivers.

Farmers' M. & S. Club v. Atchison, T. & S. F. R. Co. 12 Inters. Com. Rep. 351.

The railroad is a common carrier, and control of its business is within the regulatory power of the sovereign under which it lives.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; Interstate Commerce Commission v. Illinois C. R. Co. *supra*.

While the power to regulate may not be delegated, there can be delegated by the body having the authority to regulate, the duty of ascertaining what proper rates are.

2 Bacon, Abr. p. 160; Reagan v. Farmers' Loan & T. Co. 154 U. S. 393, 38 L. ed. 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479-494, 42 L. ed. 243-251, 17 Sup. Ct. Rep. 896.

A reasonable rate, as that expression is used in the act, means the reasonable rate within the constitutional guaranty.

Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 645.

A local rate is *prima facie* excessive when employed as part of a through rate.

McMorran v. Grand Trunk R. Co. 2 Inters. Com. Rep. 604; Board of Trade v. Alabama R. Co. 4 Inters. Com. Rep. 343.

Messrs. Frederick Manley Ives and Everett M. Burdett filed a brief as *amici curiæ* in support of the position of appellants:

A railroad rate may not be kept at an unreasonably high figure, so that it may operate as a protective tariff against goods manufactured at a distance, to protect goods manufactured near by.

Interstate Commerce Commission v. Louisville & N. R. Co. 118 Fed. 623.

It is the duty of the Commission to investigate, upon a proper complaint, whether rates complained of are unreasonably high or unjustly discriminatory, and to determine what are reasonable and just rates to be charged as a maximum, and *a fortiori* rates that shall not be discriminatory.

Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 645.

The Commission did not attempt arbitrarily to create an artificial zone tributary to a given trade or manufacturing center, but plainly found that the rates complained of were unduly and unjustly discriminatory against the complainants and the Atlantic seaboard cities, besides being unreasonably high; that to reduce the rates from the seaboard to the Mississippi river, or the local rates between the rivers, would not affect the discrimination, though it would cure the excessive rate. Therefore, to gain both results, to wit, a reasonable rate which did not discriminate, they ordered the through rates reduced by reducing those parts thereof in force between the rivers. This was, of course, a finding that the rates ordered were reasonable and free from undue and unjust discrimination.

Chicago, R. I. & P. R. Co. v. Interstate Commerce Commission, 171 Fed. 689.

If, as claimed by the railroads, this proceeding, instituted in the circuit court by them, was an original action (independent of the proceeding before the Commission), where the questions at issue were to be tried *de novo* (Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 649), the findings of the Commission were at least *prima facie* evidence of the matters therein stated.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 454, 51 L. ed. 1128, 1133, 27 Sup. Ct. Rep. 700; Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 645; Tift v. Southern R. Co. 138 Fed. 753, 79 C. C. A. 536, 148 Fed. 1021; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45.

The appellees were obliged to prove by a fair preponderance of the evidence that the reduced rates were unreasonably low.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 264-267, 46 L. ed. 1151, 1156, 1157, 22 Sup. Ct. Rep. 900; Missouri, K. & T. R. Co. v. Interstate Commerce Commission, *supra*; Interstate Commerce Commission v. Louisville & N. R. Co. 73 Fed. 409; Denady Main Colliery Co. v. Manchester, S. & L. R. Co. L. R. 11 App. Cas. 97.

Whether or not the rates are unjustly discriminatory is a question of fact.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 219, 220, 40 L. ed. 940, 947, 948, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 28, 45 L. ed. 719, 729, 21 Sup. Ct. Rep. 516.

It is not sufficient to show mere discrimination. To be illegal under the interstate

commerce act, discrimination must be undue or unjust.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Texas & P. R. Co. v. Interstate Commerce Commission, *supra*.

And the fact that the rate charged a local shipper for transporting property between two points is more than the proportion (applying between the same points) of a joint through rate does not support an allegation of undue preference or discrimination against the local shipper.

Parsons v. Chicago & N. W. R. Co. 11 C. C. A. 489, 5 Inters. Com. Rep. 95, 27 U. S. App. 394, 63 Fed. 903; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900.

The appellee railroads must prove that the order of the Commission showed an exertion of authority which was in form within its power, but which was manifested in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power; that the order was more than merely inexpedient or unwise.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, ante, 280, 30 Sup. Ct. Rep. 155.

The Commission would not have had the power in this proceeding to reduce the local rates from Chicago to Kansas City, or from St. Louis or Cincinnati to Kansas City, for example, even if high, as complaint had not been made against them. It is always open to the Chicago, St. Louis, and Cincinnati shippers and jobbers, or to anyone who feels he is discriminated against by the order of the Commission, to complain of the local rates on the ground that they are unreasonably high, and if such persons should prove their case, they are entitled to a reduction.

Kindel v. New York, N. H. & H. R. Co. 15 Inters. Com. Rep. 555; Spokane v. Northern P. R. Co. 15 Inters. Com. Rep. 376.

The through rates, being charged for services separable and separate from the local rates, must stand or fall upon their merits, irrespective of whether the local rates are in themselves just and reasonable. If they are not just or reasonable, appropriate proceedings should be instituted to make them so.

Stickney v. Interstate Commerce Commission, 164 Fed. 644.

Messrs. William D. McHugh and Colin C. H. Fyffe argued the cause and filed a brief for appellees:

The Commission has no power to compel the railroads to put in force a rate relation which in itself works an undue discrimina-

tion or unreasonable preference. The act creating the Commission forbids any such undue or unreasonable prejudice or preference.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Railroad Commission v. Galveston Chamber of Commerce* (Tex. Civ. App.) 115 S. W. 94.

There are several cases where the facts are similar to those of the case at bar, in this: that an identical service is rendered where no outside competition intervenes to force the railroad in question into the position of leaving alone the favored business or taking it at a lower rate. In these cases it has been held that the preference was undue and unreasonable.

Bigbee & W. River Packet Co. v. Mobile & O. R. Co. 4 Inters. Com. Rep. 829, 60 Fed. 545; *Interstate Commerce Commission v. Alabama Midland R. Co.* 5 Inters. Com. Rep. 308, 69 Fed. 232, affirmed in 168 U. S. 144, 166, 42 L. ed. 414, 423, 18 Sup. Ct. Rep. 45; *Hilton Lumber Co. v. Wilmington & W. R. Co.* 9 Inters. Com. Rep. 31; *New York, N. H. & H. R. Co. v. Platt*, 7 Inters. Com. Rep. 323; *Wight v. United States*, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822.

Mr. Justice McKenna delivered the opinion of the court:

The question in the case is the validity of an order of the Interstate Commerce Commission, reducing the class rates charged by the appellee railroad companies on through freight shipped from the Atlantic seaboard to *Kansas City and St. Joseph, Missouri, and Omaha, Nebraska, cities on the Missouri river, and called throughout the record, and in this opinion, Missouri river cities.

The through class rates were reduced from $\frac{1}{17}, \frac{2}{20}, \frac{3}{23}, \frac{4}{28}, \frac{5}{27}$ in cents per 100 pounds to $\frac{1}{13}, \frac{2}{13}, \frac{3}{13}, \frac{4}{13}, \frac{5}{13}$. The numbers above the lines indicate the classes and the numbers below the lines the rates.

The reduction was made in that part of the through rate which applied to the haul between the Mississippi and Missouri rivers. Explaining its order of reduction, the Commission said the through rates from Atlantic seaboard terminals to the Missouri river cities are made by adding together the rates from points of origin to the Mississippi river crossings, using proportional rates when such were available, and the local rates from the Mississippi crossings to the Missouri river cities. The through rates the Commission pronounced to be unreasonably high, "because those portions of the through rates which apply between the Mississippi river crossings and the Missouri river cities are too high. These are

defendants' 'separately established rates,' which are 'applied to the through transportation,' and therefore the through rates should be adjusted by reduction of those factors or parts thereof which are found to be unreasonable."

The division of the rates, as established by the railroad, was as follows: From New York to the several Mississippi river crossings on traffic moving through them to points beyond, in cents per 100 pounds, $\frac{1}{17}, \frac{2}{20}, \frac{3}{23}, \frac{4}{28}, \frac{5}{27}$. From the Mississippi river crossings to the Missouri river cities, $\frac{1}{10}, \frac{2}{15}, \frac{3}{15}, \frac{4}{17}, \frac{5}{12}$. The latter are local class rates under the Western classification, and are those which the Commission adjudged too high, and which it reduced in cents per 100 pounds, to the following: $\frac{1}{11}, \frac{2}{14}, \frac{3}{14}, \frac{4}{14}, \frac{5}{15}$. The amount of reduction, it will be observed, is 9 cents on first-class freight and a proportional reduction on the other four classes.

The order of the Commission required the railroad companies to cease and [91] desist on or before the 25th of August, 1908, from charging, demanding, or collecting anything in excess of the rates last above set out, and the companies were required to put such rates in force before the 25th of August, 1908, and maintain them for a period of not less than two years.

The proceedings before the Commission were begun by a petition filed by appellants in case No. 664, who were doing business in Kansas City and St. Joseph, Missouri, and Omaha, Nebraska. They alleged that they were engaged in either the mercantile or manufacturing business, and in buying and selling various commodities shipped from the Atlantic seaboard to them, respectively, under the definite freight classifications maintained by the railroad companies. The rates, according to the classifications, from New York to St. Paul and Minneapolis, and rates from New York to Chicago, and from the latter city to Kansas City, St. Joseph, and Omaha, the petition alleged, "are arrived at by adding to the rates from Mississippi river points, as shown above, the following rates, subject to official classification, to wit: 87 cents, 75 cents, 58 cents, 41 cents, and 35 cents per hundred pounds for said five classes, respectively; that the aforesaid through rates, applying from New York to Kansas City, are observed by defendant carriers on traffic moving by way of Chicago; that in the division of said through rates from Atlantic seaboard to said three Missouri river cities, Kansas City, St. Joseph, and Omaha, each of said defendant railroad companies allows and pays to said Eastern connections 72.3 cents, 62.4 cents, 48.4 cents, 34.3 cents, and 29.4 cents per hundred pounds on the

said five classes, respectively; and charges, accepts, and retains, as their respective shares of said through rates upon the several classes aforesaid, 74.7 cents, 57.6 cents, 44.6 cents, 33.7 cents and 27.6 cents per hundred pounds."

A table showing the distance of the various roads from New York to St. Paul and 92] Minneapolis and the Missouri *river cities is given, which shows that the distances are not materially different, and also shows distances west of Chicago.

It is alleged that the rates charged and the classifications enforced by the company for the transportation of property from the Atlantic seaboard and other producing territory to the Missouri river cities "are in themselves unreasonable and relatively unjust, unfair, and prejudicial as compared with rates from the same territory to St. Paul and Minneapolis," though the volume or tariff and the cost of handling it is not greater. Discrimination is alleged, with a detail of circumstances, against the Missouri river cities, and the violation of the interstate commerce act [act February 4, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154].

What are conceived to be reasonable rates are set out, and that the rates charged are alleged to be discriminatory against the complainants, and are excessive and unreasonable in and of themselves, because higher and greater than enough to pay the cost of transportation and maintenance and a fair profit on the valuation of the property employed.

The railroad companies filed separate answers, in which they admitted the charges and rates set out in the petition and the division thereof, but denied discrimination in favor of St. Paul and Minneapolis against the Missouri river cities, and alleged competitive conditions existing as to the first-named cities. They deny that the rates from the Atlantic seaboard to the last-named cities, suggested by the petitioners, would be reasonable or just, or that the rates charged are unduly high or excessive, or discriminate against the Missouri river cities or the petitioners.

The Chicago & Northwestern Railway Company filed an amended answer, in which it alleged that the complaint related to the through rates from the Atlantic seaboard to the Missouri river cities, and that 93] they were alleged to *be unfair and prejudicial compared to rates to St. Paul and Minneapolis, and "unreasonable and excessive in and of themselves." And, further, that the rates had been fixed and established by the railroad companies by virtue of joint traffic agreements, and had been duly filed, posted, and published by the companies, and

that all the companies to such agreements were necessary parties. Fifty or more companies were named.

The Eastern companies (those operating east of Chicago), answering, denied that there was any agreement between them and the original respondents for the shipment and division of through rates between the Atlantic seaboard and St. Paul and Minneapolis, and alleged that, in conjunction with their several connections, they receive to Chicago the same rate in cents per hundred pounds as applied upon like tariff originating at the same points of origin and terminating at Chicago, and are not concerned with the rates or proportional rates charged or accepted by the different carriers from Chicago to St. Paul or Minneapolis. They also denied that they were parties to any joint tariff or class rates from the Atlantic seaboard to the Missouri river cities. They admitted participation in joint through class rates to Mississippi river points, and denied that they, however, were unreasonable or unjust in or of themselves, or as respectively applied to shipments destined to St. Paul or Minneapolis, or shipments destined to points west of the Mississippi river.

They further alleged as follows:

"That the rates from New York city to East St. Louis, Illinois, are computed at 116 per cent of the rates from New York to Chicago, according to relative distances, that the rates from New York to East St. Louis are part of a general structure of rates whereby all rates from New York and other Eastern points to points in the states of Ohio, Indiana, Illinois, Michigan, Pennsylvania, Kentucky, and Wisconsin, and the province of Ontario are made *upon the [94] bases of percentages of the rates from the points of origin to Chicago; that the said rates for the first five classes governed by the official classification from New York to East St. Louis of 87 cents, 75 cents, 58 cents, 41 cents, and 35 cents per hundred pounds, respectively, are applied as proportional rates to the various Mississippi river crossings north of East St. Louis, to and including East Dubuque, Illinois, and that from other Eastern points than New York city the rates to East St. Louis apply equally to said Mississippi river crossings, and all of such rates to said Mississippi river crossings apply uniformly upon all shipments destined to all points west of the Mississippi river and east of Pacific coast terminals and points taking the same rates. Respondents allege that all of the rates from Eastern points to said Mississippi river crossings are just and reasonable in and of themselves, and as applied to shipments destined

to any point west of the Mississippi river and east of Pacific coast terminals.

They alleged that the rates to the Mississippi river crossings are governed by the official classification, and those from the latter crossings to the Missouri river points are governed by the Western classification, and that innumerable articles are differently classified in such classifications. That it would be impossible to establish joint through rates on the basis set out in the petition without simultaneously applying the official classification to all traffic from all Eastern points and all points intermediate between the rivers, and establishing relative through class rates from all such Eastern points to all such intermediate points between the rivers, and that this would require a general revision and reduction of rates, which would cause great hardship and irreparable injury to the respondents and other interstate carriers not parties to the proceeding.

It is alleged that the reasonableness of the rates from Eastern points to Chicago [95] and to the Mississippi river is *not questioned by petitioners, and that the grievance of the latter, if they have any, lies in the rates applied by the original respondents from Chicago and the Mississippi river crossings to the Missouri river cities on shipments originating at Eastern points. They hence prayed to be dismissed. They were subsequently dismissed.

The Sioux City Commercial Club intervened and supported the petition, and prayed that whatever should be done for the other Missouri river cities should be done for Sioux City. The St. Paul Jobbers & Manufacturers Association and the Minneapolis Commercial Club intervened and in substance coincided with the views and interest of the defendant carriers.

A great deal of testimony was taken and the order made which has been recited. The appellee companies then filed a bill in the circuit court of the United States for the northern district of Illinois, eastern division, for a temporary and permanent injunction against the order, that it be annulled, and the Interstate Commerce Commission be enjoined from enforcing it. A temporary injunction was granted. It was made permanent on final hearing, the court dividing. 171 Fed. 680.

The pleadings in the case are very voluminous. They consist of the bill of the railroad companies, the answers to it by the Interstate Commerce Commission, and the intervening petitions of certain other railroad companies, and mercantile and manufacturing concerns.

Even a summary of the pleadings would be very long, and we shall, therefore, say

but little more than that the allegations of the bill and those of the answer of the Commission, and its denials, are such as tend to the support of the respective contentions of the companies and the Commission, upon which we shall hereafter comment. We may, however, say further that emphasis is given to certain matters. The companies make prominent that two classifications of freight are in force upon which tariff rates *are based: The official classification [96] from the Atlantic seaboard to the Mississippi river, and the Western classification, between the river and the Missouri river cities; that the classifications materially differ and constrain different rates; that those between the rivers are just and reasonable and apply to all merchandise, whatever be its point of origin. That business conditions have grown up and are dependent upon the rates established, which will be disturbed by their alteration; that their alteration as required by the order of the Commission will compel a discrimination between shippers and localities, to do which is in excess of the powers of the Commission.

It is alleged that the rates are fair compared to the cost of service, absolutely and relatively, and that the rates east of the Mississippi river are not changed, the order affecting alone the proportion of the through rates charged by the complainant carriers, and will compel new through rates, which will not affect the proportion thereof received by the Eastern carriers.

And it is alleged that the Commission only has power to establish, after hearing on complaint, through rates and joint rates, and prescribe the just and reasonable proportions of such rates between the carriers only when they (the carriers) fail to agree upon the proportion or division thereof, and that there was no evidence that they had failed to agree upon such rates or the proportion and divisions thereof, and that, therefore, the order exceeds the power of the Commission, and deprives the companies of their property without due process of law, in violation of the 5th Amendment of the Constitution of the United States.

It is further alleged that there was no evidence that the rates between the rivers are unjust or unreasonable, except by comparison with other rates; that no evidence was offered of cost of service or of the various elements proper to be considered in determining whether a rate is just and *reasonable in and of itself, and that "the whole and only reason and the whole and only conclusion" of the Commission upon which the reduction was ordered was because the Commission decided that merchandise shipped from the Atlantic seaboard

should be transported by the companies at a lower charge than that exacted for the transportation of an equal amount of merchandise when the same was shipped from St. Louis, Chicago, or other points west of the Atlantic seaboard. And this, it alleged, is in excess of the powers of the Commission, misapplies the law, and compels the companies to serve a certain class of shippers at an unreasonable rate, and to take a rate lower than is charged other shippers for a like service, which involves less expense to the companies.

A loss of revenue is alleged, which will result in a deprivation of their property without due process of law, and that the enforcement of the order, even if it be finally set aside, will cause great disturbance to the business of the companies.

The Commission meets those points with denials of the facts alleged and their consequences, and opposes them as well by other facts and considerations.

It asserts that the bill has no equity because all the matters and things set forth therein are cognizable before it (the Commission), and it has the power to suspend, modify, or amend its order as upon a proper showing might be proper; that it has information for such action, for, under the law, the operation and operating results of each railroad are required to be filed with it, "and the subject is under constant investigation." And in such investigation, it was alleged, many elements must enter, and that the fixed charges of maintenance and operation and the cost of operation and handling of different classes of freight, state and interstate, hauled on the same train, widely different in character and value, cannot mathematically be determined so as [98] to apportion to each class *of traffic its proper division of costs, and that no method of apportionment can be devised except that which involves the exercise of judgment, and the results vary according to the method used. The Commission, therefore, says that the statements and allegations of the bill are mere conclusions and opinions, which necessarily involve consideration of all these complex and difficult problems, and should not be accepted for the purpose of setting aside its order.

Supplementing this, the Commission sets forth that on the hearing before it, oral and documentary evidence was taken, to which it gave full consideration, and to the reports filed by the companies with it in accordance with the statute, and that its order was made in accordance with the statute, and that, so far from exceeding its powers, it might have made a greater reduction; but it left the companies on the Atlantic seaboard business destined to Mis-

souri points to charge 100 per cent more than the same railroads voluntarily charge on transcontinental business, and it is alleged that it appeared from the testimony of one witness that the latter business yielded some profit, and by another witness, testifying as an expert, that a rate 50 per cent higher would be "too large, of course."

The Commission alleges the reasonableness of the rates ordered by it, and that they are less than the companies charge and accept for transcontinental freight originating at the Atlantic seaboard and destined to Pacific coast terminals, the expense of service being no greater. A comparison is made also with Montana points and Spokane points, showing the rates to be less than to the Missouri river cities, carried on the same railroads. So also to Oklahoma common points. So also for traffic originating at Pittsburg and carried through Chicago to Missouri river points, and at Chicago destined to Texas common points.

*The reason given by the Commission [99] for not disturbing the rates of the Eastern roads is that neither the complainant before it nor the companies charged that these rates were excessive, nor was a reduction of them sought; but, on the contrary, it was conceded that such rates were just and reasonable. The Eastern carriers were, therefore, dismissed from the proceedings.

The other allegations but give further details and illustrations of the foregoing.

An order was made allowing the Illinois Central Railway Company, the Atchison, Topeka, & Santa Fe Railroad Company, the Chicago & Alton Railroad Company, the Missouri Pacific Railway Company, the Missouri, Kansas, & Texas Railway Company, and the St. Louis & San Francisco Railroad Company to file petitions of intervention. The allegations of these petitions are substantially the same as those of the bill. The answer filed by the Interstate Commerce Commission to the bill was taken as filed to the intervening petition.

Leave to intervene was also given to certain business houses of Milwaukee, St. Louis, Chicago, Detroit, and Cleveland. Their petition set forth with some detail the discrimination, as it was alleged, that would be worked against them in favor of merchants at the Atlantic seaboard and Missouri river cities by the order of the Commission, and also the disturbance of the commercial conditions which would result from the order. The Burham Hanna Dry Goods Company, one of the complainants before the Commission, and a number of other corporations and copartnerships were allowed to file petitions in intervention. The petitions defended the order of the Commission, and again asserted that the rates be-

tween the Mississippi and the Missouri rivers were unreasonable.

Evidence was taken and the court made the temporary injunction permanent.

100] *The court carried into and made the foundation of its opinion the conception it had formed and expressed upon granting the preliminary injunction; that is, that the purpose of the Commission was not so much the reduction of unreasonable rates, as protection of the Missouri river cities against competition. The court said: "Indeed, the contest, in its larger aspect, is a contest not so much between the shippers and the railroads, as between the commercial and manufacturing interests of the Missouri river cities and of the Atlantic seaboard on the one part (their interests being identical), and the commercial and manufacturing interests of what is known as the Central Traffic territory (the territory west of Buffalo, Pittsburg, and Parkersburg, and east of the Mississippi river) on the other part."

To support this view it was said that the differential of 9 cents on merchandise from the Atlantic seaboard to the Missouri river cities, whatever be the principle upon which the order was based, will be "to protect to a certain degree the Missouri river jobbers and manufacturers within a certain zone of territory against the jobbers and manufacturers of Central Traffic Association territory . . . as also to open up to the Atlantic seaboard," in its trade with the Missouri river "zones of territory, the advantages contained in the differential against the competition of both the intervening Central Traffic Association territory and the Missouri river territory." And this, it was asserted, was the exercise of a "power artificially to apportion out the country into zones tributary to given trade centers, to be predetermined by the Commission, and non-tributary to others." This, it was further said, was a "power essentially different in principle from the mere power of naming rates that are reasonable."

We make these quotations from the opinion of the court because they put, in a clear and condensed way, the ultimate contention of the companies, and the evil, **as 101]** they see *it, in the order of the Commission, and which is intended to be exhibited by their voluminous pleadings and arguments. And such, it is insisted, was the conscious purpose of the Commission,—a view in which the circuit court concurred, deducing it from certain avowals of the Commission in its report.

Such purpose and the want of power in the Commission to execute it is the foundation of the court's opinion. No analysis of the facts was made which concerned any other proposition or issue. The question in-

involved, the court said, was not one of fact, but one of power; it is not whether, by the application of correct principles, a given rate had been decided to be unreasonable, but whether the principles applied are those within the power of the Commission. If this be so, we may wonder at the voluminous pleadings and the equally voluminous evidence. The elements of it were on the face of the report of the Commission. The court certainly thought it could be discerned on the face of the pleadings when passing on the motion for preliminary injunction. This question, then, we must regard as paramount, and to it we will address ourselves. It may be that no other question is necessary to be decided. What the court would have done with all other questions, we are not able to say. It took occasion to remark:

"It must be understood, however, that these orders of the Commission are enjoined simply because, in our judgment, they lay upon the commerce and manufacturing of the localities affected an artificial hand that Congress never intended should be put forth, and therefore are outside the power conferred on the Commission by Congress; for with the question of a reduction in rates, or a readjustment of rates, from which such artificial results have been eliminated, we are not now dealing."

A member of the court dissented from its judgment, and declared the grievance that the companies asserted *against **[102]** the order of the Commission was not sustained by the evidence.

Is it true that the Interstate Commerce Commission by its order exercised a power "artificially to apportion out the country into zones tributary to given trade centers," and intentionally exercised it to protect the Missouri river cities against the competition of other cities? If that be the necessary conclusion, the judgment of the circuit court, it may be contended, was right. Such conclusion we should certainly be reluctant to adopt. From whatever standpoint the powers of the Interstate Commerce Commission may be viewed, they touch many interests, they may have great consequences. They are expected to be exercised in the coldest neutrality. The Commission was instituted to prevent discrimination between persons and places. It would indeed be an abuse of its powers to exercise them so as to cause either. And the training that is required, the comprehensive knowledge which is possessed, guards or tends to guard against the accidental abuse of its powers, or, if such abuse occur, to correct it. The possession of such advantages is one of its defenses. It alleges that by § 12 of the interstate commerce act it is given authority

to inquire into the management of the business of all common carriers subject to the provisions of the act, and is required to keep itself informed as to the manner and method in which the same is conducted, and is "authorized and required to execute and enforce the provisions of the act." Other sections are more specific in grants of power. Rates may not only be investigated and be pronounced unjust or unreasonable or discriminatory, but other rates may be prescribed. These, we repeat, are great powers, and means of their proper exercise are conferred. Investigation may be conducted, and, as the Commission says in its answer, "that to enable it to perform its duties, such information as shows the operation 103] tions and operating results *of each railway is required to be filed with it, and the subject is under constant investigation."

The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it, therefore, are complex and difficult, the means of solving them are as great and adequate as can be provided. And arguments which point out and assail the imperfection which may appear in the result, this court has taken occasion to characterize. "[They] assail," it was said, "the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute, and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils." *Interstate Commerce Commission v. Illinois C. R. Co.* 215 U. S. 452, 478, ante, 280, 291, 30 Sup. Ct. Rep. 155, 163. It was, of course, recognized in that case that there must be power in the Commission to make the order which might be subject to attack, but want of power was distinguished from the mere expediency or wisdom of making it, which, it was declared, was not open to judicial review.

We return, therefore, to the question of the power of the Commission and its purpose. The complainant before that body presented two issues: The effect of the rates from the Atlantic seaboard as discriminating against the Missouri river cities in favor of St. Paul and Minneapolis, and their unreasonableness of and in themselves. The first we may immediately put out of view. It was decided adversely to the complainants before the Commission, and we may 54 L. ed.

say at the outset that the contention of the railroad *companies that it was the [104 only issue presented to the Commission is not justified.

The second issue was decided in favor of the complainants, the Commission finding that the through rates were unreasonable of and in themselves, and was caused by the charge from the Mississippi river crossings to the Missouri river cities. The grounds of its decision and principles upon which it proceeded the Commission set forth in its report, and to some extent all of the factors upon which the decision is based and supported. Indeed, the pleadings in the case and the argument of counsel are but fuller explanations of the elements set out in the report. The controversy, therefore, is not so much as to what these factors are as what they establish as to the power of the Commission to make the order. The effect of the order, it is contended, as we have seen, is to create artificial zones, tributary to certain trade centers, or, as it is expressed by the railroad companies, the effect of the order is to destroy the system of rates which has existed ever since the railroads were constructed, and to "overturn the equality of opportunity in competition" which certain commercial centers possessed under that system, and to substitute an artificial system, the feature of which is special advantages in rates to special sections. And it is said the order was entered for such purpose. The appellee interveners, who are merchants and jobbers of the territory known as the Central Freight Association territory, attack the order on the ground (a) that it violates § 2 of the interstate commerce act, in that it compels a charge to them for like kind of traffic under substantially similar circumstances and conditions greater than is charged to their competitors in seaboard territory and on the Missouri river; (b) the order is in contravention of § 3, in that it gives an unreasonable preference to merchants and jobbers in the seaboard territory and on the Missouri river over merchants and jobbers in Central *Freight As- [105 sociation territory; (c) that it arbitrarily attempts to change existing commercial conditions upon which the various distributing centers of the seaboard, Middle West, and West have become established; (d) the power of the Commission is limited to the reduction of unreasonable rates, and that the rates reduced are not shown to be such in themselves; (e) the order is void, it being an attempt at legislation on the subject of general adjustment of rates.

These contentions present the full offending of the order, and the summary of them is that rates long established have been

changed, commercial conditions are disturbed, and equal opportunities of competition of certain commercial centers which have grown up have been taken away, and undue protection given to others. This seems very formidable in the recitation. But it is met by countercharges of discrimination, and that the equal opportunities of competition contended for is a power which has grown up and is supported by the existence of unjust freight rates. It is certain that the subject has taken on more complexity than it had before the Interstate Commerce Commission, and the Commission has made this the basis of a motion to dismiss the suit as to the intervening railroads and all the intervening merchants and manufacturers, on the ground, as to the railroads, among others, that the order does not run against or operate upon them, and that no right of theirs can be determined by the decree. On the ground as to the interveners, that over the matters herein the courts exercise only the jurisdiction conferred by the act to regulate commerce, and not general equity powers, and that the matter to be determined is not the respective rights of shippers or localities, but the validity of the order of the Commission, and that the interveners have a complete remedy by application to the Commission. And we may say here, as adding to the complex effect and interest of 106] the questions *presented, that the chambers of commerce and boards of trades of certain Eastern cities have presented a brief in defense of the order, asserting a vital interest in its preservation, and exhibiting and illustrating the discrimination which, as they contend, exists against them by the breaking of rates at the Mississippi river crossings.

Let us see, therefore, upon what grounds the Commission proceeded. The Commission is accused by the railroad companies of attempting to substitute an artificial system of ratemaking for a long-established system, and to protect or foster particular localities of production and distribution. Certain remarks of the Commission are cited to support the charge. We think the charge puts out of view all else that was said by the Commission, puts out of view the comprehensive consideration the Commission took as exhibited in the explicit declaration, made after quoting the local class rates between the rivers in cents per hundred pounds, that "these are the rates that are added to the rates up to the Mississippi river crossings to make up the through rates from the Atlantic seaboard to the Missouri river cities. Are these rates, as so used, and the through rates resulting therefrom, unwarrantably high or unduly dis-

criminatory or unjustly prejudicial? Can they be changed without doing injustice elsewhere?"

We think the charge also puts out of view the disclaimers of such purpose in the answer of the Commission in its report to Congress, and its insistence that it is constrained by the law to act only on complaint to it, and that it is open at all times to be appealed to redress the grievances any shipper or locality may have. Nor did the Commission ignore or underestimate the manner in which the lines of railroads had been extended, or the system of rates or rate making which had resulted. That is the system of making rates upon certain basing lines or points. Rates "break" at such points, it was proved, as a result *of building independent [107] lines westward. In other words, lines of railroads were built to certain cities from the East, seeking such cities, it may be, because of their natural situation and facilities, and other independent lines building westward, each line fixing its own rates or uniting according to circumstances in joint rates. It is the observance of such points that give and maintain, as we understand the contention of the railroads, to certain cities "the equal opportunity in the distribution of merchandise with the merchants in the East, and with the merchants to the West of said cities, so far as their business is affected by trade rates." That this was carefully considered is manifest, for the Commission resisted the argument which was made against basing rates on such points, saying:

"We are not impressed with the view that the system of making rates on certain basing lines should be abolished. No system of rate making has been suggested as a substitute for it, except one based upon the postage-stamp theory, or one based strictly upon mileage. Either of these would create revolution in transportation affairs and chaos in commercial affairs that have been built upon the system of rate making now in effect. It must not, however, be assumed that a basing line for rates may be established and be made an impassable barrier for through rates, or that cities or markets located at or upon such basing line have any inviolable possession of, or hold upon, the right to distribute traffic in or from the territory lying beyond. Development of natural resources, increase in population, growth of manufacturing or producing facilities, and increased traffic on railroads, create changed conditions which may warrant changes in rates and in rate adjustments in order to afford just and reasonable opportunity for interchange of traf-

fic between points of production and points of large consumption."

It was the sense of the Commission, **108]** however, that such *points could not be immovable forever and fixed forever against power of changing, or that through rates based on such points must be exempt from regulation, no matter what their character, or be constituted at the will of the railroad of the sum of local rates or the sum of rates from one basing point to another, however unjust the rates might be. Indeed, as pointed out in the brief of the appellants in No. 664, the railway companies adhere to no such construction of rates. As there said, "the Pacific coast terminal rates, the Washington and Spokane common-point rates, the Oklahoma rates, and the El Paso and Texas common-point rates, are each and all a departure therefrom, and all are much less than the rates ordered by the Commission."

As we have said, the Commission is the tribunal that is intrusted with the execution of the interstate commerce laws, and has been given very comprehensive powers in the investigation of and determination of the proportion which the rates charged shall bear to the service rendered, and this power exists, whether the system of rates be old or new. If old, interests will have probably become attached to them, and, it may be, will be disturbed or disordered if they be changed. Such circumstance is, of course, proper to be considered, and constitutes an element in the problem of regulation, but it does not take jurisdiction away to entertain and attempt to resolve the problem. And it may be that there cannot be an accommodation of all interests in one proceeding. This the Commission has realized and expressed. The Commission, meeting a possible suggestion that if the part of the through haul, which consisted of the rate between the rivers, was too high, all rates between the rivers might be too high, said:

"If the local class rates of defendants between the Mississippi and Missouri rivers were reduced, it would give the same degree of advantage to all the producing and distributing centers on the east of the Missouri **109]** river, *and their relative advantages or disadvantages would not be changed, while a very serious inroad upon the revenues of the carriers would inevitably result, and at a time of industrial depression when it could not well be borne. Such a change would necessitate corresponding changes in the rates to and from intermediate points, and would probably be reflected in changes in commodity rates as well. The local class rates between the rivers are high, but this is not the time to precipitate such a vio-

lent change as would follow an important reduction of them. The first-class rate from Buffalo to Chicago, about 540 miles, and from Pittsburg to Chicago, about 465 miles, is 45 cents. From Cincinnati to Chicago, 306 miles, it is 40 cents."

We may say in passing that the passage thus quoted is one of those which is adduced to support the contention that the Commission's purpose was to introduce a new system of rate making and build up certain distributing centers. We do not think so. It only shows that the accusation that all rates between the rivers were too high might be justified, but that it would be unjust to the carriers to reduce them at that time. It is somewhat strange that that which was done in the interest of the carriers should be brought forward by them to attack the action of the Commission. It is very clear that by a voluntary reduction by them of such rates, the equality of opportunity dependent upon them would be restored. We make this observation to bring out clearly the relation of the railroad companies to the grievance complained of. That the companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his. *Clark v. Kansas City*, 176 U. S. 114, 118, 44 L. ed. 392, 396, 20 Sup. Ct. Rep. 284; *Smiley v. Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289.

But, it may be said, such limitations upon the companies *is not of consequence, for shippers and trade centers are here with complaints. It is doubtful if they are properly here, or rather, were properly permitted to intervene. We have said that the act to regulate commerce was intended to be an effective means for redressing wrongs resulting from unjust discrimination and undue preference, and this must be so, whether persons or places be sufferers. *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075. We have also said that the primary jurisdiction is with the Commission, the power of the courts being that of review, and is confined in that review to questions of constitutional power and all pertinent questions as to whether the action of the Commission is within the scope of the delegated authority under which it purports to have been made. *Interstate Commerce Commission v. Illinois C. R. Co.* 215 U. S. 452, 478, ante, 280, 291, 30 Sup. Ct. Rep. 155, 163.

The order of the Commission, besides, is

strictly limited. It was intended to determine nothing, and it determines nothing but that the through rates on Atlantic seaboard shipments to the Missouri river cities are too high. That order is alone open to review. Whether other persons, cities, or areas of territory have grounds of complaint, the way is open by application to the Commission for inquiry and remedy. In that inquiry many elements may enter upon which the judgment of the Commission should first pass, and of which the courts should not be called upon in advance to intimate an opinion. The reasons for this we have indicated, and they will be found at length in the cases which we have cited.

One question remains for discussion,—the finding of the Commission upon the character of the rate, whether it is unreasonable as decided. Such decision, we have said with tiresome repetition, is peculiarly the province of the Commission to make, and that its findings are fortified by presumptions of truth, “due to the judgments of a tribunal appointed by law and informed by experience.” *Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 454, 51 L. ed. 1133, 27 Sup. Ct. Rep. 700, and cases cited. The testimony in this case does not shake the strength of such presumptions. We have seen that the circuit court refrained from expressing an opinion upon anything but the power of the Commission. Circuit Judge Baker, dissenting from that view, went further and said:

“Complainants are common carriers whose rates on certain traffic are directed to be reduced by the order complained of. Two grounds for injunction are alleged. One is that the new rates are confiscatory. There is no proof whatever that the rates which the Commission prescribed as just and reasonable are not sufficient to pay the cost of handling that traffic, to cover that traffic’s full proportion of maintenance and overhead expenses, and to return to the carriers an ample net profit. Furthermore, proof is lacking that, if the carriers should reduce other rates to correct what they claim is the maladjustment caused by the Commission’s order, the reduction would not leave them abundant net returns. For the purposes of this hearing, therefore, it must stand as an agreed fact that the present reduction is neither directly nor indirectly obnoxious to the charge of taking private property without just compensation.” [171 Fed. 689.]

We concur in these conclusions.

Decree reversed and the case remanded with directions to dismiss the bill and all proceedings in the Circuit Court.

Mr. Justice White, dissenting:

The court below enjoined the execution of the order of the Commission because it was of the opinion that that body had exceeded the powers conferred upon it by the act to regulate commerce, since it had based its order upon the assumption that it was its duty under the act to secure a relatively equal share of the volume of interstate commerce to communities and places, and therefore that it was its province to alter otherwise legal rates for the purpose of [112] correcting the inequalities which otherwise would arise from the competitive rivalry between sections and places. As, in my opinion, the court below was correct in the view which it took of the order of the Commission, and was right in holding that the power which the order manifested was not conferred by law, I dissent from the judgment of reversal now announced. It does not, however, seem to me necessary that I should do more than state the fact of my dissent for the following reasons: The judgment of reversal is based not upon the ruling that the Commission possessed the authority to make the order if it was based upon the assertion of power upon which the court below found the order must necessarily rest, but exclusively upon the theory that the court below, while rightly holding that the Commission had not the power which it assumed that body had exerted in making the order, had nevertheless mistakenly enjoined the order, because it did not exert, or attempt to exert, the power which the court conceived had been called into play in making it. In other words, although the opinion now announced excludes the authority which the lower court deemed the Commission had exerted by the order in question, it nevertheless maintains the order because of the conclusion that the order was but an exertion by the Commission of its authority on complaint that a rate was unreasonable of itself, to correct such rate by substituting a reasonable rate therefor. Although I am unable to agree with the reasoning by which the court now gives to the order of the Commission the narrow basis thus stated, as the solution of that question depends upon the idiosyncrasies of this particular case and involves no principle of general importance, it seems to me I am called upon to do no more than simply to state my inability to agree.

Mr. Justice Holmes and Mr. Justice Lurton join in this dissent.

113] *INTERSTATE COMMERCE COMMISSION, Appt.,

v.

CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY et al.

(See S. C. Reporter's ed. 113-119.)

This case is governed by the decision in *Interstate Commerce Commission v. Chicago, R. I. & P. R. Co.* ante, 946.

[No. 641.]

Argued April 5, 6, 1910. Decided May 31, 1910.

APPPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a decree enjoining the enforcement of an order of the Interstate Commerce Commission, reducing through rates from Chicago and St. Louis to Denver. Reversed and remanded for dismissal.†

See same case below, 171 Fed. 680.

The facts are stated in the opinion.

Messrs. **Wade H. Ellis** and **Luther M. Walter** argued the cause, and, with Mr. **Edwin P. Grosvenor**, filed a brief for appellant.

Messrs. **William D. McHugh** and **Samuel A. Lynde** argued the cause and filed a brief for appellees:

If any lingering doubt exists as to the comprehensive purpose of the Commission in the orders in question, it will be entirely removed and the object of the Commission clearly appreciated by a consideration of a later decision by that body.

Indianapolis Freight Bureau v. Cleveland, C. C. & St. L. R. Co. 16 Inters. Com. Rep. 56.

If the Interstate Commerce Commission, under a misconception of the law, condemns a rate which is legal, the act of the Commission is beyond its powers and is void; and its order will be set aside by the court.

Interstate Commerce Commission v. Stickney, 215 U. S. 98, ante, 112, 30 Sup. Ct. Rep. 66; *Southern R. Co. v. St. Louis Hay & Grain Co.* 214 U. S. 297, 53 L. ed. 1004, 29 Sup. Ct. Rep. 678.

Railroad companies, under the statute, have a right to rates which are in conformity to the standards established by Congress. If this right to charge a legal rate is taken away from a carrier by the Commission, and the statute is so construed as to prevent a court from inquiring into the fact, then the carrier is deprived of its right without due process of law.

†Leave granted, on May 31, 1910, to present petition for rehearing herein within thirty days.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Missouri, K. & T. R. Co. v. Interstate Commerce Commission*, 164 Fed. 645.

The Commission cannot interfere to change practices which are legal, and thus invade the province of railroad management.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 118, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 493; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

When we consider how the orders in question will, if enforced, revolutionize the rate system which has obtained throughout the West ever since rails were laid into that territory, and how arbitrarily it overturns all the commercial conditions which have grown up in reliance upon this rate system, we see that the orders are, in reality, legislation of wide scope, and are void, as beyond the power of the Commission.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 234, 40 L. ed. 940, 952, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

Mr. Justice **McKenna** delivered the opinion of the court:

This case was argued and submitted with Nos. 663 and 664, as involving the same general questions. It was disposed of in the court below with those cases in the same opinion (171 Fed. 680) and on the same ground; to wit, that the effect of the order of the Commission to enjoin which the suit was brought apportioned "out the country into zones tributary to given trade centers, and not tributary to others," resulting in protection and favor to the first. The case is here on appeal from an order *grant- [114 ing a preliminary injunction, which was moved upon the bill (to which there was a demurrer by the Interstate Commerce Commission), and upon certain supporting affidavits.

The order enjoined was made by the Commission in a proceeding instituted before it by one George J. Kendall, in which he attacked certain rates charged by certain carriers from New York, Chicago, St. Louis, Omaha, and points taking similar rates to Denver, on the ground that the same were excessive and discriminatory, and attacked rates from Denver to Salt Lake City on similar grounds. By an amended complaint certain commodity rates were also attacked.

After hearing and argument, the Commission made its report, from which the following is an extract:

"In the *Burnham, H. M. Dry Goods Co. v. Chicago, R. I. & P. R. Co.* supra (14

Inters. Com. Rep. 299), we found that the defendant carriers had for years maintained a line of proportional class rates between Chicago and the Twin Cities, applicable on traffic from the Atlantic seaboard, one third less than their local class rates between Chicago and the Twin Cities, and that their local rates had not thereby or therefore been pulled down or reduced. We cannot accept the theory that if in this case the through rates from Chicago and St. Louis to Denver are reduced, like reductions in the local rates from Chicago or St. Louis to the Missouri river, or from the Missouri river to Denver, must automatically follow. If rates applicable only to through business, and that are materially lower than the local rates, can be maintained between Chicago and St. Paul, and in the many other instances which could be cited where the carriers adopt and maintain the same principle, without forcing reductions in the local rates, it is obvious that the same thing can be done between Chicago and the Missouri river, or between Chicago and Denver. As has been seen, the class rates from the Missouri river to Denver, short *line distance 538 miles, are on a scale of \$1.25 per 100 pounds, first class, and from Denver to Utah common points, about 650 miles, they are on a scale of \$1.64 per 100 pounds, first class. Measured by any test, these rates are in both instances unreasonable and excessive. It seems obvious that they must be revised, either by voluntary action of the carriers in conformity with the principles announced in *Spokane v. Northern P. R. Co.* supra (15 Inters. Com. Rep. 376), or in some other proceeding before this Commission. For that reason no reduction of those rates will be ordered in this case, although upon the record we are convinced that they are unwarrantedly high, and that reasonable reduction therein would not work any undue reduction in the revenues of defendants. If those rates are reduced so that the combination on the Missouri river or on Denver results in reasonable through rates, it does not necessarily follow that these through rates must again be reduced. Certainly it is better in every instance where important readjustment of rates is necessary to have it worked out by the carriers or with their co-operation, if that be possible.

"The present class rates from Chicago to the Missouri river are, in cents per 100 pounds, as follows:

Class	1	2	3	4	5	A	B	C	D	E
Rate	80	65	45	32	27	32	27	22	18½	16

"The present class rates from Chicago to Denver are, in cents per 100 pounds, as follows:

Class	1	2	3	4	5	A	B	C	D	E
Rate	205	165	125	97	77	92	72	62	53½	46

being made up of the sums of the class rates from Chicago to the Missouri river crossings, as above, and the class rates from the Missouri river to Denver, as follows:

Class	1	2	3	4	5	A	B	C	D	E
Rate	125	100	80	65	50	60	45	40	35	30

"The present class rates from St. Louis to Denver are, in cents per 100 pounds, as follows:

Class	1	2	3	4	5	A	B	C	D	E
Rate	185	145	115	92	72	84½	64½	57	48½	41

being made up of the class rates from St. Louis to the Missouri river, in cents per 100 pounds, as follows:

Class	1	2	3	4	5	A	B	C	D	E
Rate	60	45	35	27	22	24½	19½	17	13½	11

and the above-named class rates from the Missouri river to Denver:

"As hereinbefore stated, we find that this rate adjustment is unjustly discriminatory in favor of the Missouri river cities and against Denver. The through class rates from Chicago to Denver and from St. Louis to Denver are unreasonably high in and of themselves. The reduction of those rates as herein ordered will not involve any unreasonable or undue reduction of the revenues of the defendants affected thereby, and for these reasons and upon the whole record we are of the opinion that, for the future, reasonable class rates from Chicago to Denver should not exceed, in cents per 100 pounds, the following:

Class	1	2	3	4	5	A	B	C	D	E
Rate	180	145	110	85	67	80½	63	54	47	40

and that reasonable class rates from St. Louis to Denver should not exceed, in cents per 100 pounds, the following:

Class	1	2	3	4	5	A	B	C	D	E
Rate	162	127	101	80½	63	74	56	50	42	36"

An order was directed to be entered in accordance with those views, which was done, and the railroads were required thereby to cease and desist, on or before the 1st of May, 1909, and for a period of two years, to exact for the transportation of traffic rates in excess of those above mentioned, respectively, from Chicago and St. Louis to Denver, and to establish on or before that date and maintain said rates between said cities.

The railroads affected, to wit, Chicago, Burlington, & Quincy Railroad Company, the Chicago, Rock Island, & Pacific Railway Company, Chicago & Northwestern Railway Company, Chicago, Milwaukee, & St. Paul Railway Company, the Atchison, Topeka, & Santa Fe Railway Company, Missouri Pacific Railway Company, Union Pacific Railroad Company, and the Wabash Railroad Company, filed a bill to enjoin the enforcement of the order.

In their bill the companies described their respective roads and the termini of the

roads, and alleged that the companies were respectively engaged as common carriers in the transportation of property by railroad by continuous carriage or shipment from and to the points designated in the report and order of the Commission. The bill alleged the relation of the carriers to one another, and the extent of their roads westward and eastward, and their relation to roads east of Chicago and the Mississippi river. The manner of charging and adjusting rates is described in the bill, and the classification of freight which existed, as in the bill in Nos. 663 and 664.

In the bill in those cases, the Mississippi river was alleged to be a basing point for freight destined to the Missouri river cities. In the case at bar the Missouri river is added as a basing point in the making of rates for the transportation of merchandise originating east of the Mississippi river, destined to territory between the rivers and to the Missouri river cities and west thereof. And it is alleged that the making of such basing points "has been due both to natural physical conditions and to the natural development of railroad construction and operation to and beyond said rivers and in territory between the same, and has naturally resulted in the evolution and development of railroad transportation, and the business and commerce in and through Western territory."

The facts which caused such result are set out at length and are in substance that railroads were built westward to certain points, and that other and independent roads were constructed farther westward, each road [118] charging its *separate rate, and that the places to which and from which the roads were built were natural distributing centers, "and were able to compete on the basis of equality with each other in the distribution and sale of their merchandise."

The relation of the two rivers as basing points and why the Missouri was made one is set forth in the following paragraph:

"Your orators further aver that long prior to the construction of any railroad westward across the Missouri river to the city of Denver, the said Missouri river had been made a basing point in the making of rates to territory west of said Missouri river, and that, as is above stated, for many years the only railroads serving the said Missouri river cities were lines of railroads entering said cities from the east, and terminating there, and lines of railroad beginning at said cities and extending west therefrom, and that at the time the said four lines of railroad of your orators, the Chicago, Burlington, & Quincy Railroad Company, the Chicago, Rock Island, & Pacific Railway Company, the Missouri Pacific Railway Com-

pany, and the Atchison, Topeka, & Santa Fe Railway Company, were constructed west of and across the said Missouri river to the city of Denver, or other Colorado common points, the said Missouri river cities and the commercial interests therein had become extensive and important, and the competition with the railroads whose lines terminated at said Missouri river cities had become so active and the competition between the several distributing points on said Missouri river and east thereof had become so extensive and important that the said four companies whose lines were extended across said river and westward therefrom were compelled, by reason of commercial and competitive conditions, to recognize, adopt, and apply at said Missouri river cities the said system of basing rates on the Missouri river which had always *theretofore [119] obtained, as hereinabove set forth." That is, as had obtained on the Mississippi river.

The other allegations supplement the above, and are substantially like those which formed the basis of the contentions made and argued in the other cases.

The bill, as we have said, was supported by affidavits. They were substantially the same and set forth the acquaintance of their makers with railroad construction, development, and management. They set forth with detail the facts and circumstances which their makers conceived to be determinative of the questions involved, and a justification of the system of rate making established by the companies, and which, they averred, affected "vitally all the important lines of business of the Western country." They further averred that a change in the system, whereby the practices under it "should be forbidden, would be a change which would revolutionize the methods of doing business throughout the Western country, and would work injury to the west and its business, the extent of which would be so great as to be difficult of computation."

It will be seen, therefore, that this case and the other cases are alike except as to the points of destination of the roads and the cities that are concerned with the rates charged and reduced. This, and they turn on the same question of the power of the Commission, the effect of its order on business conditions and the systems of rate making by the railroads, its effect upon the revenues of the companies, and by their reduction to cause a deprivation of the property of the companies without due process of law, in violation of the 5th Amendment of the Constitution of the United States.

Further elaboration we think is unnecessary; and on the authority of cases Nos. 663 and 664, the decree of the Circuit Court is reversed and the case remanded, with di-

rections to set aside the injunction and dismiss the bill.

So ordered.

120] *RE HENRY A. CLELAND, Petitioner.

(See S. C. Reporter's ed. 120-124.)

Mandamus — to inferior court — jurisdiction below.

Mandamus will not issue to compel a Federal judge to dismiss, for lack of jurisdiction, a suit which he certifies that he is satisfied involves a controversy within the jurisdiction of the court, brought by a nonresident transferee of shares in an insolvent corporation, for the benefit of all the shareholders, to have a receiver appointed and the company wound up, although the transfer, while absolute, was made when the corporation was insolvent, and for the purpose of bringing the suit. [For other cases, see *Mandamus*, II. c, in Digest Sup. Ct. 1908.]

[No. 12, Original.]

Argued April 4, 1910. Decided May 31, 1910.

PETITION for a writ of mandamus to compel the district judge sitting in the Circuit Court of the United States for the Eastern District of Michigan to dismiss, for lack of jurisdiction, a suit brought by a nonresident transferee of shares in an insolvent corporation, for the benefit of all the shareholders, to have a receiver appointed and the company wound up. Rule discharged. Writ of mandamus denied.

The facts are stated in the opinion.

Mr. Charles D. Joslyn argued the cause, and Mr. Paul B. Moody filed a brief for petitioner:

Petitioner had a right to present the jurisdictional question to the court for determination, and this right was recognized, though his petition was denied.

NOTE.—As to when mandamus is the proper remedy—see notes to *United States ex rel. International Contracting Co. v. Lamont*, 39 L. ed. U. S. 160; *McCluny v. Silliman*, 4 L. ed. U. S. 263; *Fleming v. Guthrie*, 3 L.R.A. 54; *Burnsville Turnpk. Co. v. State*, 3 L.R.A. 265; *State ex rel. Charleston, C. & C. R. Co. v. Whitesides*, 3 L.R.A. 777; and *Ex parte Hurn*, 13 L.R.A. 120.

On mandamus to control inferior tribunal—see note to *Re Morgan*, 29 L. ed. U. S. 135.

On mandamus in the exercise of superintending control of superior over inferior tribunal—see note to *State ex rel. Fourth Nat. Bank v. Johnson*, 51 L.R.A. 33.

Minot v. Mastin, 37 C. C. A. 234, 95 Fed. 734; *Credits Commutation Co. v. United States*, 177 U. S. 311, 315, 44 L. ed. 782, 785, 20 Sup. Ct. Rep. 636; *Re Columbia Real Estate Co.* 50 C. C. A. 406, 112 Fed. 645; *United States v. Philips*, 46 C. C. A. 660, 107 Fed. 824; *Re Metropolitan R. Receivership (Re Reisenberg)* 208 U. S. 90, 111, 52 L. ed. 403, 413, 28 Sup. Ct. Rep. 219; *New Orleans v. Warner*, 180 U. S. 199, 45 L. ed. 493, 21 Sup. Ct. Rep. 353; *Brooks v. Gibbons*, 4 Paige, 374; *Thompson v. Brown*, 4 Johns. Ch. 619; *Hammond v. Hammond*, 2 Bland. Ch. 362; *Bronson v. La Crosse & M. R. Co.* 2 Wall. 283, 17 L. ed. 725; *Guarantee Trust & S. D. Co. v. Duluth & W. R. Co.* 70 Fed. 806; *Stewart v. Dunham*, 115 U. S. 61, 29 L. ed. 329, 5 Sup. Ct. Rep. 1163.

A jurisdictional question of this character may be raised by others than the original parties to the cause.

Kreider v. Cole, 79 C. C. A. 339, 149 Fed. 647.

The defect of jurisdiction is not cured by subsequent parties coming into the case, such as the Rochester Savings & Loan Association of New York, nor other stockholders who might be nonresidents of the state of Michigan.

Ibid; *Speckert v. German Nat. Bank*, 38 C. C. A. 682, 98 Fed. 151; *Olds Wagon Works v. Benedict*, 14 C. C. A. 285, 32 U. S. App. 116, 67 Fed. 1; *Kidder v. Northwestern Mut. L. Ins. Co.* 117 Fed. 997; *Farmers' & M. Nat. Bank v. Schuster*, 29 C. C. A. 649, 52 U. S. App. 612, 86 Fed. 161; *Nash v. McNamara*, 145 Fed. 541; *Richmond & D. R. Co. v. Findley*, 32 Fed. 641; *Burnham v. First Nat. Bank*, 3 C. C. A. 486, 10 U. S. App. 485, 53 Fed. 163; *Grand Trunk R. Co. v. Twitchell*, 8 C. C. A. 237, 21 U. S. App. 45, 59 Fed. 727; *Cable v. Ellis*, 110 U. S. 389, 28 L. ed. 186, 4 Sup. Ct. Rep. 85; *Houston & T. C. R. Co. v. Shirley*, 111 U. S. 358, 28 L. ed. 455, 4 Sup. Ct. Rep. 472; *Jefferson v. Driver*, 117 U. S. 272, 29 L. ed. 897, 6 Sup. Ct. Rep. 729; *Stevens v. Nichols*, 130 U. S. 230, 32 L. ed. 914, 9 Sup. Ct. Rep. 518.

Neither can the passage of time nor the number or character of proceedings taken in the cause affect the duty of the court to dismiss the cause the moment the collusive character of the original invocation of the jurisdiction appears.

Cochran v. Montgomery County, 199 U. S. 260, 50 L. ed. 182, 26 Sup. Ct. Rep. 58, 4 A. & E. Ann. Cas. 451; *Cleveland v. Cleveland C. C. & St. L. R. Co.* 77 C. C. A. 467, 147 Fed. 171; *Erie R. Co. v. Burns*, 77 C. C. A. 473, 147 Fed. 177; *Minnesota v. Northern Securities Co.* 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. Rep. 598; *Williams v. Nottawa*, 104 U. S. 209, 26 L. ed. 719; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 218 U. S.

463, 4 Sup. Ct. Rep. 510; *Ayres v. Wiswall*, 112 U. S. 187, 28 L. ed. 693, 5 Sup. Ct. Rep. 90; *Farmington v. Pillsbury*, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807; *Cashman v. Amador & S. Canal Co.* 118 U. S. 58, 30 L. ed. 72, 6 Sup. Ct. Rep. 926; *Little v. Giles*, 118 U. S. 596, 30 L. ed. 269, 7 Sup. Ct. Rep. 32; *Texas Transp. Co. v. Seeligson*, 122 U. S. 519, 30 L. ed. 1150, 7 Sup. Ct. Rep. 1261; *Torrence v. Shedd*, 144 U. S. 527, 36 L. ed. 529, 12 Sup. Ct. Rep. 726; *Cameron v. Hodges*, 127 U. S. 322, 32 L. ed. 132, 8 Sup. Ct. Rep. 1154; *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Graves v. Corbin*, 132 U. S. 571, 33 L. ed. 462, 10 Sup. Ct. Rep. 196; *Anderson v. Watt*, 138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449; *Cates v. Allen*, 149 U. S. 451, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; *Steigleder v. McQuesten*, 198 U. S. 141, 49 L. ed. 986, 25 Sup. Ct. Rep. 616.

This case falls within the rule of *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150, and *Re Winn*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515, and the petitioner is entitled to the relief prayed for.

Mr. De Forest Paine argued the cause and filed a brief for respondent:

Mandamus was not the proper remedy.

Ex parte Loring, 94 U. S. 418, 24 L. ed. 165; *Re Rice*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; *Re Atlantic City R. Co.* 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 379, 37 L. ed. 486, 489, 13 Sup. Ct. Rep. 758; *Re Pollitz*, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729; *Ex parte Nebraska*, 209 U. S. 436, 52 L. ed. 876, 28 Sup. Ct. Rep. 581; *Re Winn*, 213 U. S. 458, 468, 53 L. ed. 873, 877, 29 Sup. Ct. Rep. 515; *Re Riggs*, 214 U. S. 9, 53 L. ed. 887, 29 Sup. Ct. Rep. 598.

Eight years after the bill in this cause was filed, and nearly seven after he had proved his claim in the cause, the petitioner Cleland challenges the jurisdiction of the court to which he himself has submitted and twice appealed by petition. No excuse for the delay is offered or made by him. He does not say why he was not informed before, or what steps, if any, he ever took to become informed, or when. He simply says that he is "lately informed." Such an averment does not excuse delay. When and how knowledge was obtained, and why the discovery was not made before, must be averred.

Hardt v. Heidweyer, 152 U. S. 547, 558, 559, 38 L. ed. 548, 552, 14 Sup. Ct. Rep. 671; *Foster v. Mansfield, C. & L. M. R. Co.* 54 L. ed.

146 U. S. 88, 99, 100, 36 L. ed. 899, 903, 13 Sup. Ct. Rep. 28.

In examining into the grounds upon which his objection rests, his delay in presenting it should be and will be considered.

Deputron v. Young, 134 U. S. 241, 251, 252, 33 L. ed. 923, 928, 929, 10 Sup. Ct. Rep. 539; *Toledo Traction Co. v. Cameron*, 69 C. C. A. 36, 137 Fed. 56; *Briggs v. Traders' Co.* 145 Fed. 260.

The court below is not warranted in dismissing the cause unless the facts create a legal certainty of the conclusion based on them.

Barry v. Edmunds, 116 U. S. 550, 559, 29 L. ed. 729, 732, 6 Sup. Ct. Rep. 501; *Deputron v. Young*, 134 U. S. 241, 252, 33 L. ed. 923, 929, 10 Sup. Ct. Rep. 539; *Wetmore v. Rymer*, 169 U. S. 115, 128, 42 L. ed. 682, 686, 18 Sup. Ct. Rep. 293; *Put-in-Bay Waterworks, Light & R. Co. v. Ryan*, 181 U. S. 409, 431, 45 L. ed. 927, 937, 21 Sup. Ct. Rep. 709.

When a party is the actual owner of property, the motive, purpose, or object of acquiring it is not material.

Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. ed. 448, 24 Sup. Ct. Rep. 269; *Blair v. Chicago*, 201 U. S. 400, 448, 50 L. ed. 801, 821, 26 Sup. Ct. Rep. 427; *Dickerman v. Northern Trust Co.* 176 U. S. 190, 191, 192, 44 L. ed. 430, 431, 20 Sup. Ct. Rep. 311.

It may have been acquired as a gift and for the purpose of suit.

South Dakota v. North Carolina, 192 U. S. 286, 48 L. ed. 448, 24 Sup. Ct. Rep. 269.

The qualifying and procuring of Bishop to file the bill in behalf of all was not unlawful, and collusion within the act of 1875 cannot be predicated of it.

Towle v. American Bldg. Loan & Invest. Soc. 60 Fed. 131.

It is not material that the bill does not specify that it is in behalf of all; it is in its nature a bill in behalf of all.

Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788.

On this record the question of the jurisdiction of this court ought to be at rest.

Whyte v. Gibbes, 20 How. 541, 15 L. ed. 1016; *Washington Bridge Co. v. Stewart*, 3 How. 413, 11 L. ed. 658.

Mr. Justice Holmes delivered the opinion of the court:

This is a petition for a writ of mandamus commanding the Honorable Henry H. Swan, sitting in the circuit court of the United States for the eastern district of Michigan, to dismiss a cause on the ground that the suit does not really and substantially involve a controversy within the jurisdiction of that court. Act of March 3,

1875, chap. 137, § 5. 18 Stat. at L. 470, 472, U. S. Comp. Stat. 1901, pp. 508, 511. 121] The suit in question was begun *on March 30, 1901, by a shareholder in an insolvent Michigan corporation, a mutual building and loan association, to have a receiver appointed and the association wound up. There were provisions in the Michigan statutes for such cases, but after conference with the secretary of state, now the governor of Michigan, the attorney general of the state and officers of the corporation, it was decided that the most saving and beneficial course would be to have a receiver appointed by the United States court, the assets of the company being partly scattered in distant states. As the requirement of proceedings under the state law was understood to be mandatory upon the secretary of state, the beginning of this suit was hastened. To that end Aldrich, who had been counsel for the corporation, and who wanted to be appointed receiver, transferred and procured to be issued certificates of stock to a friend of his, Bishop, the original plaintiff, and Bishop thereupon signed and swore to the bill, alleging the par value of his stock to be over \$2,000. No doubt he intended thereby to help Aldrich, but he also understood that he was acting for the benefit of all concerned, and undoubtedly one reason for applying to him was to save time in getting a nonresident shareholder. It was for the benefit of all, in fact. The answer to the present petition states that all the shareholders have come in. Moreover, although it was disputed at the bar, we see no ground for denying that, on the face of the bill, the jurisdiction of the court was established. The laws of Michigan did not exclude it, and the corporation was not so far in the hands of the state officers as to prevent action by the court. See further, *Brown, B. & Co. v. Lake Superior Iron Co.* 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Ct. Rep. 604.

It is unnecessary to set forth the proceedings under the bill at length. They have gone on from March 30, 1901. Real estate has been sold by the receiver, assets collected, and all the debts of the corporation out- 122] side the claims of *shareholders have been paid, except one disputed claim for \$3,000. The main matter outstanding is a suit against directors and certain withdrawing shareholders for money alleged to have been paid improperly and upon other claims, which is on the docket for hearing. See *Aldrich v. Gray*, 77 C. C. A. 597, 147 Fed. 453, 8 A. & E. Ann. Cas. 832. It is enough to say that after considerable litigation and much expense and trouble, the proceedings are drawing to a close.

The petitioner never has been admitted

formally as a party to the suit, but he proved his claim as holder of shares of the par value of \$2,000 on May 29, 1902, and while, since that time, he has been active in trying to have the receiver removed, and in having him called to account, his various petitions have not been dismissed by the circuit court on the ground that he had no standing before it. It may be assumed for purposes of decision that he has a standing here.

After continuing this activity for years, the petitioner now, without adequately explaining his delay and change of attitude, seeks to reduce all the proceedings to naught. *Deputron v. Young*, 134 U. S. 241, 33 L. ed. 923, 10 Sup. Ct. Rep. 539. His pecuniary interest in doing so is infinitesimal, even if not actually contravened. It cannot be believed the motive for the petition is such as to appeal to the discretion of the court. But apart from questions of discretion, so far from its appearing to the satisfaction of the circuit court, as the statute requires, that the suit did not involve a controversy within its jurisdiction, the judge certifies that he is satisfied that it does involve such a controversy. *Put-in-Bay Waterworks, Light & R. Co. v. Ryan*, 181 U. S. 409, 431, 45 L. ed. 927, 937, 21 Sup. Ct. Rep. 709. On the face of the record he was right, and the summary remedy of mandamus would not be proper, even if our conclusion from the evidence were different from his, which is not the case. *Re Winn*, 213 U. S. 458, 468, 53 L. ed. 873, 877, 29 Sup. Ct. Rep. 515.

It is said that, on the undisputed facts, Bishop was not *a bona fide shareholder- [123] er, and that the proceeding was collusive. But the first proposition is not true and the second is not law. Bishop became the absolute owner of the shares in his name. The answer to the petition so finds, and there is no question about it. See *South Dakota v. North Carolina*, 192 U. S. 286, 310, 48 L. ed. 448, 457, 24 Sup. Ct. Rep. 269. Some of these shares had been issued to Aldrich in payment for service, others were issued by the corporation upon payment of \$10, the proper sum at the start. It is said that, the corporation being insolvent, the issue of the certificate was a fraud on the other shareholders. No one complains here except the petitioner. It seems to have been to the advantage of all. Certainly it was not necessarily a fraud upon them. As to collusion, there is nothing unlawful in transferring shares to a man out and out, for the convenience of immediately beginning a suit that other shareholders have a right to begin, that all parties in interest want to have begun,

and that the authorities of the opposing jurisdiction approve.

Perhaps the most plausible ground would have been that Bishop's interest was not as great as his allegation implied, even granting his right as a shareholder. But there is no reason to doubt that he thought that it was. See *Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501. And with regard to this and the objections previously mentioned, it is enough to quote the language of the court in *Put-in-Bay Waterworks, Light, & R. Co. v. Ryan*, 181 U. S. 409, 432, 433, 45 L. ed. 927, 938, 21 Sup. Ct. Rep. 709: "Jurisdiction having attached under the allegations of the original bill, and the court having proceeded, in a proper exercise of its discretionary power, to appoint a receiver, . . . and the court having also, in the exercise of its power as a court of equity, allowed the intervention of other creditors, as between some of whom and the defendant company there was jurisdiction in the court, both as respects diversity of citizenship and amount of claims, we think its 124] jurisdiction did not fail by reason *of anything that appeared in *ex parte* affidavits . . . denying the truth of the allegations . . . in respect to the amount in dispute."

Rule discharged.

Writ of mandamus denied.

ALFRED DOZIER, Plff. in Err.,

v.

STATE OF ALABAMA.

(See S. C. Reporter's ed. 124-128.)

Interstate commerce — state license tax — peddlers and drummers.

The sale within the state of a frame for a portrait, made in another state, to fill

an order taken by a solicitor in the former state, cannot be so separated from the rest of the dealings between the nonresident maker and the purchaser as to sustain the imposition of a license tax, under Ala. act of March 7, 1907, § 17, where the order for the portrait contemplated its delivery in an appropriate frame, which the purchaser of the portrait should have the option of buying at the factory price.

[For other cases, see *Commerce*, 438-462, in *Digest Sup. Ct. 1908.*]

[No. 105.]

Submitted January 25, 1910. Decided May 31, 1910.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a conviction in the City Court of Montgomery, in that state, for selling picture frames without a license. Reversed.

See same case below, 154 Ala. 83, 129 Am. St. Rep. 51, 46 So. 9.

The facts are stated in the opinion.

Mr. A. D. Gash submitted the cause for plaintiff in error:

Section 17 of Alabama act of March 7, 1907, providing that every person who solicits orders for pictures or frames, or sells or disposes of picture frames, shall pay a license tax in each county, is an attempt to interfere with and to regulate commerce, and as such is invalid as to an agent of a corporation residing out of the state.

Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep.

NOTE. — On peddlers and drummers as related to interstate commerce—see notes to *Stockard v. Morgan*, 46 L. ed. U. S. 785; *Re Spain*, 14 L.R.A. 97; and *State v. Bayer*, 19 L.R.A. (N.S.) 297.

Sale of picture frame as incidental to transaction protected by the commerce clause.

Prior decisions upon the point now settled by *DOZIER V. ALABAMA* are in conflict. The same view of the transaction was taken in *State v. Coop*, 52 S. C. 508, 41 L.R.A. 501, 30 S. E. 609, where the sale of a frame for a portrait made in another state, to fill an order taken by a solicitor in the state where it was delivered, was held to be a mere incident to the taking of the order for the portrait, and, as such, protected 54 L. ed.

from state regulation, where the order for the portrait contained a provision that it should be delivered in a frame which the purchaser of the portrait should have the option of buying at the wholesale price.

So, in *Chicago Portrait Co. v. Macon*, 147 Fed. 967, it was held that if a stipulation in an order for the enlargement of a picture, that the customer should have the option of receiving his picture framed or unframed, having a choice between frames of different prices, could properly be construed to indicate that the delivering agent is engaged in selling the frame, the sale of such frames is nevertheless a mere incident to the main business, and therefore within the protection of the commerce clause.

And in *Laurens v. Elmore*, 55 S. C. 477, 45 L.R.A. 249, 33 S. E. 560, an ordinance imposing a license tax on occupations was

143, 10 Sup. Ct. Rep. 725; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 146; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Stockard v. Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576.

An agent of a foreign corporation, who delivers a frame to each purchaser of portraits, whose contract of purchase provides that the portrait will be delivered in a suitable frame, that may be accepted at factory price, who has only one frame fitted to and surrounding each portrait as it is delivered, and who does not offer to sell any frame to others than those whose contract calls for the option of accepting said suitable frame, and who carries no extra frames whatever, but keeps the title for his company or returns to his company any frame that is refused,—is engaged solely in interstate commerce.

Chicago Portrait Co. v. Macon, 147 Fed. 967; *State v. Coop*, 52 S. C. 508, 41 L.R.A. 501, 30 S. E. 609; *Laurens v. Elmore*, 55 S. C. 477, 45 L.R.A. 249, 33 S. E. 560.

The statute discriminates against the rights and privileges of citizens of other states.

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565.

Mr. Alexander M. Garber submitted the cause for defendant in error. Mr. Thomas W. Martin was on the brief:

The sale of the frames was made and completed in Alabama by the agent after the frames were brought into the state, and while in the possession of the agent; and therefore the transaction with respect to the frames was not interstate but intrastate commerce, and the conviction should be sus-

tained under the latter alternative in the complaint.

State v. Montgomery, 92 Me. 433, 43 Atl. 13; *Chrystal v. Macon*, 108 Ga. 27, 33 S. E. 810; *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; *Rearick v. Pennsylvania*, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; *General Oil Co. v. Crain*, 209 U. S. 231, 52 L. ed. 765, 28 Sup. Ct. Rep. 475.

Several recent decisions of this court on the question of when the taxing power of the state begins throw much light on this question.

American Steel & Wire Co. v. Speed and *Rearick v. Pennsylvania*, *supra*; *General Oil Co. v. Crain*, 209 U. S. 212, 52 L. ed. 755, 28 Sup. Ct. Rep. 475.

Mr. Justice Holmes delivered the opinion of the court:

The plaintiff in error was convicted and sentenced to a fine on a complaint for breach of an Alabama statute of *March 7, [127] 1907. By § 17 of that act a license tax was imposed on persons who did not have a permanent place of business in the state, and also keep picture frames as a part of their stock in trade, if they solicited orders for the enlargement of photographs or pictures of any character, or for picture frames, whether they made charge for such frames or not, or if they sold or disposed of picture frames. The Chicago Crayon Company, having its only place of business in Chicago, and being engaged in the business of making and enlarging portraits from photographs, and in the manufacturing of picture frames, solicited orders in Alabama without paying the license tax. These orders were given

held invalid as against a person selling picture frames, who sold them only on pictures made in another state, pursuant to orders theretofore given.

But in *Roselle v. Com.* (Va.) 65 S. E. 526, and *State v. Looney*, 214 Mo. 216,—L.R.A.(N.S.) —, 97 S. W. 934, 99 S. W. 1165, the sale of the frames in which portraits ordered from a nonresident concern were delivered was declared not to be interstate commerce, so as to exempt the persons delivering the frames from taking out peddlers' licenses, where the memorandum left by the agents soliciting the orders for the portraits recited that the portraits would be delivered in suitable frames, which the purchasers could take at the wholesale price if they chose to do so.

And in *Chrystal v. Macon*, 108 Ga. 27, 33 S. E. 810, that part of a business conducted by a nonresident through local agents, which

relates to the sale and delivery of picture frames from a stock kept in the state, to persons having given orders for portraits, there being no obligation to take and pay for the frames unless the purchasers choose to exercise their right of selection, was held not to be interstate commerce, within the protection of the commerce clause, although no frames are sold except to persons who order portraits.

So, in *State v. Montgomery*, 92 Me. 433, 43 Atl. 13, it was held that the agent of a nonresident concern, for which orders for enlarging pictures had been obtained, might constitutionally be required to obtain a peddler's license when engaged in delivering pictures and frames, where the orders stated that each picture would be delivered in an appropriate frame, which the customer was advised, but not compelled, to buy.

in writing for a portrait of the size and kind wanted, specified the price, cash on delivery, and continued: "I understand that my portrait is to be delivered in an appropriate frame, which this contract entitles me to accept at factory price." The agent of the company gave back a written acceptance, repeating the other terms of the bargain, and adding: "All portraits are delivered in appropriate frames, which this contract entitled the purchaser to accept at factory prices," with particulars purporting to show that these prices were from one third to one half the retail or usual ones. The plaintiff in error, who also had no permanent place of business in Alabama and had paid no license tax, was an agent of the company, who delivered pictures and frames, and collected for them, in pursuance of the agreed plan. The pictures and frames were sent to the agent, and remained the property of the company until paid for and delivered. On these facts the supreme court of Alabama, while admitting that the dealings concerning the pictures were commerce among the states, sustained the conviction, on the ground that the sale of the frames was a wholly local matter. 154 Ala. 83, 129 Am. St. Rep. 51, 46 So. 9.

No doubt it is true that the customer was not bound to take the frame unless he saw [128] fit, and that the sale of it *took place wholly within the state of Alabama, if a sale was made. But, as was hinted in *Rearick v. Pennsylvania*, 203 U. S. 507, 512, 51 L. ed. 295, 297, 27 Sup. Ct. Rep. 159, what is commerce among the states is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed. It was agreed that the frame should be offered along with the picture. The offer was a part of the interstate bargain, and as it was agreed that the frame should be offered "at factory prices," and the company and factory were in Chicago, obviously it was contemplated, if not agreed, that the frame should come on with the picture. In fact, the frames were sent on with the pictures from Chicago, and were offered when the pictures were tendered, as part of a transaction commercially continuous, and one at prices generically fixed by the contract for the pictures, and by that contract represented to be less than retail or usual prices, in consideration, it is implied, of the purchase already agreed to be made. We are of opinion that the sale of the frames cannot be so separated from the rest of the dealing between the Chicago company and the Alabama purchaser as to sustain the license tax upon it. Under the decisions, the statute, as applied to this case, is a regulation of commerce among the states, 54 L. ed.

and void under the Constitution of the United States. Art. 1, § 8. *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *Rearick v. Pennsylvania*, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159.

Judgment reversed.

*EDWARD S. THOMAS, as Trustee [129 in Bankruptcy of Charles I. Lightstone, Bankrupt, Appt.,

v.

SOLOMON M. SUGARMAN.

(See S. C. Reporter's ed. 129-134.)

Appeal—in bankruptcy case—time for taking.

1. An appeal to the Federal Supreme Court from a decree of a circuit court of appeals on a bill in equity brought by a trustee in bankruptcy to set aside a transfer made by the bankrupt in fraud of creditors need not be taken within the thirty days prescribed by general orders in bankruptcy No. 36, for appeals under the bankrupt act, but the appellate jurisdiction being under, or the same as that under, the circuit courts of appeals act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 6, the appeal is in time if taken within a year.

[For other cases, see Appeal and Error, IV. d, in Digest Sup. Ct. 1908.]

Election of remedies—effect—pursuing two remedies.

2. The trustee in bankruptcy does not, by obtaining a judgment against the bankrupt for the proceeds of a transfer in fraud of creditors, make an election which prevents him from suing in equity to set aside such transfer.

[For other cases, see Election of Remedies, IV., in Digest Sup. Ct. 1908.]

[No. 131.]

Argued April 12, 1910. Decided May 31, 1910.

APPEAL from the United States Circuit Court of appeals for the Second Circuit to review a decree which affirmed a

NOTE—On appeal and review in bankruptcy cases—see note to *Re Eggert*, 43 C. A. 9.

On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to *Bagley v. General Fire Extinguisher Co.* 53 L. ed. U. S. 605.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to *Wedding v. Meyler*, 66 L.R.A. 833.

decree of the District Court for the Southern District of New York, sustaining a plea in bar to a bill in equity brought by a trustee in bankruptcy to set aside a transfer made by the bankrupt as in fraud of creditors. Reversed.

See same case below, 15 L.R.A.(N.S.) 1267, 85 C. C. A. 337, 157 Fed. 669.

The facts are stated in the opinion.

Mr. Abram I. Elkus argued the cause, and, with Messrs. Carlisle J. Gleason and James, Schell, & Elkus, filed a brief for appellant:

The trustee became the legal custodian of, and entitled to the physical custody of, all property of every kind in the bankrupt's possession. The property belonging to third persons passed to the trustee, pending the determination of ownership. The bankrupt could not assert an outstanding title in anyone else as against his trustee.

Re Beal, 1 Low. Dec. 323, Fed. Cas. No. 1,156; Re Vogel, 7 Blatchf. 18, Fed. Cas. No. 16,982; Re Moses, 1 Fed. 845; Re Smith, 100 Fed. 795.

The trustee took the property subject to all the rights of third parties, and in the same condition in which the bankrupt had it.

Re New York Economical Printing Co. 49 C. C. A. 133, 110 Fed. 514.

The turn-over order is not a judgment or decree for the payment of money against the bankrupt, but a mere order for delivery of assets to the trustee. It is merely an assertion of possessory rights.

Re Schlesinger, 42 C. C. A. 207, 102 Fed. 117.

The doctrine of election of remedies applies only where the remedies asserted are irreconcilable.

15 Cyc. Law & Proc. pp. 257, 261; Mills v. Parkhurst, 126 N. Y. 93, 13 L.R.A. 472, 26 N. E. 1041; Re Garver, 176 N. Y. 386, 68 N. E. 667.

The trustee did nothing which will bar the claims of creditors.

Bowdish v. Page, 153 N. Y. 104, 47 N. E. 44; Furness v. Ewing, 2 Pa. 479; Butler v. Hildreth, 5 Met. 49.

The doctrine of election of remedies seems to have developed from the doctrine of equitable estoppel. Indeed, some courts have gone the length of holding that to bar a creditor from setting aside a fraudulent transfer made by a debtor, the elements of equitable estoppel must be present.

Jenness v. Ber'y, 17 N. H. 549; Robins v. Wooten, 128 Ala. 379, 30 So. 681; Wood v. Potts, 140 Ala. 425, 37 So. 253.

An elaborate search shows that no case has gone the length of applying the doctrine of election of remedies so as to bar

a trustee and creditors upon facts such as are here presented.

Butler v. O'Brien, 5 Ala. 316; Torreyson v. Turnbaugh, 105 Mo. App. 439, 79 S. W. 1002; Crumbaugh v. Kugler, 3 Ohio St. 544; Furness v. Ewing, 2 Pa. 479; Millington v. Hill, 47 Ark. 301, 1 S. W. 547; Cunningham v. Campbell, 3 Tenn. Ch. 708; Goldnamer v. Robinson, 11 Ky. L. Rep. 630; Pulsifer v. Waterman, 73 Me. 233; Briggs v. Merrill, 58 Barb. 389; Arnold v. Hoshildt, 69 Minn. 101, 71 N. W. 829; Kells v. McClure, 69 Minn. 60, 71 N. W. 827; Lemay v. Bibeau, 2 Minn. 291, Gil. 251; Hathaway v. Brown, 22 Minn. 214; Barker v. Phillips, 11 Rob. (La.) 190; E. S. Bonnie & Co. v. Perry, 117 Ky. 459, 78 S. W. 208; Robb v. Vos, 155 U. S. 13, 39 L. ed. 52, 15 Sup. Ct. Rep. 4; Sickman v. Abernathy, 14 Colo. 174, 23 Pac. 447; Butler v. Hildreth, supra; Fitts v. Beardsley, 28 N. Y. S. R. 658, 8 N. Y. Supp. 567; Rennick v. Bank of Chillicothe, 8 Ohio, 529; Crook v. First Nat. Bank, 83 Wis. 31, 35 Am. St. Rep. 17, 52 N. W. 1131; Fowler v. Bowerly Sav. Bank, 113 N. Y. 450, 4 L.R.A. 145, 10 Am. St. Rep. 479, 21 N. E. 172; Deitz v. Field, 10 App. Div. 425, 41 N. Y. Supp. 1087; Cobb v. Hatfield, 46 N. Y. 533; Terry v. Munger, 121 N. Y. 161, 8 L.R.A. 216, 18 Am. St. Rep. 803, 24 N. E. 272; Goodwin v. Griffiths, 88 N. Y. 629.

Sugarman had no right of action against the trustee, and no right of action against anyone else, by reason of the fraudulent transfer. He was *in pari delicto* with the bankrupt, and the court would leave him where it found him.

Wheeler v. Sage, 1 Wall. 518, 17 L. ed. 646; Selz v. Unna, 6 Wall. 327, 18 L. ed. 799; Milwaukee & M. R. Co. v. Soutter, 13 Wall. 517, 20 L. ed. 543; McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; Goodrich v. Houghton, 134 N. Y. 115, 31 N. E. 516.

The vendee's act being actually fraudulent, he would not be entitled, upon final judgment against him for the property transferred, to have credit for the money he had paid the vendor.

Lynch v. Burt, 67 C. C. A. 305, 132 Fed. 417; Johnstor v. Forsyth Mercantile Co. 127 Fed. 845; Burt v. C. Gotzian & Co. 43 C. C. A. 59, 102 Fed. 937; Baldwin v. Short, 125 N. Y. 560, 26 N. E. 928; Fowler v. Dearing, 6 App. Div. 221, 39 N. Y. Supp. 1034; Conde v. Hall, 92 Hun, 335, 37 N. Y. Supp. 411.

Under the fraudulent conspiracy charge in the complaint, the bankrupt and Sugarman are jointly and severally liable to the trustee. The pursuit of one and the gaining of judgment against him, where that judgment is not satisfied, would not bar action against the other.

Watts v. British & American Mortg. Co. 9
218 U. S.

C. C. A. 98, 23 U. S. App. 257, 60 Fed. 483; Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129; Russell v. McCall, 141 N. Y. 437, 38 Am. St. Rep. 807, 36 N. E. 498; Osterhout v. Roberts, 8 Cow. 43; Preston v. Hutelinson, 29 Vt. 144.

Mr. John J. Crawford argued the cause and filed a brief for appellee:

The appeal should be dismissed because not taken in due time.

Conboy v. First Nat. Bank, 203 U. S. 141, 51 L. ed. 128, 27 Sup. Ct. Rep. 50.

In seeking to recover the proceeds of sale as a part of the bankrupt's estate, the complainant necessarily affirmed the sale, and hence he may not now proceed upon the theory that the sale was void.

Robb v. Vos, 155 U. S. 13, 39 L. ed. 52, 15 Sup. Ct. Rep. 4; Connihan v. Thompson, 111 Mass. 272; Butler v. Hildreth, 5 Met. 49; Siekman v. Abernathy, 14 Colo. 174, 23 Pac. 447; Hathaway v. Brown, 22 Minn. 214; Millington v. Hill, 47 Ark. 301, 1 S. W. 547; Bank of Iron Gate v. Brady, 184 U. S. 665, 46 L. ed. 739, 22 Sup. Ct. Rep. 529; William W. Bierce v. Hutelins, 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524; Furness v. Ewing, 2 Pa. 479; Cunningham v. Campbell, 3 Tenn. Ch. 708; Butler v. O'Brien, 5 Ala. 316; Lemay v. Bibeau, 2 Minn. 291, Gil. 251; Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 4 L.R.A. 145, 10 Am. St. Rep. 479, 21 N. E. 172; Rennie v. Bank of Chillicothe, 8 Ohio, 529; Searf v. Jardine, L. R. 7 App. Cas. 345, 19 Eng. Rul. Cas. 738.

The election is determined by the commencement of the proceeding, and not by the result.

Robb v. Vos, *supra*; Re Garver, 176 N. Y. 386, 68 N. E. 667; Lowenstein v. Glass, 48 La. Ann. 1422, 20 So. 890; Smith v. Gilmore, 7 App. D. C. 192; Theusen v. Bryan, 113 Iowa, 496, 85 N. W. 802; Thomas v. Watt, 104 Mich. 201, 62 N. W. 345; Ludington v. Patton, 111 Wis. 208, 86 N. W. 571.

One of the tests applied in cases of election is whether the two actions could be prosecuted at the same time.

Fowler v. Bowery Sav. Bank, 113 N. Y. 455, 4 L.R.A. 145, 10 Am. St. Rep. 479, 21 N. E. 172.

Persons acting in a fiduciary capacity may be bound by their election between inconsistent remedies.

Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 4 L.R.A. 145, 10 Am. St. Rep. 479, 21 N. E. 172; Fitts v. Beardsley, 28 N. Y. S. R. 658, 8 N. Y. Supp. 567; Butler v. Hildreth, *supra*.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity brought by a trustee

in bankruptcy to set aside a transfer of accounts and bills receivable, made by the bankrupt to the defendant, Sugarman, with intent to delay and defraud creditors. Sugarman pleaded in bar that the plaintiff had ratified his dealings because, with knowledge of all the facts, the plaintiff had taken a judgment against the bankrupt for \$17,500, a part or all of which was money remaining in the bankrupt's hands of \$30,000, alleged by the bill to have been paid to him by Sugarman in pursuance of the fraudulent scheme. A majority of the circuit court of appeals held the ratification made out, on the ground that, to get the judgment, the trustee had to rely upon a right inconsistent with that now set up. 15 L.R.A.(N.S.) 1267, 85 C. C. A. 337, 157 Fed. 669. The plaintiff appealed to this court.

It is argued that the appeal was too late because not taken within thirty days after the decree, as required by *general orders in bankruptcy No. 36, for appeals under the act. But this is not an appeal under the act, § 25, by authority of which the general order was adopted, and is not governed by that order. The appellate jurisdiction is under or is the same as that under the court of appeals act of March 3, 1891, chap. 517, § 6, 26 Stat. at L. 828, U. S. Comp. Stat. 1901, p. 549. Knapp v. Milwaukee Trust Co. March 7, 1910 [216 U. S. 545, ante, 610, 30 Sup. Ct. Rep. 412]. The appeal was taken within a year and was in time.

On the merits we are of opinion that the decision was wrong. We are quite ready to assume what the court below was at some trouble to establish that an act of election directed toward a third person may operate *in rem* and establish title as to all parties concerned. But the demand of the trustee on the bankrupt, even when enforced by a resort to the courts and by judgment, had no element of election about it. The legal title to the money had been in the bankrupt, and was transferred by the statute to the trustee (§ 70). He was entitled to have that money in his hands as against the bankrupt in any event, whether he decided to hand it back to Sugarman or to distribute it in dividends. The law had put him in the bankrupt's shoes with additional powers. Therefore to insist that the bankrupt should do what the statute required him to do was as consistent with a subsequent rescission of the bankrupt's fraudulent acquisition of title as with an affirmance of it. It had no relation to that question, except possibly to put the plaintiff in a position better to decide it.

Decree reversed.

135] *HARRY T. HERNDON, Prosecuting Attorney of Clinton County, Missouri, and Cornelius Roach,† Secretary of State of the State of Missouri, Appts.

v.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 135-159.)

Appeal — misjoinder — objection not raised below.

1. An objection to joining a prosecuting attorney and the secretary of state as parties defendant in the same bill will not be considered in an appellate court, where no such objection was specially taken below.

[For other cases, see Appeal and Error, VIII. j. in Digest Sup. Ct. 1908.]

Pleading — multifariousness of bill.

2. Multifariousness cannot successfully be urged against a bill filed by a foreign railway company in a Federal circuit court to enjoin a prosecuting attorney from enforcing a state statute requiring the stoppage of interstate passenger trains at junction points, and to restrain the secretary of state from proceeding under the authority of another state statute to revoke the company's license and right to do local business because of bringing suit in a Federal court.

[For other cases, see Pleading, 280-299, in Digest Sup. Ct. 1908.]

States — immunity from suit — suit against state officers.

3. The immunity of a state from suit is

†Substituted as appellant for John E. Swanger.

NOTE. — On suits against state officers as suits against state—see notes to Sanders v. Saxton, 1 L.R.A.(N.S.) 727; Ex parte Young, 13 L.R.A.(N.S.) 932; and Beers v. Arkansas, 15 L. ed. U. S. 991.

On recognition or exclusion of foreign corporations generally—see notes to Cone Export & Commission Co. v. Pool, 24 L.R.A. 289, and McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13.

On exclusion of foreign corporation as interference with interstate commerce—see note to Kindel v. Beck & P. Lithographing Co. 24 L.R.A. 311, and Western U. Tele. Co. v. Taggart, 60 L.R.A. 677.

On revocation of corporate license for removal of cause to Federal court—see note to Prewitt v. Security Mut. L. Ins. Co. 1 L.R.A.(N.S.) 1019.

State regulation of stops of interstate passenger and mail trains.

It is well settled that state regulations which require railway companies to stop their interstate passenger or mail trains at designated stations are repugnant to the commerce clause of the Federal Constitution when—and only when—adequate and reasonable or proper facilities are otherwise af-

not violated by entertaining a suit in a Federal circuit court, brought by a foreign railway company to restrain a prosecuting attorney from enforcing a state statute requiring the stoppage of interstate passenger trains at junction points, and to restrain the secretary of state from proceeding under the authority of another state statute to revoke the company's license and right to do local business because of bringing suit in a Federal court.

[For other cases, see States, IX. c. 2, in Digest Sup. Ct. 1908.]

Interstate commerce — requiring stoppage of trains at junction points.

4. The requirement that passenger trains shall stop at all junction points of other roads, which is made by Mo. act of March 19, 1907, amending Mo. Rev. Stat. § 1075, amounts to an unnecessary and unlawful burden upon interstate commerce if such requirement is construed to necessitate the stoppage of through interstate trains for the transfer of passengers from one road to another, when ample facilities for the traveling public are already provided, and severe detriment and hindrance to interstate traffic will result.

[For other cases, see Commerce, 321-325, in Digest Sup. Ct. 1908.]

Foreign corporations — revoking right to do local business — interstate commerce — equal protection of the laws.

5. The license or permit to do local business, given to a foreign railway company which has come into the state in compliance with its laws, and has acquired, under the sanction of the state, a large amount of property within its borders, cannot be revoked under the authority of Mo. act of

furnished such stations. The only task for the court in any particular case is to determine whether or not adequate and reasonable train service is otherwise afforded.

Eleven trains a day, regularly stopping at a small town in South Carolina, the junction point with a small branch road, afford adequate local facilities, and necessitate holding invalid an order made under state authority, requiring the railway company to stop at that point on signal two of its through fast mail trains running between Jersey City, New Jersey, and Tampa, Florida. Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121, reversing 71 S. C. 130, 50 S. E. 641, and 74 S. E. 80, 54 S. E. 224.

Four trains a day each way, making stops at an Arkansas town with about 4,500 inhabitants, are enough to invalidate, as a regulation of interstate commerce, a statute under which is required the stopping at that point of a through interstate passenger and mail train running from Mexico and Western points to St. Louis, Missouri, and beyond. St. Louis, I. M. & S. R. Co. v. State, 85 Ark. 284, 107 S. W. 989.

Three south-bound trains stopping daily at a county seat in Mississippi having about 1,200 inhabitants afford such adequate and reasonable accommodation as renders inval-

March 13, 1907, and the company subjected to penalties because it brings a suit in a Federal court, or removes a suit from a state court to a Federal court, especially where a domestic railway company may bring suit in a Federal court, or, in a proper case, remove one thereto, without forfeiting its right to do business, or incurring a liability to penalties.

[For other cases, see Corporations, XII. b, 2; Constitutional Law, 254-265, in Digest Sup. Ct. 1908.]

[No. 150.]

Argued April 14, 1910. Decided May 31, 1910.

APPEAL from the Circuit Court of the United States for the Western District of Missouri to review a decree enjoining the prosecuting attorney of Clinton county, in that state, from enforcing a state statute requiring the stoppage of interstate passenger trains at junction points, and restraining the secretary of state from revoking the company's license and right to do local business because of bringing suit in the Federal court. Affirmed.

See same case below, 157 Fed. 783.

The facts are stated in the opinion.

Mr. James T. Blair argued the cause, and, with Messrs. Elliott W. Major and Charles G. Revelle, filed a brief for appellants:

id an order of the state railroad commission, requiring a railway company to stop two of its interstate mail and passenger trains at that point, on their way from Chicago to New Orleans. *Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90.

A state statute requiring a through interstate train carrying passengers and the United States mail to turn aside from the direct interstate route and run to a station $3\frac{1}{2}$ miles away, and back again, because it is the county seat, is an unconstitutional interference with interstate commerce and with the transportation of the mails. *Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096, reversing 143 Ill. 434, 19 L.R.A. 119, 33 N. E. 173. In this case six regular passenger trains (concededly ample train service) stopped at this point.

And a statutory requirement that all regular passenger trains must stop at county seats constitutes a direct burden on interstate commerce so far as such statute requires through interstate passenger trains to stop at such a station, when four regular passenger trains daily each way (admitted by demurrer to be ample train service) regularly stop at that point. *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 54 L. ed.

Statutes requiring trains to stop at the intersection of the track on which they are running with the tracks of other railroads have been quite generally recognized as valid police regulations.

Indianapolis & St. L. R. Co. v. People, 91 Ill. 456; *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 191, 12 L.R.A. 830, 9 So. 320; *Richmond & D. R. Co. v. Freeman*, 97 Ala. 297, 11 So. 800; *Peoria & P. U. R. Co. v. Peoria & F. R. Co.* 105 Ill. 117; *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.* 105 Ill. 400, 44 Am. Rep. 799; *San Antonio & A. P. R. Co. v. Bowles*, 88 Tex. 640, 32 S. W. 880; *Louisville & N. R. Co. v. East Tennessee, V. & G. R. Co.* 9 C. C. A. 314, 22 U. S. App. 110, 60 Fed. 993; *Missouri ex rel. Barton County v. Kansas City, Ft. S. & G. R. Co.* 32 Fed. 724; *Chesapeake & O. R. Co. v. Com.* 99 Ky. 176, 35 S. W. 266; *Com. v. Chesapeake & O. R. Co.* 16 Ky. L. Rep. 481, 29 S. W. 136; *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.* 64 Mich. 370, 31 N. W. 281; *Kansas City Suburban Belt R. Co. v. Kansas City, St. L. & C. R. Co.* 118 Mo. 623, 24 S. W. 478; *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.* 30 Ohio St. 610; 33 Cyc. Law & Proc. pp. 670, 671; *Fremund, Pol. Power*, § 73; *Southern R. Co. v. King*, 87 C. C. A. 290, 160 Fed. 332; *Elliott, Railroads*, 2d ed. § 668; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 522, 523, 44 L. ed. 871, 872, 20 Sup. Ct. Rep. 722; *State v. Chicago, M. & St. P. R. Co.* 122 Iowa, 24, 101 Am. St. Rep. 254, 96 N. W. 904.

U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722, reversing 175 Ill. 359, 51 N. E. 842.

But a statute requiring all regular passenger trains, except transcontinental or through trains entering the state from any other state, to stop at all county seats, is a reasonable exercise of the police power of the state, although construed to apply to a train carrying the mails and carrying passengers who are to be transferred to another train of the same company, which will carry them to another state. *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627, affirming 57 Minn. 390, 24 L.R.A. 502, 59 N. W. 487. The particular county seat involved in this case was a village of 800 inhabitants, and was otherwise served by two passenger and a mixed train daily each way.

A state statute which requires each railway company operating its road within the state to cause three each way of its regular passenger trains, if so many are run daily, Sundays excepted, to stop long enough at every station, city, or village containing over 3,000 inhabitants, to receive and let off passengers, is not an invalid regulation of interstate commerce as applied to trains engaged therein. *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

The act of March 19, 1907, as construed by the courts of Missouri, is valid.

New York, N. H. & H. R. Co. v. New York, 165 U. S. 631, 41 L. ed. 854, 17 Sup. Ct. Rep. 418; Missouri P. R. Co. v. Larabee Flour Mills, 211 U. S. 621, 53 L. ed. 360, 29 Sup. Ct. Rep. 214; Gladson v. Minnesota, 166 U. S. 430, 41 L. ed. 1065, 17 Sup. Ct. Rep. 627; Cleveland, C. C. & St. L. R. Co. v. Illinois, supra; Michigan C. R. Co. v. Powers, 201 U. S. 291, 50 L. ed. 760, 26 Sup. Ct. Rep. 459.

Though the statute assailed be invalid, yet the complainant, in addition, must allege facts bringing the case within some head of equity jurisdiction.

Cruikshank v. Bidwell, 176 U. S. 80, 44 L. ed. 380, 20 Sup. Ct. Rep. 280; Pacific Exp. Co. v. Seibert, 142 U. S. 348, 35 L. ed. 1038, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

The bill contains no grounds for equitable interposition as against Herndon.

Pacific Exp. Co. v. Seibert, 44 Fed. 315, affirmed in 142 U. S. 339, 355, 35 L. ed. 1035, 1040, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; 1 Pom. Eq. Jur. 3d ed. §§ 250, 251½; Troy & B. R. Co. v. Boston, 11. T. & W. R. Co. 86 N. Y. 128; Cruikshank v. Bidwell, 176 U. S. 81, 44 L. ed. 381, 20 Sup. Ct. Rep. 280.

The bill attempts to join two distinct proceedings.

Street, Fed. Eq. Pr. § 440; Gaines v. Chew, 2 How. 642, 11 L. ed. 411; Brown v. Guarantee Trust & S. D. Co. 128 U. S. 412, 32 L. ed. 470, 9 Sup. Ct. Rep. 127; Hefner v. Northwestern Mut. L. Ins. Co. 123 U. S. 751, 31 L. ed. 311, 8 Sup. Ct. Rep. 337; Emmons v. National Mut. Bldg. & L. Asso. 68 C. C. A. 330, 135 Fed. 689.

This suit is within the prohibition of the 11th Amendment to the Constitution of the United States.

Smyth v. Ames, 169 U. S. 518, 519, 42 L. ed. 839, 18 Sup. Ct. Rep. 418; Ex parte Young, 209 U. S. 149, 156, 157, 52 L. ed. 724, 727, 728, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764; Fitts v. McGhee, 172 U. S. 530, 43 L. ed. 541, 19 Sup. Ct. Rep. 269; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164.

The act of March 13, 1907, does not contravene § 8 of article 1 of the Constitution of the United States, nor the laws passed in pursuance thereof. The act itself specifically permits the transaction of interstate business by appellee even after revocation of its license for violating the act, thus exempting complainant's interstate business from its operation.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 46, 44 L. ed. 664, 20 Sup. Ct. Rep. 518; Louisville & N. R. Co. v. Kentucky, 183 U. S. 512, 518, 46 L. ed. 304, 306, 22 Sup. Ct. Rep. 95.

Appellee is not denied the equal protection of the laws.

Dueat v. Chicago, 10 Wall. 415, 19 L. ed. 973; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 118, 34 L. ed. 396, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Baltimore Traction Co. v. Baltimore Belt R. Co. 151 U. S. 138, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 248, 257, 50 L. ed. 1014, 1018, 26 Sup. Ct. Rep. 619, 6 A. & E. Ann. Cas. 317; Board of Education v. Illinois, 203 U. S. 561, 51 L. ed. 318, 27 Sup. Ct. Rep. 171, 8 A. & E. Ann. Cas. 157; Pembina Consol. Silver Min. & Mill Co. v. Pennsylvania, 125 U. S. 188, 31 L. ed. 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Missouri P. R. Co. v. Mackey, 127 U. S. 209, 32 L. ed. 109, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Beekwith, 129 U. S. 29, 32 L. ed. 586, 9 Sup. Ct. Rep. 207; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Doyle v. Continental Ins. Co. 94 U. S. 535-537, 24 L. ed. 148-150.

Appellee is not deprived of its property without due process of law, nor are its privileges and immunities abridged.

Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 248, 50 L. ed. 1014, 26 Sup. Ct. Rep. 619, 6 A. & E. Ann. Cas. 317; Doyle v. Continental Ins. Co. supra; National Council, J. O. U. A. M. v. State Council, 203 U. S. 163, 51 L. ed. 137, 27 Sup. Ct. Rep. 46; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 269, 35 L. ed. 1009, 12 Sup. Ct. Rep. 173; Yesler v. Washington Harbor Line, 146 U. S. 656, 36 L. ed. 1122, 13 Sup. Ct. Rep. 190; Waters-Pierce Oil Co. v. Texas, 177 U. S. 45, 46, 44 L. ed. 664, 665, 20 Sup. Ct. Rep. 518; Cooley, Const. Lim. 7th ed. p. 567; Slaughter-House Cases, 16 Wall. 74, 21 L. ed. 408.

Mr. M. A. Low argued the cause, and, with Mr. E. C. Lindley, filed a brief for appellee:

The act of March 13, 1907, denies to appellee the equal protection of the laws, guaranteed to it by the 14th Amendment to the Constitution of the United States. By the invitation and permission of the state, it is doing business therein, and is subject to its process at the instance of suitors, as fully as any domestic corporation. Under such circumstances it is entitled to invoke the protection of this clause of the Federal Constitution.

Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 243, 248, 51 L. ed. 168, 170, 27 Sup. Ct. Rep. 126, 7 A. & E. Ann. Cas. 1104; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; St. Tammany Waterworks Co. v. New Orleans Waterworks Co. 120 U. S. 64, 68, 30 L. ed.

563, 565, 7 Sup. Ct. Rep. 405; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 28, 29, 32 L. ed. 585, 586, 9 Sup. Ct. Rep. 207; State v. Cadigan, 73 Vt. 245, 57 L.R.A. 666, 87 Am. St. Rep. 714, 50 Atl. 1079; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365.

The right conferred upon appellee by the acts of March 24, 1870, and March 11, 1895, to do business in the state, is property, within the meaning of the 14th Amendment, and that property right cannot be substantially impaired or taken away except by due process of law. Appeal to the jurisdiction of the courts of the United States for the protection of that property is one of the processes of law which appellee has the constitutional right to invoke.

Bertholf v. O'Reilly, 74 N. Y. 519, 30 Am. Rep. 323; Londoner v. Denver, 210 U. S. 373, 385, 52 L. ed. 1103, 1112, 28 Sup. Ct. Rep. 708; Wynehamer v. People, 13 N. Y. 392; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 708, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; Monongahela Nav. Co. v. United States, 148 U. S. 312, 343, 344, 37 L. ed. 463, 474, 13 Sup. Ct. Rep. 622.

The act of March 19, 1907, which requires that all trains carrying passengers shall stop at the junction or intersection of other railroads, is an unwarranted interference with interstate commerce.

Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121.

The objection of multifariousness is an objection of inconvenience.

Story, Eq. Jur. § 539; Graves v. Ashburn, 215 U. S. 331, ante, 217, 30 Sup. Ct. Rep. 110; Campbell v. Mackay, 1 Myl. & C. 617.

The objection of multifariousness comes too late.

Brown v. Guarantee Trust & S. D. Co. 128 U. S. 403, 412, 32 L. ed. 468, 470, 9 Sup. Ct. Rep. 127; Billings v. Mann, 156 Mass. 203, 30 N. E. 1136; 1 Street, Fed. Eq. Pr. § 936; Dan. Ch. Pl. & Pr. 6th Am. ed. 586, note 5; Jackson v. Glos, 144 Ill. 21, 32 N. E. 536.

Mr. Justice Day delivered the opinion of the court:

This suit was brought by the Chicago, Rock Island, & Pacific Railway Company
54 L. ed.

in the circuit court of the United States for the western district of Missouri, to enjoin the execution of certain provisions of the acts of the legislature of the state of Missouri, as violative of complainant's rights under the Federal Constitution. The bill was filed against Harry T. Herndon, prosecuting attorney of Clinton county, Missouri, and John E. Swanger, secretary of state of the state of Missouri.

The bill is very lengthy, and as the decision of the court was made upon demurrer to it, it will be necessary to call attention to some of its pertinent allegations. Complainant avers that it is a duly organized corporation of the state of [147] Illinois, operating a railroad in certain states; among others, in the state of Missouri; and is engaged in both state and interstate commerce. It sets forth in detail the acts of the state of Missouri authorizing the consolidation, extension, and operations of the railroads under which it claims to have acquired its system of railroads in that state. It avers that it duly filed with the secretary of state of the state of Missouri a copy of its charter, in compliance with the laws of the state, and received a certificate, November 22, 1902, in all respects in compliance with the laws of the state, authorizing the complainant to carry on business in said state for the term ending April 3, 1930, which certificate is in full force, never having been canceled or withdrawn.

The bill sets forth the act of March 19, 1907, amending § 1075 of the Revised Statutes of Missouri, requiring railroad companies to perform certain duties, among others, to stop passenger trains at the junction or intersecting points of other railroads. As that amended section is one of the acts complained of, it is set forth in the margin.†

†Sec. 1075. Every railroad corporation in this state which now is, or may hereafter be, engaged in the transportation of persons or property from one point in this state to another point in this state, shall give public notice of the regular time of starting and running its cars, and shall furnish sufficient accommodations for the transportation of all such passengers, baggage, mails, and express freight as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, at the junctions of other railroads, and at the junction of branch railroads of the same system, as herein defined, carrying passengers, and at the several stopping places: and shall at all crossings and intersections of other railroads, where such other railroad and the railroad crossing the same are now, or may hereafter be made, upon the same grade, and the character of the land at such crossing or intersection

148] *Concerning this section, and the requirement to stop trains at junction points, the bill sets out that the complainant has traffic rights over the Chicago, Burlington, & Quincy Railway track between Cameron Junction and Kansas City; that the town of Lathrop is a town of about 1,000 inhabitants, situated in Clinton county, Missouri, between Cameron Junction and Kansas City, on said line of railway; that complainant, for the purpose of carrying on its business as a common carrier, at the said station of Lathrop, stops a morning and evening passenger train each way, two west bound, and two east bound, and, in addition thereto, stops two passenger trains, one east bound and one west bound, which are local freight trains regularly carrying passengers. Complainant further sets forth that it runs a fast through passenger train between Chicago, Fort Worth, and Dallas, Texas, by means of connecting carriers in 149] the state of *Texas, and a fast through passenger train between Chicago and the Pacific coast by means of connecting carriers beyond the territory of Oklahoma, neither of which stop at the station of Lathrop to take on or let off passengers; that said trains which do not stop at Lathrop are immediately preceded by trains that do stop there, and which are maintained for the

purpose of collecting passengers from local stations and conveying them to nearby stations on the line of the road of the complainant, where both of said fast through trains do stop for the purpose of taking on and letting off passengers.

The complainant further avers that the tracks of the complainant cross and intersect with the tracks of the Atchison, Topeka, & Santa Fe Railway Company at the said station of Lathrop; that the Atchison, Topeka, & Santa Fe Railway runs two trains each way every day, all of which stop at the station of Lathrop, and which make close and direct connection with the trains which the *complainant stops [150 at the station of Lathrop; that except under unusual circumstances passengers seldom find it convenient to change from the complainant's railway to that of the Atchison, Topeka, & Santa Fe line at the station of Lathrop. Complainant avers that to stop the through interstate trains running between Chicago, Fort Worth, and Dallas, Texas, and between Chicago and the Pacific coast, would be a direct, unreasonable, and unwarrantable interference with its interstate business, and that said through trains are maintained for, and are essential to the purpose of, transporting interstate passenger traffic, and for the car-

will admit of the same, erect, build, and maintain, either jointly with the railroad company whose road is crossed, or separately by each railroad company, a depot or passenger house and waiting room or rooms sufficient to comfortably accommodate all passengers awaiting the arrival and departure of trains at such junction or railroad crossing, and shall keep such depot or passenger house or rooms warm, lighted, and open to the ingress and egress of all passengers for a reasonable time before the arrival and until after the departure of all trains carrying passengers on said railroad or railroads; and they are hereby required to stop all trains carrying passengers at the junction or intersection of other railroads, and they are further required to receive all passengers and baggage for, and to stop, on a flag or signal, all trains carrying passengers, at the junction of all branch railroads of the same system, which said branch railroads are 18 miles or more in length, and at the terminus of which is located any county seat town of any county in this state, a sufficient length of time to allow the transfer of passengers, personal baggage, mails, and express freight from the trains of railroads so connecting or intersecting; or they may mutually arrange for the transportation of such persons and property over both roads without change of cars; and they shall be compelled to receive all passengers and freight from such connecting, intersecting, or branch roads whenever the same shall be delivered to

them. And every railroad company or corporation owning, operating, or leasing any railroad in this state shall keep all its depots, stations, or passenger stations, whether located at the crossing or intersection of other roads or elsewhere, warm, lighted, and open to the ingress and egress of all passengers a reasonable time before the arrival and until after the departure of all passenger trains on said railroad which stop or receive or discharge passengers at such depots, stations, or passenger houses. Every railroad corporation or company which shall fail, neglect, or refuse to comply with any or either one of the provisions of this section from and after the time the same shall become a law, shall, for each day said railroad corporation or company refuses, neglects, or fails to comply therewith, shall forfeit and pay the sum of \$25, which may be recovered in the name of the state of Missouri, to the use of the school fund of the county wherein said crossing, depot, station, passenger house, or branch railroad is located; and it shall be the duty of the prosecuting attorney to prosecute for a recovery of the same. The term "railroad corporations," as used in this act, shall include the term "railway company and railway corporation."

Sec. 2. Inasmuch as the train service is very inconvenient and unsatisfactory in some places constitutes an emergency within the meaning of the Constitution, therefore, this act shall take effect and be in force from and after its passage.

riage of the United States mails. The complainant avers that the facilities for the interchange of passengers at the station of Lathrop are amply sufficient to accommodate the public, and that the service is both convenient and satisfactory to the public. The bill further avers that if the said through trains are required to stop at all junctions with other railways and there interchange passengers with such road, their usefulness as through trains will be destroyed, and the interstate business of the complainant interfered with to an unwarranted extent without any corresponding benefit to the traveling public; that the law of March 19, 1907, as applied to said trains which do not stop at the station of Lathrop, is a serious burden upon interstate commerce so conducted by said trains, and an unlawful and unreasonable interference therewith, and in violation of the Constitution of the United States and the acts of Congress regulating commerce. Complainant avers that the act of March 19, 1907, requiring trains carrying passengers to stop at the junction or intersections of other roads for the purpose of interchanging passengers and baggage at such junction points, was not passed in the exercise of the police power of the state of Missouri to protect the traveling public, but solely for the purpose of increasing traveling facilities, and to provide a more convenient and satisfactory train service at such junction points. Complainant avers that it installed an interlocking plant and an automatic signal device at the intersection with the tracks of the Atchison, Topeka, & Santa Fe Railway at the station of Lathrop, and thereby provided an absolutely safe method for its through trains to pass over the tracks of the Atchison, Topeka, & Santa Fe road without stopping. The bill avers that Harry T. Herndon, as prosecuting attorney for the county of Clinton, Missouri, threatens to and will, unless enjoined, put in motion the special provisions of the act of March 19, 1907, for the enforcement of penalties of \$25 per day since July 21, 1907, which penalties in a short time would amount to many thousands of dollars.

Complainant further avers that defendant John E. Swanger, secretary of the state of Missouri, under and by authority of said act of the state of Missouri, approved March 13, 1907, concerning the bringing of cases by foreign corporations in the Federal courts, which act is set forth in the margin,† threatens to, and

will, unless *enjoined, cancel the complainant's certificate of the right to do business in the state of Missouri, and will take other steps necessary to revoke the license and permit, as provided in the act of March 13, 1907, should the complainant file this, its bill of complaint, in the United States circuit court, and because of any attempt complainant *may make to remove any case to a Federal court from any state court of the state of Missouri, and to bring any case in any Federal court against a citizen of the state of Missouri. The bill then sets out the coming of the complainant into the state of Missouri in accordance with the laws of the state, that it acquired property therein, which included many miles of railroad, depots, station grounds, shops, and warehouses, terminals, rolling stock, and other equipment necessary to the maintenance and operation of its line, located in the state of Missouri, and at an assessed value of \$3,252,775. The bill sets out the various particulars wherein it is contended that the act of March 13, 1907, is void under the Constitution of the United States, and the bill avers that if the complainant should attempt to remove into the Federal courts any case commenced in the state courts of Missouri, or should commence proceedings in any Federal court against a citizen of the state of Missouri, the defendant, as secretary of state of the state of Missouri, would deny the right of complainant to do business in the state of Missouri, and if the complainant attempted to carry on the same it would be subject to forfeit and to pay to the state of Missouri a penalty of not less than \$2,000 nor more than \$10,000, to be recovered in any court in the state having jurisdiction. An injunction was prayed against the defendant Harry T. Herndon as prosecuting attorney of the county of Clinton, Missouri, requiring him to refrain from enforcing, or attempting to enforce, the provisions of the act of March 19, 1907, so far as it relates to the stopping of the trains aforesaid, at the crossing of the Atchison, Topeka, & Santa Fe Railway at the station of Lathrop, Clinton county, Missouri, and from enforcing, or attempting to enforce, the penalties of the statute; and that the defendant John E. Swanger, secretary of state of the state of Missouri, be restrained from enforcing, or attempting to enforce, the provisions of the act of March 13, 1907, *providing for the revocation and canceling of the complainant's charter because of the removal of

†Be it enacted by the general assembly of the state of Missouri as follows:

Sec. 1. If any foreign or nonresident railway corporation of whatever kind, incorporated, created, and existing under the laws

of any other state, territory, or country, and doing business as a carrier of freight or passengers from one point in this state, to another point in this state, under the laws of this state regulating or authorizing

cases from a state to a Federal court, or bringing suit in a Federal court against any citizen of the state of Missouri.

A demurrer was filed to the bill by both of the defendants, the same was overruled, and a final decree was entered enjoining the enforcement of the act of March 13, 1907, because of the beginning of the suits, or the removal of cases to Federal courts, and enjoining the enforcement of the act of March 19, 1907, so far as it relates to the complainant's said trains passing through Lathrop, or the stopping of such trains at the station of Lathrop, and enjoined the defendant prosecuting attorney of Clinton County, Missouri, from enforcing, or attempting to enforce, the provisions of said act as to stopping said trains, or enforcing the penalties provided for in that act for the failure to comply with the provisions thereof.

It is evident from the foregoing statement that the constitutional questions involved in this case are: First, whether, under the act of March 19, 1907, the complainant can be compelled to stop its through trains, described in the bill, at the station of Lathrop, and whether such a statute, so far as it relates to interstate commerce trains, is void as an attempt to regulate interstate commerce, and

imposes a burden thereon by state legislation. And, secondly, under the act of March 13, 1907, can the license and right of the complainant to do business in the state of Missouri be lawfully revoked because it has begun a suit, or may remove a suit, from a state court to a Federal court, complainant being a corporation organized in another state.

Before considering these questions, we will notice some of the objections to the decree below, made by the learned counsel for the state. It is asserted that the bill is multifarious, and that there is no right to join the defendants, the prosecuting attorney and secretary of state, in the *same bill. But no objection to such [155] joinder of the parties was specially taken, and it is well settled that an objection of this character must be promptly made. The proper way to raise such question is by special demurrer, specifically directed to the objection. 1 Street, Fed. Eq. Pr. § 936. It is true that a court may itself take the objection in extreme cases, when that course is essential to the necessary and proper administration of justice. But, as laid down in *Oliver v. Piatt*, 3 How. 333, 412, 11 L. ed. 622, 658, Mr. Justice Story, speaking for the court, if the court can get to a final decree without serious embarrass-

the licensing of, or the issuing of a permit or a certificate of authority to, or suffering or allowing, any such corporation to enter or to do business in this state shall, without the consent of the other party, in writing, to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this state in any Federal court, the license, permit, certificate of authority, and all right of such corporation and its agents to carry passengers or freight from one point in this state to another point in this state shall forthwith be revoked by the secretary of state, and its right to do such business shall cease, and the secretary of state shall publish such revocation in some newspaper of large and general circulation in the state, and such corporation shall not again be authorized or permitted to carry passengers or freight from one point in this state to another point in this state, or to do business as a carrier of passengers or freight of any kind from one point in this state to another point in this state at any time within five years from the date of such revocation or the cessation of such right. But the revocation of such license, permit, right, certificate of authority, or the cessation of such right, shall not be deemed to prohibit or prevent such corporation from carrying passengers or freight from a point within this state to a point without this state, or from a point without this state to a point within this state, or from making what are

known as interstate shipments and transportation.

Sec. 2. If any corporation included in the provisions of this act shall carry, or attempt to carry, or hold itself out to carry, passengers or freight of any kind from one point in the state to another, without a license, permit, or certificate of authority therefor, first had and obtained from the state of Missouri,—to be issued by the secretary of state,—or after its license, permit, right, or certificate of authority to carry passengers or freight of any kind from one point in this state to another point in this state, shall have been revoked or ceased, as provided for by the preceding section of this act, it shall forfeit and pay to the state of Missouri for each offense a penalty of not less than \$2,000 nor more than \$10,000, suit to be brought therefor in any court of competent jurisdiction by the attorney general or the prosecuting attorney of any county in the state in which such offense shall have been committed, and such offense shall be deemed to have been committed either in the county where such transportation originated or in the county where it terminated. And the governor may, whenever he shall deem it necessary, appoint special counsel to assist the attorney general or any prosecuting attorney to enforce or carry out the provisions of this act.

Sec. 3. All acts or parts of acts in conflict herewith are, in so far as they are in conflict, hereby repealed.

Approved March 13, 1907.

[Laws of Missouri of 1907, p. 174.]

ment, it will do so; and says the learned justice: "A *fortiori*, an appellate court would scarcely entertain the objection, if it was not forced upon it by a moral necessity." No such ease exists here. Certainly, in the absence of a specific objection, there is no difficulty in hearing at the same time the case against the secretary of state and the prosecuting attorney. The bringing of the suit against the prosecuting attorney in the Federal court, if the statute of March 13, 1907, is to be carried out, will forfeit the complainant's right to do business within the state, and we see no reason why the right to declare such forfeiture may not be considered with the case against the prosecuting attorney. We find no merit in the objection of multifariousness.

As to the objection that the suit is one against the state, we think no discussion is necessary, and content ourselves with a reference to the late cases in this court to that point. *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441; *Western U. Teleg. Co. v. Andrews*, 216 U. S. 165, ante, 430, 30 Sup. Ct. Rep. 286.

The act of March 19, 1907, requiring the stopping of certain trains, upon its face seems to require the stoppage of all passenger trains at the junction or intersection of other roads. But it is contended by counsel for the state that this statute is but an amendment of former statutes, and that the requirement to stop trains carrying passengers, *as qualified by the subsequent language of the act, means to stop such trains for a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express from the trains of the roads connecting or intersecting to the trains of the other road, and that, therefore, the act applies only to the operation of trains actually carrying such passengers, personal baggage, mails and express as are destined for points on the connecting road, and does not require the stoppage of all trains carrying passengers, as is set out in the bill. And this conclusion, it is said, must necessarily follow because of the construction given to the statute prior to its amendment on March 19, 1907. *State use of School Fund v. Wabash, St. L. & P. R. Co.* 83 Mo. 148; *Logan v. Hannibal & St. J. R. Co.* 77 Mo. 666; *State ex rel. McPherson v. St. Louis & S. F. R. Co.* 105 Mo. App. 212, 79 S. W. 714.

The contention is that the amendment of 1907 has only the effect to bring into the statute certain provisions as to branch railroads. Assuming this to be a correct interpretation of this statute, and that it only requires the stoppage of trains at

Lathrop carrying passengers destined for points on the intersecting railroad, or to take up passengers there, destined for points on complainant's road, the question remains, Would the requirement of the act of March 19, 1907, to stop the through trains described in the bill, for such purpose and under the circumstances set forth, be an unlawful attempt to regulate interstate commerce, and impose an unlawful burden thereon?

The extent of the right to control through interstate transportation of passengers by state legislation, or under orders of a commission authorized by the state, has been recently before this court. *Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121.

The principle to be deduced from these cases is, that where a railroad company has already provided ample facilities for [157] the adequate accommodation of the traveling public, such as may be proper and reasonable at any given point, and operates interstate commerce trains, carrying passengers, through the same places, at which such interstate trains do not stop, a state regulation which requires the stopping of such interstate trains, in addition to ample facilities already provided, to the detriment and hindrance of interstate traffic, is an unlawful regulation and burden upon interstate commerce. Applying the principles thus settled, and taking the allegations of the bill as true, which we must do, in view of the fact that the case was decided upon demurrer, we think that construing the statute so as to require the stoppage of the through trains whenever any persons might seek to avail themselves thereof, in order to permit a transfer of passengers from one road to the other upon such trains, would be an unnecessary and unlawful burden upon interstate traffic. The averment of the bill is that the business is already amply provided for in the other trains of the company and the connecting road, and the serious detriment to the interstate carrying business from the requirement to stop the through trains described for the purpose of permitting such transfers is fully set forth in the bill, and admitted by the demurrer.

It is true that the bill avers that few persons require transfer at such connecting point, but if passengers have the right, under this statute, to require the stoppage of such through trains at Lathrop whenever they may desire to avail themselves of such privilege, serious inconvenience would result to the interstate traffic in question.

It is to be remembered that this statute

is not of that class passed in the exercise of the police power of the state for the promotion of the public safety, and requiring the stoppage of trains by one railroad before crossing the tracks of another railroad; this statute, as its second section shows, was passed for the purpose of providing *greater facilities of travel, and not for the protection of life and limb. We therefore reach the conclusion that the circuit court did not err in granting the injunction, so far as it relates to the enforcement of the act of March 19, 1907, relating to the stoppage of the interstate commerce trains at the station of Lathrop.

As to the validity of the act of March 13, 1907, forfeiting the right of the company to do business in the state of Missouri, and subjecting it to penalties in case it should bring a suit in the Federal courts, or remove one from the state courts to the Federal courts, but little need be said. This is so because of the cases decided at this term, involving contentions kindred to the one made in this case. See *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, ante, 355, 30 Sup. Ct. Rep. 190; *Pullman Co. v. Kansas*, 216 U. S. 56, ante, 378, 30 Sup. Ct. Rep. 232; *Ludwig v. Western U. Teleg. Co.* 216 U. S. 146, ante, 423, 30 Sup. Ct. Rep. 280; *Southern R. Co. v. Greene*, 216 U. S. 400, ante, 536, 30 Sup. Ct. Rep. 287.

Applying the principles announced in those cases, it is evident that the act in controversy cannot stand, in view of the provisions of the Constitution of the United States. Moreover, this is not a case where the state has undertaken to prevent the coming of the corporation into its borders for the purpose of carrying on business. The corporation was within the state, complying with its laws, and had acquired, under the sanction of the state, a large amount of property within its borders, and thus had become a person within the state, within the meaning of the Constitution, and entitled to its protection. Under the statute in controversy, a domestic railroad company might bring an action in the Federal court, or, in a proper case, remove one thereto, without being subject to the forfeiture of its right to do business, or to the imposition of penalties provided for in the act. In all the cases in this court discussing the right of the states to exclude foreign corporations, and to prevent them from removing cases to the Federal courts, 159] it has been conceded that *while the right to do local business within the state may not have been derived from the Federal Constitution, the right to resort to the Federal courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof.

It is enough now to say that within the principles decided at this term, in the cases cited above, the act of March 13, 1907, as applied to the complainant railroad company, in view of the admitted facts set out in the bill in this case, is unconstitutional and void. We find no error in the decree granted in the Circuit Court, and the same is affirmed.

Affirmed.

The CHIEF JUSTICE concurs in the result.

CORNELIUS ROACH,† Secretary of State
of the State of Missouri, Appt.,

v. .

ATCHISON, TOPEKA, & SANTA FE
RAILWAY COMPANY.

(See S. C. Reporter's ed. 159, 160.)

This case is governed by the decision in *Herndon v. Chicago, R. I. & P. R. Co.*, ante, 970.

[No. 151.]

Argued April 14, 15, 1910. Decided May 31, 1910.

APPEAL from the Circuit Court of the United States for the Western District of Missouri to review a decree enjoining the secretary of state from revoking the license of a foreign railway to do business in the state because of removing suits from a state court to a Federal court. Affirmed.

See same case below, 157 Fed. 783.

Mr. James T. Blair argued the cause, and, with Messrs. Elliott W. Major and Charles G. Revelle, filed a brief for appellant:

The act assailed by this suit is valid, and is not objectionable to the provisions of the Federal Constitution.

Doyle v. Continental Ins. Co. 94 U. S. 540, 24 L. ed. 151; *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 A. & E. Ann. Cas. 317.

Railway companies, for the purpose of legislation, belong to a class as separate and distinct as insurance companies.

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Beekwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207.

The power to prevent a corporation from coming into the state, or to impose as a condition of coming into, or doing business there-

†Substituted as appellant for John E. Swanger.

in, such terms, restrictions, and regulations as it deems proper, of necessity embraces the right to place it in a class different from domestic corporations, and to impose upon the one a condition not required of the other, since the lesser is necessarily contained in the greater power.

Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281.

The distinction between a domestic and foreign corporation, and the differences in their rights, and the power exercised by the state in respect to each, are broad enough to authorize a classification and separate regulations in so far as the Constitution applies, and for this purpose it is immaterial that a foreign corporation has been duly admitted to the state.

National Council, J. O. U. A. M. v. State Council, 203 U. S. 163, 51 L. ed. 132, 27 Sup. Ct. Rep. 46; Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 Sup. Ct. Rep. 346; Board of Education v. Illinois, 203 U. S. 556, 51 L. ed. 314, 27 Sup. Ct. Rep. 171, 8 A. & E. Ann. Cas. 157.

Messrs. James P. Gilmore and Gardner Lathrop argued the cause, and, with Messrs. Robert Dunlap and Thomas R. Morrow, filed a brief for appellee:

The fact that appellee had property lawfully acquired in the state of Missouri brings it under the protection of both the Federal and state Constitutions as to being deprived of its property without due process of law.

Society for Savings v. Coite, 6 Wall. 504, 18 L. ed. 897; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; State ex rel. Richards v. Ackerman, 51 Ohio St. 163, 24 L.R.A. 298, 37 N. E. 828; Northwestern Mut. L. Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982; State ex rel. Clapp v. Sioux City & N. R. Co. 43 Minn. 17, 44 N. W. 1032; Wilmington & W. R. Co. v. Reid, 13 Wall. 264, 20 L. ed. 568; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; Atchison, T. & S. F. R. Co. v. Sullivan, 97 C. C. A. 1, 173 Fed. 456.

The rights and privileges which attach to the use of the property, when they become vested under the law of the state, are property rights which cannot be taken away without compensation by the state (Gulf & S. I. R. Co. v. Hewes, 183 U. S. 77, 46 L. ed. 91, 22 Sup. Ct. Rep. 26; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622); and are

rights which inhere in the value of the property, so that they must be considered, even under the exercise of the rate-making power of the state (Willcox v. Consolidated Gas Co. 212 U. S. 22, 24, 53 L. ed. 382, 384, 29 Sup. Ct. Rep. 192; Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 537).

Therefore these rights cannot be forfeited by the state afterwards attempting to impose an arbitrary or unreasonable condition to their further exercise, any more than a state might, after title to property has vested, subsequently create and attach an arbitrary condition to the right further to hold or enjoy such property. It might be conceded that such rights might be forfeited by the state on the failure of the company to observe some condition upon which the rights were granted and held; but even in that event, the forfeiture could only be made effective by judicial proceedings.

Garfield v. United States, 211 U. S. 249, 262, 53 L. ed. 168, 174, 29 Sup. Ct. Rep. 62.

This court, as observed in Garfield v. United States, supra, has uniformly and steadfastly held that "there is no place in our constitutional system for the exercise of arbitrary power." The legislation involved is certainly a clear instance of the exercise of such power, not only because it imposes an arbitrary and unreasonable condition, but it leaves the enforcement thereof entirely to the secretary of state, without hearing, let, or hindrance. This cannot be done. There is provided no method of hearing or notice; but the action of the secretary of state in canceling the permit and forfeiting rights is unrestricted, without any precaution to protect against his decision in the first instance, or to review it after it has been made.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Yiek Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Re Quong Woo, 13 Fed. 229; Re Wo Lee, 26 Fed. 471; Barthet v. New Orleans, 24 Fed. 563.

The action of the secretary of state is also made conclusive, which, under the circumstances of this case, cannot be permitted. It is not even subject to review in subsequent prosecutions for penalties.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Felix v. Wallace County, 62 Kan. 832, 84 Am. St. Rep. 424, 62 Pac. 667; Missouri, K. & T. R.

Co. v. Simonson, 64 Kan. 802, 57 L.R.A. 765, 91 Am. St. Rep. 248, 68 Pac. 653; Little Rock & Ft. S. R. Co. v. Payne, 33 Ark. 816, 34 Am. Rep. 55; Meyer v. Berlandi, 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513.

It is not beyond the bounds of probability that the courts of Missouri might construe the act so as to deny the appellee the right to sue out a writ of error from this court to the state courts of last resort. Even in the case of the removal of a suit from a state to a Federal court, there is in a sense the institution of that suit in the Federal court, as the petition and bond for removal are in the nature of process, bringing the suit in the Federal court (*Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; *Kinney v. Columbia Sav. & L. Asso.* 191 U. S. 78, 48 L. ed. 103, 24 Sup. Ct. Rep. 30). It is, however, generally recognized that a writ of error is a new action, and where this view obtains, a writ of error from this court to a state court would be instituting a proceeding therein. That is the doctrine of the supreme court of Missouri, and, of course, in enforcing the statute, following its own decisions, a forfeiture would follow if the appellee should find it necessary to sue out a writ of error from the highest court of our land to one of our state courts (*St. Louis v. Butler*, 201 Mo. 399, 99 S. W. 1092).

The statute being invalid, appellee clearly brings itself within the right of the injunction granted.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441; *Ludwig v. Western U. Teleg. Co.* 216 U. S. 146, ante, 423, 30 Sup. Ct. Rep. 280; *Missouri, K. & T. R. Co. v. Missouri R. & Warehouse Comrs.* (*Missouri, K. & T. R. Co. v. Hickman*) 183 U. S. 53, 46 L. ed. 78, 22 Sup. Ct. Rep. 18; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Pennoyer v. McConanghy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Allen v. Baltimore & O. R. Co.* 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 925, 962; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *Tomlinson v.*

Branch, 15 Wall. 460, 21 L. ed. 189; *Litchfield v. Webster County*, 101 U. S. 773, 25 L. ed. 925; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 623; *Western U. Teleg. Co. v. Myatt*, 98 Fed. 335; *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; *Gregg v. Sanford*, 12 C. C. A. 525, 28 U. S. App. 313, 65 Fed. 151; *Western U. Teleg. Co. v. Henderson*, 68 Fed. 588; *Cobb v. Clough*, 83 Fed. 604; *Mills v. Green*, 67 Fed. 818; *Scott v. Donald*, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262; 1 Pom. Eq. Jur. 3d ed. §§ 243-275, 1345; 6 Pom. Eq. Jur. § 546.

Mr. Justice Day delivered the opinion of the court:

This case was argued at the same time with No. 150 [217 U. S. 135, ante, 970, 30 Sup. Ct. Rep. 633], and involves the validity of the statute of March 13, 1907. The case was also decided upon demurrer to the bill. The allegations of the bill and supplemental bill showed that the Atchison, Topeka, & Santa Fe Railway Company was within the state of Missouri in compliance with its laws; that it had acquired a large amount of property therein; that, being a foreign corporation, it had removed suits from a state to the Federal court, and the company averred that for that reason its right to do business in the state of Missouri was about to be revoked by the action of the secretary of state. This case comes within the principles just laid down in 150, and the decree of the Circuit Court is affirmed.

Affirmed.

The CHIEF JUSTICE concurs in the result.

*PINK FRANKLIN, Plff. in Err., [161 v.

STATE OF SOUTH CAROLINA.

(See S. C. Reporter's ed. 161-172.)

Civil rights—negroes as grand jurors—discrimination.

1. A motion to quash an indictment against a negro for disqualification of the grand jurors, who must be electors, because of a change in the state Constitu-

NOTE.—On negroes as grand jurors—see note to *Carter v. Texas*, 44 L. ed. U. S. 839.

As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On homicide in resisting arrest—see note to *Keady v. People*, 66 L.R.A. 353.

tion respecting the qualifications of electors, alleged to violate the act of Congress of June 25, 1868 (15 Stat. at L. 73, chap. 70), does not present any question of the denial of a Federal right, where there is nothing in the record to show that the grand jury, as actually impaneled, contained any person who was not qualified as an elector under the earlier Constitution, or was so made up as to exclude negro citizens on account of their race.

[For other cases, see Civil Rights, 30-33, in Digest Sup. Ct. 1908.]

Civil rights — negroes as grand jurors — discretion of jury commissioners.

2. No discrimination against negroes because of their race, in the selection of the grand jury, is made by S. C. Laws 1902, p. 1066, § 2, giving the jury commissioners the right to select electors of good moral character, such as they may deem qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions.

[For other cases, see Civil Rights, 21-33, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — refusing continuance.

3. The refusal to grant a continuance of a criminal case, sought on the ground that the counsel for the accused had not had sufficient time or opportunity to examine the notes of the testimony taken before the coroner who investigated the case, is not a denial of due process of law, where the difficulty seems to have been that the notes of the testimony were somewhat illegible, and that the person making them was not at hand.

[For other cases, see Constitutional Law, 779-830, in Digest Sup. Ct. 1908.]

Trial — directing acquittal — homicide in resisting arrest — illegal warrant.

4. A peremptory instruction to acquit one accused of homicide in resisting arrest because the statute under which the arrest was attempted and the arrest warrant was issued is void under the Federal Constitution is properly refused, where, if the state's testimony is to be believed, the accused, without any warning, or resorting to any other means of resistance, and after the officer had knocked for admission, shot such officer upon his entering the open door, armed with a supposed warrant of arrest.

[For other cases, see Trial, VI. d, 3, d, in Digest Sup. Ct. 1908.]

[No. 164.]

Argued April 20, 21, 1910. Decided May 31, 1910.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which affirmed a conviction of murder in the Court of General Sessions for Orangeburg County, in that state. Affirmed.

See same case below, 80 S. C. 332, 60 S. E. 953.

The facts are stated in the opinion.

54 L. ed.

Messrs. John Adams and Jacob Moore argued the cause and filed a brief for plaintiff in error:

The prohibition of the 14th Amendment extends to all acts of the state, whether through its legislative, its executive, or its judicial authority.

Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676.

Due process of law means the common law and the statute laws existing in this state at the adoption of our Constitution.

Stelmeyer v. Charleston, 53 S. C. 281, 31 S. E. 322.

The plaintiff in error was denied due process of law in the refusal of his motion for a continuance.

Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Ex parte Riggins, 134 Fed. 419; Orr v. Gilman, 183 U. S. 278, 286, 46 L. ed. 196, 201, 22 Sup. Ct. Rep. 213; United States v. Moore, 129 Fed. 630.

The law under which the warrant was issued is unconstitutional.

Ex parte Drayton, 153 Fed. 986; Ex parte Hollman, 79 S. C. 9, 21 L.R.A. (N.S.) 242, 60 S. E. 19, 14 A. & E. Ann. Cas. 1105.

The attempt to enforce this unconstitutional statute was a denial by the state of due process of law and of the equal protection of the law, within the meaning of the 14th Amendment to the Constitution of the United States.

Ex parte Hollman, 79 S. C. 24, 21 L.R.A. (N.S.) 242, 60 S. E. 19, 14 A. & E. Ann. Cas. 1105.

An officer is bound to know the law, and if he makes an arrest upon a supposed warrant which on its face is void, he is liable to the person arrested.

1 Am. & Eng. Enc. Law, p. 750; Savacool v. Boughton, 5 Wend. 170, 21 Am. Dec. 181; Stephens v. Wilkins, 6 Pa. 260; Moore v. Watts, Breese (Ill.) 18; Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; Ex parte Burford, 3 Cranch, 448, 2 L. ed. 495.

A policeman cannot legally arrest one charged with an offense less than felony without a warrant, where the offense is not committed in his presence.

Percival v. Bailey, 70 S. C. 72, 49 S. E. 7.

One restrained of his liberty under an illegal arrest may use necessary force, even to the taking of life, to make his escape.

State v. Davis, 53 S. C. 150, 69 Am. St. Rep. 845, 31 S. E. 62.

Mr. Charles J. Bonaparte also filed a brief for plaintiff in error:

The South Carolina statute is invalid.

Peonage Cases, 123 Fed. 671; *Toney v. State*, 141 Ala. 120, 67 L.R.A. 286, 109 Am. St. Rep. 23, 37 So. 332, 3 A. & E. Ann. Cas. 319; *Ex parte Drayton*, supra; *Ex parte Hellman*, supra; *Clyatt v. United States*, 197 U. S. 215, 49 L. ed. 729, 25 Sup. Ct. Rep. 429; *State v. Julow*, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *Adair v. United States*, 208 U. S. 174, 175, 52 L. ed. 442, 443, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; *State v. Goodwill*, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285.

No such act has been sustained except when it was construed as making criminal a particular kind of fraud. Substantially on this ground, statutes of this character have been held constitutional in North Carolina, Georgia, and Louisiana.

State v. Norman, 110 N. C. 484, 14 S. E. 968; *Lamar v. State*, 120 Ga. 312, 47 S. E. 958; *Banks v. State*, 124 Ga. 15, 2 L.R.A. (N.S.) 1007, 52 S. E. 74; *State v. Thomas*, 144 Ala. 77, 2 L.R.A. (N.S.) 1011, 113 Am. St. Rep. 17, 40 So. 271, 6 A. & E. Ann. Cas. 744; *State v. Murray*, 116 La. 655, 40 So. 930, 7 A. & E. Ann. Cas. 957.

The plaintiff in error was fully justified in using reasonable force to protect his person, his liberty, and his habitation, and in his situation, as shown by the evidence for the state, the firing of the fatal shot was not an unreasonable use of force for these purposes.

Beard v. United States, 158 U. S. 550, 39 L. ed. 1086, 15 Sup. Ct. Rep. 962; *Wallace v. United States*, 162 U. S. 466, 40 L. ed. 1039, 16 Sup. Ct. Rep. 859; *Alberty v. United States*, 162 U. S. 499, 40 L. ed. 1051, 16 Sup. Ct. Rep. 864; *Rowe v. United States*, 164 U. S. 546, 41 L. ed. 547, 17 Sup. Ct. Rep. 172; *State v. Brooks*, 79 S. C. 144, 17 L.R.A. (N.S.) 483, 128 Am. St. Rep. 836, 60 S. E. 518, 15 A. & E. Ann. Cas. 49; *Brinkley v. State*, 89 Ala. 34, 18 Am. St. Rep. 87, 8 So. 22; *People v. Lewis*, 117 Cal. 186, 59 Am. St. Rep. 167, 48 Pac. 1088; *Palmer v. State*, 9 Wyo. 40, 87 Am. St. Rep. 910, 59 Pac. 793; 2 *Bishop, Crim. Law*, 653; *Pond v. People*, 8 Mich. 177; *Erwin v. State*, 29 Ohio St. 188, 23 Am. Rep. 733; *Jones v. State*, 26 Tex. App. 1, 8 Am. St. Rep. 454, 9 S. W. 53; *Maury v. State*, 68 Miss. 605, 24 Am. St. Rep. 291, 9 So. 445; *Com. v. Delaney*, 16 Ky. L. Rep. 509, 29 S. W. 616; *State v. Davis*, 53 S. C. 150, 69 Am. St. Rep. 845, 31 S. E. 62; 2 *Am. & Eng. Enc. Law*, p. 852.

Messrs. **J. Fraser Lyon** and **D. S. Henderson** argued the cause, and, with Messrs. **C. M. Ebird** and **B. H. Moss**, filed a brief for defendant in error:

Jury laws are not objectionable if they do not in terms discriminate on account of

race or color, or if, in the administration of the law, discriminations have not been made on account of race or color.

Re Shibuya Jugiro (*Shibuya Jugiro v. Brush*) 140 U. S. 297, 298, 35 L. ed. 513, 11 Sup. Ct. Rep. 770; *Strauder v. West Virginia*, 100 U. S. 310, 25 L. ed. 666; *Rawlins v. Georgia*, 201 U. S. 639, 50 L. ed. 899, 26 Sup. Ct. Rep. 560, 5 A. & E. Ann. Cas. 783.

A state is not restricted by either Constitution or laws of the United States as to the manner in which its peace officers shall serve warrants issued by its courts.

Gibson v. Mississippi, 162 U. S. 591, 40 L. ed. 1081, 16 Sup. Ct. Rep. 904; *Andrews v. Swartz*, 156 U. S. 272-276, 39 L. ed. 422, 423, 15 Sup. Ct. Rep. 389; *Bergemann v. Backer*, 157 U. S. 655-659, 39 L. ed. 845-848, 15 Sup. Ct. Rep. 727.

An instruction by a state court to a jury, which does not present any Federal question, need not be considered by this court.

Hannibal & St. J. R. Co. v. Missouri River Packet Co. 125 U. S. 273, 31 L. ed. 736, 8 Sup. Ct. Rep. 874; *Davis v. Texas*, 139 U. S. 651-657, 35 L. ed. 300-303, 11 Sup. Ct. Rep. 675; *West v. Louisiana*, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650.

It is not the duty of the constable executing the warrant to inquire into the constitutionality of the law under which the warrant is issued.

3 *Russell, Crimes*, p. 97.

An officer acting in good faith and in obedience to a warrant of arrest apparently regular, issued from a court having jurisdiction of the subject-matter, is not liable for imprisonment.

Leger v. Warren, 62 Ohio St. 500, 51 L.R.A. 193, 78 Am. St. Rep. 738, 57 N. E. 506.

So, where the writ or warrant is valid on its face, the officer is not liable for executing the same, although the ordinance may be invalid or unconstitutional; as where the ordinance is unconstitutional on account of unreasonableness and discrimination in favor of residents.

Brooks v. Mangan, 86 Mich. 576, 24 Am. St. Rep. 137, 49 N. W. 633.

A marshal is not liable for false imprisonment for making an arrest under an invalid ordinance against peddling, where the justice who issues the warrant has jurisdiction for prosecuting violations of ordinances, and the marshal is the proper officer to execute the process.

Hofschulte v. Doe, 78 Fed. 437.

If one resists an officer in the execution of a process issued by a court having jurisdiction of the subject-matter, and if the process is regular on its face, such resistance is indictable.

2 *Am. & Eng. Enc. Law*, p. 910.

Refusal of the trial judge to direct a verdict, and the affirmance by the supreme court of his refusal, was upon a ground entirely independent of the validity of the warrant and of the statute referred to.

Gatewood v. North Carolina, 203 U. S. 542, 51 L. ed. 310, 27 Sup. Ct. Rep. 167.

This court has no jurisdiction to revise the decision of the highest court of a state upon a pure question of fact, although a Federal question might arise if the question of fact were decided in a particular way.

Israel v. Arthur, 152 U. S. 362, 38 L. ed. 478, 14 Sup. Ct. Rep. 583; *Dower v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452.

The highest court of the state is, except in the matter of contracts, the ultimate tribunal to determine the meaning of its statute.

Bachtel v. Wilson, 204 U. S. 36, 51 L. ed. 357, 27 Sup. Ct. Rep. 243.

The jury commissioners could not exercise an arbitrary discrimination, and certainly no discrimination was meant or could be assumed on account of race, color, or previous condition.

Murray v. Louisiana, 163 U. S. 108, 41 L. ed. 90, 16 Sup. Ct. Rep. 990; *Gibson v. Mississippi*, 162 U. S. 566, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Martin v. Texas*, 200 U. S. 319, 50 L. ed. 498, 26 Sup. Ct. Rep. 338; *Thomas v. Texas*, 212 U. S. 283, 53 L. ed. 514, 29 Sup. Ct. Rep. 393; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567.

Mr. Justice Day delivered the opinion of the court:

The plaintiff in error, Pink Franklin, a citizen of the negro race, was convicted, in the court of general sessions for the county of Orangeburg, South Carolina, of the crime of murder by the shooting of one H. E. Valentine; thereupon he was sentenced to suffer the death penalty, and upon appeal to the supreme court of South Carolina the judgment of the court of general sessions was affirmed. 80 S. C. 332, 60 S. E. 953. The case is here upon a writ of error to the supreme court of South Carolina.

The record discloses that the homicide occurred upon the attempt of H. E. Valentine, a constable, to arrest Franklin upon a charge of "having violated and broken 163] *an agricultural contract," against the form of a statute made and provided in such cases in the state of South Carolina. The statute referred to is § 357 of the Criminal Code of South Carolina, which provides:

"Any laborer working on shares of crop or for wages in money or other valuable consideration, under a verbal or written con-

tract to labor on farm lands, who shall receive advances either in money or supplies, and thereafter wilfully, and without just cause, fail to perform the reasonable service required of him by the terms of said contract, shall be liable to prosecution for a misdemeanor, and on conviction shall be punished by imprisonment for not less than twenty days, nor more than thirty days, or to be fined in the sum of not less than \$25 nor more than \$100, in the discretion of the court: Provided, the verbal contract herein referred to shall be witnessed by at least two disinterested witnesses."

Upon the filing of the complaint before a magistrate, what is termed an arrest warrant was issued, directed to Henry E. Valentine, as special constable, commanding him to apprehend the plaintiff in error because of the alleged violation of the agricultural contract, and to bring him before the magistrate, to be dealt with according to law.

As it becomes necessary, in considering the Federal questions raised in the record, to know the facts concerning the homicide, we take occasion to briefly summarize such as are pertinent. The testimony offered for the state and that offered for the plaintiff in error differed widely as to what occurred at the time the constable was shot. The record discloses that about the time of the attempted arrest, Valentine, the constable, summoning one Carter to assist him, about 3 o'clock on the morning of the homicide, proceeded to the farm of one Spires, who lived near to Franklin's house, and requested him to induce Franklin to go to his house, that he might be there arrested. *Ac- [164 cordingly, Spires went to Franklin's, and, having aroused him, asked him to do some plowing for him. Franklin replied that he would do the plowing that afternoon, but could not work for Spires that morning. Thereupon Valentine and Carter went to Franklin's house to make the arrest. For the state the testimony tended to show that the door of Franklin's house and the inner door of his bedroom were open; that Valentine rapped with a knife on the steps of the house, and called to Franklin, and received no response; that Valentine thereupon directed Carter to go around the house, which he did, and Valentine, entering the door, was instantly shot by Franklin, and Valentine's pistol was seized and wrung from his hand; that after he was shot a colored woman came in with an axe and said that she had a good will to finish up the job; that Carter, upon hearing the pistol shots, which were fired in rapid succession, ran around the house, and was caught by the leg by Franklin's son, a small boy; that up-

on entering the house he, too, was shot, receiving a slight wound.

On the other hand, the accused testified that he had no acquaintance with Valentine; that he did not know that he was an officer of the law and armed with a warrant for his arrest; that he heard nothing until the door was hurled open, and Valentine said to him "Hands up!" that he (Franklin) did not move; that Valentine shot him, inflicting a wound in his shoulder; that he fell down by his pallet, got his gun, and fired, intending to get out of the way, and did get out as fast as he could.

In a proceeding of this kind this court has no jurisdiction to notice other errors than those which involve alleged violations of Federal rights secured by the Constitution of the United States or Federal statutes. The states have the right to administer their own laws for the prosecution of crime, and the jurisdiction of this court extends only to the reversal of such state proceedings [165] where fundamental rights secured by the Federal law have been denied by the proceedings in the state courts. *Rogers v. Peck*, 199 U. S. 425, 434, 50 L. ed. 256, 260, 26 Sup. Ct. Rep. 87, and cases there cited.

We will proceed, then, to examine the errors assigned which may be fairly said to raise Federal questions reviewable here. A motion was made to quash the indictment because of the disqualification of the grand jury which returned it. The argument being that the Federal act of June 25, 1868 (15 Stat. at L. 73, chap. 70), provides that the Constitutions of certain states, including South Carolina, should never be amended or changed so as to deprive any citizen or class of citizens of the United States, of the right to vote in said state, given to them by the Constitution thereof, named in the act, except for the punishment for crimes such as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the states. The necessary qualifications of voters in South Carolina at that time were defined in § 2, article 8, of the Constitution of South Carolina of 1868, and were: "Every male citizen of the United States of the age of twenty-one years and upwards, not laboring under the disabilities named in this Constitution, without distinction of race, color, or former condition, who shall be a resident of this state at the time of the adoption of this Constitution, or who shall thereafter reside in this state one year and in the county in which he offers to vote sixty days next preceding any election, shall be entitled to vote for all officers that are now or hereafter may be elected by the people, and upon all questions submitted to the electors at

any elections: Provided, that no person shall be allowed to vote or hold office who is now or hereafter may be disqualified therefor by the Constitution of the United States until such disqualification shall be removed by the Congress of the United States: Provided further, that no person, while kept in any almshouse or asylum, or of unsound mind, or confined in any public *prison, shall be allowed to vote or [166 hold office." These qualifications for voters were changed by the Constitution of 1895, and now are:

"Art. 2, § 4. The qualifications for suffrage shall be as follows: '(a) residence in the state for two years, in the county one year, in the polling precinct in which the elector offers to vote, four months, and the payment, six months before any election, of any poll tax then due and payable; . . . (d) Any person who shall apply for registration after January 1st, 1898, if otherwise qualified, shall be registered: Provided, that he can both read and write any section of this Constitution submitted to him by the registration officer, or can show that he owns and has paid all taxes collectible during the previous year on property in this state assessed at three hundred dollars (\$300) or more.'"

This change in the qualification for voters, it is said, worked a deprivation of the rights of the accused, because the qualification of grand jurors under the Constitution of 1895, they being required to be electors of the state, made eligible different persons than those who were qualified to be electors under the Constitution of 1868. As to this contention, the South Carolina supreme court held that the Constitution of 1895 laid no restriction on color or previous condition to entitle one to be an elector; that the act of Congress of 1868 had no reference to the selection of jurors, and that it was inapplicable to the Constitution of the state in regard to juries.

If it could be held that the act of Congress restricted the state of South Carolina in fixing the qualifications for suffrage, it is unnecessary to decide the point in this case, as there is nothing in the record to show that the grand jury, as actually impaneled, contained any person who was not qualified as an elector under the Constitution of 1868, nor is there anything to show that the grand jury was so made up as to prevent citizens of the race of the *plaintiff in error from sitting there- [167 ou. There was no allegation in the motion to quash upon this ground, or offer of proof in the case to show that persons of the African race were excluded because of their race or color from serving as grand jurors in the criminal prosecution of a person of

that race; therefore the case does not come within the rule laid down in *Carter v. Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687; *Rogers v. Alabama*, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257, and kindred cases. Moreover, if the restriction upon the right to fix qualifications for suffrage in the Federal act could have the effect contended for as to subsequent state action, there was nothing in the act to prevent the selection of grand jurors having the qualifications prescribed for electors in the Constitution of 1895, in the absence of a showing that such legislation operated to exclude citizens from such juries on account of race. *Re Shibuya Jugiro*, 140 U. S. 297, 298, 35 L. ed. 513, 11 Sup. Ct. Rep. 770. In this class of cases, when the real objection is that a grand jury is so made up as to exclude persons of the race of the accused from serving in that capacity, it is essential to aver and prove such facts as establish the contention. *Martin v. Texas*, 200 U. S. 316, 50 L. ed. 497, 26 Sup. Ct. Rep. 338.

It is next contended, concerning the jury law of South Carolina, that it confers arbitrary power upon the jury commissioners in selecting jurors. Section 2 of the act of 1902 provides (p. 1066):

"They [the jury commissioners] shall . . . prepare a list of such qualified electors under the provisions of the Constitution, between the ages of twenty-one and sixty-five years, and of good moral character, of their respective counties, as they may deem otherwise well qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions, which list shall include not less than one from every three of such qualified electors," etc.

We do not think there is anything in this provision of the statute having the effect to deny rights secured by the Federal Constitution. It gives to the jury commissioners *the right to select electors of good moral character, such as they may deem qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions. There is nothing in this statute which discriminates against individuals on account of race or color or previous condition, or which subjects such persons to any other or different treatment than other electors who may be qualified to serve as jurors. The statute simply provides for an exercise of judgment in attempting to secure competent jurors of proper qualifications. *Murray v. Louisiana*, 163 U. S. 101, 108, 41 L. ed. 87, 90, 16 Sup. Ct. Rep. 990; *Gibson v. Mississippi*, 162 U. S. 565, 589, 40 L. ed. 1075, 1081, 16 Sup. Ct. Rep. 904.

Under this statute, the supreme court of 54 L. ed.

South Carolina held that the jury commissioners were only required to select men of good moral character, and that competent colored men were equally eligible with others for such service. We find no denial of Federal rights in this provision of the statute.

It is next contended that the plaintiff in error was denied due process of law in the refusal of the court to continue his case when the same was called for trial. It is elementary that the matter of continuance rests in the sound discretion of the trial court, and its action in that respect is not ordinarily reviewable. It would take an extreme case to make the action of the trial court in such a case a denial of due process of law. A continuance was asked for because, it was alleged, the counsel for the accused had not had sufficient time or opportunity to examine the notes of the testimony taken before the coroner who investigated the case. The record discloses that, in support of the motion to continue, counsel for the plaintiff in error made affidavit that, two weeks before the beginning of the term, he had called upon the clerk of the court, and asked to see the testimony taken before the coroner, and that the clerk had informed him that the coroner kept his book in a room upstairs, but that the *room was locked at the time; [169 that the plaintiff in error's counsel thereupon made a search for the coroner, and that, failing to find him, he called upon the solicitor for the state, and asked him if he had the original testimony, and the same was handed him, which testimony was partly in shorthand, and the stenographer who took the same being out of town at the time, counsel for the accused could therefore not get a proper and intelligent reading of the testimony. Counsel for the accused further deposed that he called upon the deputy sheriff and asked him to go into the room used by the grand jury at the time, to get the coroner's book. This was on Tuesday or Wednesday of the week of the trial. He found, upon examination, that the testimony had not been copied into the coroner's book, and that therefore the counsel were not enabled to read and become familiar with the testimony "absolutely needed for contradiction on the trial of such causes." Counsel for the state stated in this connection that when the attorney for the accused came to his office and asked for the coroner's inquisition, he handed to him the papers in the case, telling him at the time that he did not know whether he could read them or not, because they were written in a kind of short or running hand; that he had suppressed no record in the

case, and had given the counsel all the records which he had; that the record was written in a kind of running long hand; that the young man who took the testimony was out of town at the time, and that he had so stated. Upon this showing, the court declined to continue the case. Certainly there was no deprivation of due process of law in this action.

It is next contended that the court erred in refusing to direct a verdict upon motion of the defendant's counsel at the close of the testimony, because the warrant on which the deceased attempted to arrest the plaintiff in error was null and void, be-
170] cause the act under which it *was issued was unconstitutional, and this, so far as Federal questions are concerned, because it was in violation of Art. 4, and repugnant to the 13th and 14th Amendments of the Federal Constitution. Responding to this motion to direct an acquittal, the court said:

"It is not necessary to argue that point further, even if you were to establish the fact that the warrant were null and void, or even if the man had no warrant at all, it would not be competent for the court to direct a verdict in favor of the defendant Pinkney Franklin, and the motion is refused. I will also leave it to the jury as to the guilt or innocence of the other defendant. I don't care to discuss the matter, but I do not apprehend that it is a case in which the court ought to direct a verdict in case of either of the defendants, and the motion is therefore refused."

The only Federal question raised in this connection is found in this denial of the motion to direct a verdict in favor of the accused, because the statute under which he was sought to be arrested was void under the Federal Constitution, and the warrant issued for his arrest under such unconstitutional law therefore void and of no effect. That the statute under which the proceedings were had and the warrant issued is unconstitutional was held by the supreme court of South Carolina in *Ex parte Hollman*, 79 S. C. 1, 21 L.R.A. (N.S.) 242, 60 S. E. 19, 14 A. & E. Ann. Cas. 1105. In that case the court reached the conclusion that the statute in question not only violated the Constitution of the state, but was in contravention of the 13th and 14th Amendments to the Constitution of the United States, and § 1990 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1266), known as the peonage statute. See *Clyatt v. United States*, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429.

But an inspection of this record does not disclose that by any request to charge,

or otherwise, any advantage was sought to be taken of the unconstitutionality of the act other than is found in the request for the peremptory *instruction to acquit [171 the accused. Even if one attempted to be arrested under process issued under a void and unconstitutional law has the right to resist arrest, even to the taking of human life (a point we do not find it necessary to decide), the case could not have been taken from the jury upon the testimony disclosed in this record. The right to make such resistance to the officer, under the circumstances here shown, must have been left to the determination of the jury, under proper instructions. In this case, if the state's testimony is to be believed, the accused, without any warning, or resorting to any other means of resistance, and after the constable had knocked for admission, shot the officer upon his entering the open door, armed with a supposed warrant of arrest. Upon this showing, the case could certainly not be taken from the jury because of any supposed right to resist with all necessary force an unlawful arrest because of the invalidity of the statute, or the warrant issued in pursuance thereof.

It was insisted in the oral argument of this case, and an elaborate brief was filed by eminent counsel, making the contentions that the proceedings for the arrest of the accused were in violation of the 13th Amendment to the Constitution, and of § 1990 of the Revised Statutes of the United States, abolishing and prohibiting peonage, and declaring null and void the resolutions, regulations, and usages of any state or territory in that respect; and that they were in violation of § 5526 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3715), punishing any person who holds, arrests, or returns, or causes to be held, arrested, or returned, or in any way aids in the arrest or return of, any person to a condition of peonage, and were in violation of the 13th Amendment. This being so, and the statute and the warrant being illegal and void, the accused, it is contended, had the right to use all reasonable force to protect his person, his liberty, and his habitation *from such [172 unlawful arrest; and that therefore the firing of the fatal shot was only a reasonable use of force for the defense of the accused under the circumstances shown.

But, as we have said, the only attempt to raise questions of a Federal character concerning the validity of the statute and the warrant under which it was issued, and the right to resist arrest under such warrant, was in the request for a peremptory instruction for an acquittal. Even upon the theory of his rights now advanced, he

was not entitled to a peremptory instruction taking the case from the jury.

The supreme court of South Carolina considered and overruled certain grounds of appeal, which embrace objections to the charge. But we do not find in these rulings any determination of Federal questions adverse to the plaintiff in error which would warrant a reversal of the judgment by this court. These rulings were upon questions of general law, concerning which no Federal right was asserted and denied, as is essential to enable this court to review the judgment of a state court.

After giving this case the examination its importance deserves, in view of its gravity, we are unable to find in the record anything which worked a deprivation of Federal rights, warranting this court in disturbing the judgment of the Supreme Court of South Carolina, and the judgment is affirmed.

Affirmed.

173] *JOHN A. WATSON, Plff. in Err.,
v.

STATE OF MARYLAND.

(See S. C. Reporter's ed. 173-180.)

Error to state court — questions reviewable — statutory construction.

1. The construction given by the Maryland court of appeals to Md. Code 1904, art. 43, § 99, making it a misdemeanor to attempt to practise medicine without registration, as not being subject to the limitations of § 80 of that article, relating to the sending of notice to unregistered physicians, is conclusive upon the Federal Supreme Court on writ of error to the state court.

[For other cases, see Appeal and Error, 2124-2151, in Digest Sup. Ct. 1908.]

NOTE. — On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to State ex rel. Hill v. Doekery, 63 L.R.A. 571.

On notice and hearing required to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

For a discussion of police power generally—see notes to State v. Marshall, 1 L.R.A. 51; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; State v. Schlemmer, 10 L.R.A. 135; and Barbier v. Connolly, 28 L. ed. U. S. 923.

54 L. ed.

Constitutional law — due process of law — notice.

2. A conviction for practising medicine without registration, contrary to Md. Code 1904, art. 43, § 99, is not wanting in due process of law because the accused was not given the notice required by § 80 of that article to be sent to unregistered physicians, where he had a trial before a court and jury under the Maryland statutes, was proceeded against under the forms provided for by the laws of that state, and the section under which the conviction was had has been construed by the highest court of the state completely to define the offense without resorting to the necessity of notifying unregistered physicians before they become liable to the penalties for practising without registration.

[For other cases, see Constitutional Law, 696-773, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — registration of physicians — classification — police power.

3. The exemption from the provisions of Md. Code 1904, art. 43, § 83, for the registration of physicians, in favor of those physicians who were then practising in the state, and had so practised prior to January 1, 1898, and could prove by affidavit that within one year of said date they had treated at least twelve persons in their professional capacity, is not such an unreasonable and arbitrary classification as renders the statute invalid, as denying the equal protection of the laws, but is within the discretion vested in the legislature in exercising the police power.

[For other cases, see Constitutional Law, 337-368, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — registration of physicians — classification — police power.

4. Resident physicians or assistant physicians at hospitals, and students on hospital or dispensary duty or in the office of physicians, physicians and surgeons from other states, or residing on the borders of a neighboring state, Army and Navy surgeons, chiropodists, midwives, and masseurs, could be exempted by Md. Code 1904, art. 43, § 101, from the provisions of that article for the registration of physicians, without rendering the statute invalid as denying the equal protection of the laws.

[For other cases, see Constitutional Law, 337-368, in Digest Sup. Ct. 1908.]

[No. 174.]

Argued and submitted April 27, 1910. Decided May 31, 1910.

IN ERROR to the Court of Appeals of the State of Maryland to review a judgment which affirmed a conviction in the Circuit Court of Allegany County for practising medicine without registration. Affirmed.

See same case below, 105 Md. 650, 66 Atl. 635.

The facts are stated in the opinion.

Mr. Charles G. Watson argued the cause, and, with Mr. Ferdinand Williams, filed a brief for plaintiff in error:

Class legislation less unreasonable has been declared unconstitutional in some of the following cases:

Dent v. West Virginia, 129 U. S. 121, 124, 32 L. ed. 626, 627, 9 Sup. Ct. Rep. 231; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *State v. Pennoyer*, 65 N. H. 113, 5 L.R.A. 709, 18 Atl. 878.

If the statute makes classifications that are unnecessary and without due regard to the fitness of the persons composing some of the classes, or imposes greater burdens on some than on other persons similarly situated, then it must be in conflict with the 14th Amendment.

Caldwell v. Texas, 137 U. S. 692, 697, 34 L. ed. 816, 818, 11 Sup. Ct. Rep. 224.

Mr. Isaac Lobe Straus submitted the cause for defendant in error:

The law providing for the registry and official examination of physicians and surgeons before they are permitted to practise medicine is constitutionally valid as clearly within the police power of the state, and as not repugnant to any clause of the state or Federal Constitution.

Manger v. State Medical Examiners, 90 Md. 659, 45 Atl. 891; *Scholle v. State*, 90 Md. 729, 50 L.R.A. 411, 46 Atl. 326; *State v. Knowles*, 90 Md. 646, 49 L.R.A. 695, 45 Atl. 877; *Dent v. West Virginia*, 129 U. S. 126, 32 L. ed. 627, 9 Sup. Ct. Rep. 231; *Williams v. Dental Examiners*, 93 Tenn. 619, 27 S. W. 1019; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 293, 294, 42 L. ed. 1042, 1043, 18 Sup. Ct. Rep. 594; *Cooley, Const. Law*, 3d ed. pp. 256, 257.

The power of the state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine, and punishing those attempting to engage therein in defiance of such statutory provisions, is not open to question.

Reetz v. Michigan, 188 U. S. 506, 47 L. ed. 564, 23 Sup. Ct. Rep. 390; 4 Enc. U. S. Sup. Ct. Rep. p. 377; *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 41 L.R.A. 212, 50 N. E. 750.

The reasons upon which are based the exceptions provided for in the statute under consideration are so manifest and appro-

priate that there is no necessity or occasion for argument concerning them.

Scholle v. State, 90 Md. 741, 50 L.R.A. 411, 46 Atl. 326; *State v. Van Doran*, 109 N. C. 864, 14 S. E. 32.

*Mr. Justice Day delivered the [174 opinion of the court:

The plaintiff in error was convicted in the circuit court of Allegany county, Maryland, for a violation of § 99 of article 43 of the Maryland Code of 1904, for the offense of practising medicine in the state of Maryland without being registered in accordance with the provisions of §§ 83 and 89 of the same article. The Maryland act in question, requiring registration of physicians, provides a comprehensive system for the regulation of the practice of medicine and surgery, and, concerning the necessity of registration, enacts (art. 43, § 83):

"All persons, except physicians who were practising medicine in this state prior to the 1st day of January, 1898, who are now practising medicine or surgery, and can prove by affidavit that within one year of said date said physician had treated in his professional capacity at least twelve persons, who shall commence the practice of medicine or surgery in any of their branches after the 11th day of April, 1902, shall make a written application for license to the president of either board of medical examiners," etc.

The statute requires proof of good moral character, certain school education, and makes provision as to the effect of diplomas from certain medical colleges, and as to other and various details required of an applicant for the practice of medicine or surgery.

The judgment of conviction was affirmed by the court of appeals of Maryland (105 Md. 650, 66 Atl. 635), and the case is brought here to review that judgment, because of alleged violation of certain rights secured to the plaintiff in error by the Federal Constitution. The first of these grounds concerns § 80 of the same act, which provides for the sending of notice to physicians practising in the state without being legally registered, and further providing that those physicians being entitled to register, and yet have failed to comply at the expiration of four months from the election of the secretary-treasurer of the board, shall be prosecuted; and that no one after the 11th day of April, 1902, shall be allowed to practise medicine or surgery without being duly registered according to the provision of the subtitle.

The contention of the plaintiff in error is that there being no charge in the indictment, nor proof in the case, that he was

furnished with this notice, his conviction was without due process of law. But the court of appeals of Maryland, examining this question, determined that § 99, under which the indictment was prosecuted, making it a misdemeanor to attempt to practise medicine in the state of Maryland without registration, was not subject to the limitations of § 80, relating to the sending of the notice, etc.

The offense, the court of appeals held, was created solely by § 99 in broad and general language, without exceptions or qualification, and that for conviction under that section it was not essential to prove the sending of the notice required by § 80. This construction of the Maryland statute is conclusive upon us. The accused had a trial before a court and jury under the statutes of Maryland, was proceeded against under the forms provided for by the laws of that state, and under a statute which the highest court of the state has held completely defined the offense without resorting to the necessity of notifying unregistered physicians before they became liable for the penalties of the act for practising without registration. The contention that the conviction in this aspect was without due process of law under the Federal Constitution cannot be sustained.

It is next contended that § 83 violates the Federal Constitution, in the 14th Amendment thereof, in denying to the plaintiff in error the equal protection of the laws, in that it makes unreasonable and arbitrary [176] *distinctions in its classification of physicians, including some and excluding others, and in making unreasonable omissions of certain classes from the requirements of the act, as shown in the exemption of certain classes from its requirements. It is contended that to except from the provisions of the act the physicians who were practising medicine in the state prior to the 1st day of January, 1898, who, at the time of the passage of the act, were practising medicine or surgery, and who could prove by affidavit that within one year of said date they had treated at least twelve persons in their professional capacity, is an unreasonable and arbitrary classification, resulting in the exclusion from the exception of physicians of equal merit and like qualifications with those who are within its terms.

It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine. Deal-

ing, as its followers do, with the lives and health of the people, and requiring for its successful practice general education and technical skill, as well as good character, it is obviously one of those vocations where the power of the state may be exerted to see that only properly qualified persons shall undertake its responsible and difficult duties. To this end many of the states of the Union have enacted statutes which require the practitioner of medicine to submit to an examination by a competent board of physicians and surgeons, and to receive duly authenticated certificates showing that they are deemed to possess the necessary qualifications of learning, skill, and character essential to their calling. In *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231, the subject is elaborately considered, and this view affirmed by Mr. Justice Field, speaking for the court.

*In such statutes there are often [177 found exceptions in favor of those who have practised their calling for a period of years. In the *Dent Case*, supra, an exception was made in favor of practitioners of medicine who had continuously practised their profession for ten years prior to a date shortly before the enactment of the law. Such exception proceeds upon the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest as a result of an examination before a board of medical experts. In the statute under consideration, the excepted class were those who had practised before the 1st day of January, 1898, being more than four years before the passage of the law, and who could show, presumably with a view to establishing that they were actively practising at that time, that they had treated at least twelve persons within one year of that date.

Conceding the power of the legislature to make regulations of this character, and to exempt the experienced and accepted physicians from the requirements of an examination and certificate, the details of such legislation rest primarily within the discretion of the state legislature. It is the lawmaking body, and the Federal courts can only interfere when fundamental rights guaranteed by the Federal Constitution are violated in the enactment of such statutes.

This subject has been so frequently and recently before this court as not to require an extended consideration. The right to regulate occupations was considered by this court at the present term in the case of *Williams v. Arkansas*, 217 U. S. 79, ante, 673, 30 Sup. Ct. Rep. 493, in which it was held that a state statute which prohibited

a certain class of drumming or soliciting of business on trains did not amount to a denial of the equal protection of the law. In that case the recent cases in this court were 178] reviewed and followed. *It was therein held that regulations of a particular trade or business essential to the public health and safety were within the legislative capacity of the state in the exercise of its police power, and that unless such regulations are so unreasonable and extravagant as to interfere with property and personal rights of citizens, unnecessarily and arbitrarily, they are within the power of the state; and that the classification of the subjects of such legislation, so long as such classification has a reasonable basis, and is not merely arbitrary selection without real difference between the subjects included and those omitted from the law, does not deny to the citizen the equal protection of the laws. Applying these tests, we see nothing arbitrary or oppressive in the classification of physicians subject to the provisions of this statute, which excludes from its requirements those who have practised prior to January 1, 1898, and were able to show that they had treated at least twelve persons in a professional way within a year of that date.

But it is insisted that undue discrimination is shown and equal protection of the law denied in the exceptions of the statute provided for in art. 43, § 101, of the Code. These exceptions are contained in the following portions of that section:

“ . . . but nothing herein contained shall be construed to apply to gratuitous services, nor to any resident or assistant resident physicians or students at hospitals, in the discharge of their hospital or dispensary duties, or in the office of physicians, or to any physician or surgeon from another state, territory, or district in which he resides, when in actual consultation with a legal practitioner of this state, or to commissioned surgeons of the United States Army or Navy or Marine Hospital Service, or to chiropodists, or to midwives, or to masseurs or other manual manipulators, who use no other means; nor shall the provisions of this subtitle apply to physicians 179] or surgeons *residing on the borders of a neighboring state, and duly authorized under the laws thereof to practise medicine or surgery therein, whose practice extends into the limits of this state: Provided, that such practitioners shall not open an office or appoint places to meet their patients or receive calls within the limits of this state without complying with the provisions of this subtitle: Provided, that the same privileges be accorded to licensed physicians of this state: Provided, further, that nothing in this subtitle shall annul any of the

provisions of article 32, title ‘Dentistry,’ nor shall apply to any registered graduate of dental surgery now practising in the said state of Maryland, with the sign titles: Dentist, surgeon dentist, dental surgeon, or stomatologist.”

The court of appeals of Maryland contented itself on this branch of the case with a reference to its former decisions as to certain of the exceptions, and, as to the others, with the expression of the opinion that all of them came within the discretion vested in the legislature, in the exercise of the police power, to make regulations for the public health and safety. We shall not take occasion to consider each of these exceptions. A reading of them makes it manifest that they are not without reason. Before a law of this kind can be declared violative of the 14th Amendment as an unreasonable classification of the subjects of such legislation because of the omission of certain classes, the court must be able to say that there is “no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.” Such was the expression of this court in *Missouri, K. & T. R. Co. v. May*, 194 U. S. 269, 48 L. ed. 972, 24 Sup. Ct. Rep. 638, quoted with approval in *Williams v. Arkansas*, supra.

The stress of the argument for the plaintiff in error as to these exceptions is put upon the exemption of resident physicians, or assistant physicians, at hospitals, and students on hospital and dispensary duties. The selection *of the exempted classes [180 was within the legislative power, subject only to the restriction that it be not arbitrary or oppressive, and apply equally to all persons similarly situated. We cannot say that these exceptions nullify the law. The reason for them may be that hospitals are very often the subject of state or municipal regulation and control, and employment in them may be by boards responsible to public authority under state law or municipal ordinance. Certainly the conduct of such institutions may be regulated by such laws or municipal regulations as might not reach the general practitioner of medicine. In any event, we cannot say that these exceptions are so wholly arbitrary and have such slight relation to the objects to be attained by the law as to require the courts to strike them down as a denial of the equal protection of the law, within the meaning of the Federal Constitution.

Other questions are made in the record, but they do not present alleged denials of rights of a Federal character, reviewable here. We find no error in the judgment of the Court of Appeals of Maryland, and the same is affirmed.

Affirmed.

CITY OF OMAHA, Petitioner,
v.
OMAHA WATER COMPANY.

(See S. C. Reporter's ed. 180-205.)

Municipal corporations — water supply — purchase — majority decision of appraisers.

1. The appraisal of a waterworks plant where a municipality elects, under legislative authority, to exercise its option to purchase at a value to be determined by three engineers, one each to be selected by the city and the waterworks company, and the third by the two so selected, is a matter of public concern, and unanimity among the appraisers is therefore unnecessary, the decision of the majority being sufficient.

[For other cases, see *Municipal Corporations*, II. f, in *Digest Sup. Ct. 1908.*]

Municipal corporations — water supply — purchase — procedure of appraisers.

2. The valuation of a waterworks plant, made by a board of appraisers where a municipality has elected, under legislative authority, to exercise its option to purchase at a value to be determined by three engineers, one each to be selected by the city and the waterworks company, and the third by the two so selected, is not vitiated, in the absence of any evidence of actual bad faith, by the examination of the company's books by the appraisers without the consent of the city, or the presence of its representatives, since the strict rules relating to arbitration and awards do not apply.

[For other cases, see *Municipal Corporations*, II. f, in *Digest Sup. Ct. 1908.*]

Municipal corporations — water supply — authority to purchase — suburban distributing system.

3. The city of Omaha had the power to acquire and operate a private waterworks plant as it existed, with its outlying distributing systems serving adjacent suburban towns, under Neb. Laws 1879, p. 99, providing for the construction and maintenance of waterworks "either within or without the corporate limits of the city," supplemented by Laws 1897, chap. 12a, § 27, granting the city power to appropriate any existing waterworks system lying within the city or in part without such city, and within 10 miles from the corporate limits, and by Laws 1903, chap. 12, providing a method of procedure for acquiring municipal water plants, and the creation of a water board for their control and management, and Laws 1907, chap. 12a, § 242, empowering water boards to contract with any municipality adjacent to said city to supply such municipality with water.

[For other cases, see *Municipal Corporations*, II. f, in *Digest Sup. Ct. 1908.*]

NOTE. — On establishment and regulation of municipal water supply—see note to *State ex rel. Hallauer v. Gosnell*, 61 L.R.A. 33.

54 L. ed.

Municipal corporations — water supply — purchase — outlying distributing systems.

4. The acquisition of a waterworks plant as it existed when the city made its election, under legislative authority, to exercise its option to purchase, including the outlying distributing systems serving adjacent suburban towns, must be deemed to have been within the contemplation of both the city and the waterworks company, where such system was a single one, having a common source of supply and common main connections therewith, unless the ordinance exercising the option is so plainly limited to the purchase of only so much of the distributing system as lay wholly within the corporate limits as to admit of no other meaning.

[For other cases, see *Municipal Corporations*, II. f, in *Digest Sup. Ct. 1908.*]

Municipal corporations — water supply — purchase — value as going concern.

5. The commercial value of a waterworks plant as a going concern is properly included in the valuation of the plant by the board of appraisers appointed, where the municipality has elected to exercise its option to purchase, although the ordinance exercising such option provides that nothing shall be paid for the unexpired franchise of the waterworks company.

[For other cases, see *Municipal Corporations*, II. f, in *Digest Sup. Ct. 1908.*]

[No. 159.]

Argued April 19, 1910. Decided May 31, 1910.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the Circuit Court for the District of Nebraska, dismissing a bill for the specific performance of the contract of a municipality for the purchase of a waterworks plant. Affirmed.

See same case below, 89 C. C. A. 205, 162 Fed. 225, 15 A. & E. Ann. Cas. 498.

The facts are stated in the opinion.

Mr. John Lee Webster argued the cause, and, with Messrs. Carl C. Wright and Harry E. Burnam, filed a brief for petitioner:

The fact that each party selected an appraiser, and these two the third appraiser, does not give the right, by implication or otherwise, to two appraisers to make an award, and an award so made and not concurred in by the third appraiser is void.

Willis v. Higginbotham, 61 Miss. 164; *Harvin v. Denton*, 87 Miss. 238, 39 So. 456; *Weaver v. Powel*, 148 Pa. 372, 23 Atl. 1070; *Lowe v. Brown*, 22 Ohio St. 463; *Stose v. Heissler*, 120 Ill. 433, 60 Am. Rep. 563, 11 N. E. 161; *Sherman v. Cobb*, 15 R. I. 570, 10 Atl. 591; *Memphis & C. R. Co. v. Pillow*, 9 Heisk. 248; *Jeffersonville R. Co. v. Mounts*,

7 Ind. 669; *Patterson v. Leavitt*, 4 Conn. 50, 10 Am. Dec. 98; *United Kingdom Mut. S. S. Assur. Asso. v. Houston* [1896] 1 Q. B. 567.

The rule of construction is that the contract of submission will be construed as requiring the award to be concurred in by all the appraisers or arbitrators, unless by express words or necessary implication it authorizes an award by less than all.

Richards v. Holt, 61 Iowa, 529, 16 N. W. 595; *Hubbard v. Great Falls Mfg. Co.* 80 Me. 39, 12 Atl. 878; *Lowe v. Brown*, supra; *Godfrey v. Knodle*, 44 Ill. App. 638; *Oakley v. Anderson*, 93 N. C. 108; *Mackey v. Neill*, 53 N. C. (8 Jones, L.) 214; *Anderson v. Farnham*, 34 Me. 161; *Owens v. Withee*, 3 Tex. 161; *Stosc v. Heissler and United Kingdom Mut. S. S. Assur. Asso. v. Houston*, supra.

All must concur in the award to make it valid, unless the parties have agreed that it may be made by less than all. Unless there is such an agreement, clearly and unmistakably expressed, the award will be held void when signed by two, and not concurred in by the third.

Leavitt v. Windsor Land & Invest. Co. 4 C. C. A. 425, 12 U. S. App. 193, 54 Fed. 439; *Harryman v. Harryman*, 43 Md. 140; *Byard v. Harkrider*, 108 Ind. 376, 9 N. E. 294; *Willis v. Higginbotham and Weaver v. Powel*, supra; *Eames v. Eames*, 41 N. H. 177; *Towne v. Jaquith*, 6 Mass. 46, 4 Am. Dec. 84; *Green v. Miller*, 6 Johns. 39, 5 Am. Dec. 184; *Patterson v. Leavitt*, supra; *Nettleton v. Gridley*, 21 Conn. 531, 56 Am. Dec. 378; *Jeffersonville R. Co. v. Mounts*, supra; *Smith v. Walden*, 26 Ga. 249; *Lattin v. Gamble*, 154 Mich. 178, 117 N. W. 575.

There are cases which recognize the correctness of the rules as we have stated them, but hold that an exception exists in cases where the two appraisers selected by the parties, in the event they do not agree, are to select a third appraiser. In that situation the courts hold that a third person so selected is to be treated in the character of an umpire.

Hobson v. M'Arthur, 16 Pet. 182, 10 L. ed. 930; *Home Ins. Co. v. M. Schiff's Sons*, 103 Md. 648, 64 Atl. 63; *Kelderhouse v. Hall*, 116 Ill. 147, 4 N. E. 652; *Knowlton v. Homer*, 30 Me. 552; *Fish v. Vermillion*, 70 Kan. 348, 78 Pac. 811; *Brush v. Fisher*, 70 Mich. 469, 14 Am. St. Rep. 510, 38 N. W. 446.

The rule which requires the concurrence of the three appraisers to a valid award, where each party selects one appraiser and the two select the third appraiser, applies with equal force to the valuers or appraisers of property as to arbitrators.

Sherman v. Cobb; *Lowe v. Brown*; *Jeffersonville R. Co. v. Mounts*; *Stosc v. Heissler*; and *Godfrey v. Knodle*,—supra.

A public appraisalment, within the meaning of the law, is one where the appraisers or arbitrators are appointed under a state or national law, and act as quasi public officers in the performance of a public duty.

Grindley v. Barker, 1 Bos. & P. 229; *R. v. Beetson*, 3 T. R. 529; *Withnell v. Gartham*, 6 T. R. 388; *Ex parte Rogers*, 7 Cow. 526; *Sinclair v. Jackson*, 8 Cow. 543; *Young v. Buckingham*, 5 Ohio, 485; *State ex rel. Abbeville County v. McMillan*, 52 S. C. 60, 29 S. E. 540; *Carroll v. Alsup*, 107 Tenn. 271, 64 S. W. 193; *Cortis v. Kent Waterworks Co.* 7 Barn. & C. 314.

To make an appraisalment a public one, as distinct from a private one, the appraisers must be appointed under and act under the authority of a general law, as quasi public officers.

Cooley v. O'Connor, 12 Wall. 391, 20 L. ed. 446; *Carroll v. Alsup* and *Cortis v. Kent Waterworks Co.* supra; *R. v. Whitaker*, 9 Barn. & C. 648; *People ex rel. Hawes v. Walker*, 23 Barb. 304; *People v. Coghill*, 47 Cal. 361; *Hewitt v. Craig*, 86 Ky. 23, 5 S. W. 280.

The *ex parte* examination by the board of appraisers of the books of the water company at Cincinnati, and against the protest of the city of Omaha, and without giving the city of Omaha an opportunity to examine said books or to be heard, was such misconduct as makes the award void.

Emery v. Owings, 7 Gill, 488, 48 Am. Dec. 580; *Bassett v. Harkness*, 9 N. H. 164; *Jenkins v. Liston*, 13 Gratt. 535; *Rand v. Peel*, 74 Miss. 305, 21 So. 10; *National Bank v. Darragh*, 30 Hun, 29; *Warren v. Tinsley*, 3 C. C. A. 613, 2 U. S. App. 507, 53 Fed. 689; *Cameron v. Castleberry*, 29 Ga. 495; *Walker v. Frobisher*, 6 Ves. Jr. 70; *Strong v. Strong*, 9 Cush. 560; *Hewitt v. Reed City*, 124 Mich. 6, 50 L.R.A. 128, 83 Am. St. Rep. 309, 82 N. W. 616; *Vessel Owners' Towing Co. v. Taylor*, 126 Ill. 250, 18 N. E. 663; *Elmendorf v. Harris*, 23 Wend. 628, 35 Am. Dec. 587; *Dobson v. Groves*, 6 Q. B. 637; *Western Female Seminary v. Blair*, 1 Disney (Ohio) 370; *Re Plews*, 6 Q. B. 845; *Re Tidswell*, 33 Beav. 213; *Passmore v. Pettit*, 4 Dall. 271, 1 L. ed. 830; *Wood v. Helme*, 14 R. 1. 325; *Jackson v. Roane*, 90 Ga. 669, 35 Am. St. Rep. 238, 16 S. E. 650; *Wilkins v. Van Winkle*, 78 Ga. 557, 3 S. E. 761; *Rosenau v. Legg*, 82 Ala. 568, 2 So. 441; *Knowlton v. Mickles*, 29 Barb. 465; *Sisk v. Garey*, 27 Md. 401; *Cleland v. Heddy*, 5 R. I. 163; *Lattin v. Gamble*, 154 Mich. 181, 117 N. W. 575; *Lutz v. Linthicum*, 8 Pet. 165, 8 L. ed. 904; *McFarland v. Mathis*, 10 Ark. 560; *Eastern Counties R. Co. v. Eastern Union R. Co.* 3 De G. J. & S. 610.

The receiving of *ex parte* evidence—the books of the water company—after the pub-

lic taking of evidence had been closed and arguments of attorneys made, aggravates the misconduct; and the award is void.

Walker v. Frobisher and Jackson v. Roane, *supra*; Catlett v. Dougherty, 114 Ill. 568, 2 N. E. 669; Wilkins v. Van Winkle; Hewitt v. Reed City; Rosenau v. Legg; Dobson v. Groves; Knowlton v. Mickles; Western Female Seminary v. Blair; Sisk v. Garey; Cleland v. Hedly; Bassett v. Harkness; and Rand v. Peel,—*supra*.

The court will not permit an inquiry into the effect of the *ex parte* evidence, but will set aside the award.

Jenkins v. Liston; Catlett v. Dougherty; National Bank v. Darragh; Hewitt v. Reed City; Cleland v. Hedly; and Knowlton v. Mickles,—*supra*.

It was not necessary for the city of Omaha to introduce evidence that the arbitrators were improperly influenced by the *ex parte* evidence.

Warren v. Tinsley and Elmendorf v. Harris, *supra*; Ingraham v. Whitmore, 75 Ill. 24; Alexander v. Cunningham, 111 Ill. 511; Jackson v. Roane, *supra*; Moshier v. Shear, 102 Ill. 169, 40 Am. Rep. 573; Shipman v. Fletcher, 82 Va. 601.

The award will be held to be void, even though it appears that the appraisers were respectable gentlemen, or did not consider the *ex parte* evidence, or were not influenced thereby.

Walker v. Frobisher; National Bank v. Darragh; Hewitt v. Reed City; Dobson v. Groves; Passmore v. Pettitt; Knowlton v. Mickles; McFarland v. Mathis; and Lattin v. Gamble,—*supra*.

The water company will not be heard to say that its conduct in presenting its books to the board of appraisers did not improperly influence them or produce harmful results.

Catlett v. Dougherty, *supra*. Insurance Co. of N. A. v. Hegewald, 161 Ind. 631, 66 N. E. 902.

An arbitrator who takes instructions from one side—as Mead did from the manager of the water company regarding the books—is in law acting corruptly.

Strong v. Strong and Western Female Seminary v. Blair, *supra*.

Valuers of property, although called appraisers, or referees, or commissioners, in receiving evidence and in making awards are governed by the law relating to arbitration.

Continental Ins. Co. v. Garrett, 60 C. C. A. 395, 125 Fed. 589; Christianson v. Norwich Union F. Ins. Soc. 84 Minn. 526, 87 Am. St. Rep. 379, 88 N. W. 16; Mason v. Fire Asso. of Philadelphia (S. D.) 122 N. W. 423; Hills v. Home Ins. Co. 129 Mass. 345; Washburn v. White, 197 Mass. 540, 84 N. E. 106; Insurance Co. of N. A. v. Hegewald, 161 Ind. 631, 66 N. E. 902.

wald, *supra*; Manufacturers' & B. F. Ins. Co. v. Mullen, 48 Neb. 620, 67 N. W. 445; Sherman v. Cobb, 15 R. I. 570, 10 Atl. 591; Lowe v. Brown, 22 Ohio St. 463; Godfrey v. Knodle, 44 Ill. App. 638; Stose v. Heissler, 120 Ill. 433, 60 Am. Rep. 563, 11 N. E. 161; Emery v. Owings, 7 Gill, 488, 48 Am. Dec. 580; Redner v. New York F. Ins. Co. 92 Minn. 306, 99 N. W. 886; Earle v. Johnson, 81 Minn. 472, 84 N. W. 332; Hart v. Kennedy, 47 N. J. Eq. 51, 20 Atl. 29.

The award is void because the appraisers exceeded their authority in appraising and including in the award a sum for going value.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19-52, 53 L. ed. 382-399, 29 Sup. Ct. Rep. 192.

The award includes property the city is without authority to purchase, to wit: Those parts within, and used only to supply water to, Florence, Dundee, East Omaha, and South Omaha.

National Waterworks Co. v. Kansas City, 65 Fed. 691.

A municipality acts under delegated power, and can exercise only such rights and powers as are expressly conferred or necessarily implied from express grants; and all grants of power are to be strictly construed.

Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48-53, 43 L. ed. 67-71, 18 Sup. Ct. Rep. 732; Ft. Scott v. W. G. Eads Brokerage Co. 54 C. C. A. 437, 117 Fed. 54; State ex rel. Ransom v. Irey, 42 Neb. 189, 60 N. W. 601.

Cities have no power to levy taxes for the purpose of maintaining, or to own or construct, waterworks for the benefit of adjoining municipalities.

Sutherland-Innes Co. v. Evert, 30 C. C. A. 305, 58 U. S. App. 335, 86 Fed. 597; Ottawa v. Carey, 108 U. S. 121, 27 L. ed. 674, 2 Sup. Ct. Rep. 361; Quincy v. Boston, 148 Mass. 389, 19 N. E. 519; Arnold v. Pawtucket, 21 R. I. 15, 41 Atl. 576; Duluth v. Duluth Gas & Water Co. 45 Minn. 210, 47 N. W. 781; Farwell v. Seattle, 43 Wash. 141, 86 Pac. 217; 10 A. & E. Ann. Cas. 130; Bristol v. Bristol & W. Waterworks, 23 R. I. 274, 49 Atl. 974.

Where the power of one city to supply another city with water has been sustained, there will be found express statutory authority to that end.

West Hartford v. Water Comrs. 68 Conn. 323, 36 Atl. 786; Pittsburgh v. Brace Bros. 158 Pa. 174, 27 Atl. 854.

A decree of specific performance will not be entered where the purchaser would only obtain an equitable title.

Wesley v. Eells, 177 U. S. 370, 44 L. ed.

810, 20 Sup. Ct. Rep. 661; *Tiffin v. Shawhan*, 43 Ohio St. 178, 1 N. E. 581; *Guild v. Atchison, T. & S. F. R. Co.* 57 Kan. 70, 33 L.R.A. 77, 57 Am. St. Rep. 312, 45 Pac. 82.

Owing to the fact that the award was signed by only two of the appraisers, and owing to the misconduct of the appraisers in receiving *ex parte* evidence, and owing to the fact that the award includes outside properties, etc., it is apparent that the minds of the parties were not agreed, either as to the manner of the appraisal, or as to what was to be included in the appraisal under the contract. The complainant has not proven such a clear right as entitles it to specific performance under the circumstances stated.

Willard v. Tayloe, 8 Wall. 557-565, 19 L. ed. 501-503; *Hennessey v. Woolworth*, 128 U. S. 438-442, 32 L. ed. 500-502, 9 Sup. Ct. Rep. 109; *McCabe v. Matthews*, 155 U. S. 550-553, 39 L. ed. 256-258, 15 Sup. Ct. Rep. 190; *Hildreth v. Duff*, 78 C. C. A. 410, 148 Fed. 676.

Although the proof may come far short of showing sufficient to authorize the court to set aside the award, nevertheless, it may be sufficient for a court of equity to refuse specific performance.

Shoop v. Burnside, 78 Kan. 876, 98 Pac. 202; *Banaghan v. Malaney*, 200 Mass. 49, 19 L.R.A. (N.S.) 871, 128 Am. St. Rep. 378, 85 N. E. 839.

The election of the city of Omaha to purchase was made February 24, 1903, the case was submitted to the appraisers December 31, 1904; the award was not handed down until July 7, 1906. These delays of themselves would be sufficient to deny the decree of specific performance.

Chicago, M. & St. P. R. Co. v. Stewart, 19 Fed. 5; *Gotthelf v. Stranahan*, 138 N. Y. 345, 20 L.R.A. 455, 34 N. E. 286; *Gish v. Jamison*, 96 Va. 312, 31 S. E. 521.

The award fixes the value of the property as of the date of the award, while the law requires the valuation to be fixed as of the date of the election to purchase.

Bristol v. Bristol & W. Waterworks, 25 R. I. 189, 55 Atl. 710; *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219, 69 Pac. 176; *Caldwell v. Frazier*, 65 Kan. 24, 68 Pac. 1076; *Rockport Water Co. v. Rockport*, 161 Mass. 279, 37 N. E. 168; *Chicago, M. & St. P. R. Co. v. Stewart*, supra.

Messrs. **Howard Mansfield** and **R. S. Hall** argued the cause, and, with Mr. Herbert C. Lakin, filed a brief for respondent:

An arbitration presupposes a pre-existing controversy or difference, which is to be determined by the arbitrators through an award akin to the judgment of a court.

Garr v. Gomez, 9 Wend. 651.

Even in cases of arbitration, the strict rules governing the trials and decisions of courts are not always applied.

Hall v. Norwalk F. Ins. Co. 57 Conn. 105, 17 Atl. 356; *Continental Ins. Co. v. Garrett*, 60 C. C. A. 395, 125 Fed. 589.

The vital distinction between an arbitration and an appraisal has been clearly and uniformly recognized from remote time by the courts.

Leeds v. Burrows, 12 East, 1; *Lee v. Hemingway*, 3 Nev. & M. 860; *Parkes v. Smith*, 15 Q. B. 305, note; *Collins v. Collins*, 26 Beav. 306; *Eads v. Williams*, 4 De G. M. & G. 674; *Bottomley v. Ambler*, 38 L. T. N. S. 545; *Fry, Spec. Perf.* 2d ed. § 341; *Garr v. Gomez*, 9 Wend. 649; *Garred v. Macey*, 10 Mo. 161; *Curry v. Lackey*, 35 Mo. 389; *Kelly v. Crawford*, 5 Wall. 785, 18 L. ed. 562; *Green & C. Streets Pass. R. Co. v. Moore*, 64 Pa. 79; *Palmer v. Clark*, 106 Mass. 373; *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L.R.A. 271, 38 N. E. 432; *Norton v. Gale*, 95 Ill. 533, 35 Am. Rep. 173; *Stose v. Heissler*, 120 Ill. 433, 60 Am. Rep. 563, 11 N. E. 161; *James v. Schroeder*, 61 Mich. 28, 27 N. W. 850; *Noble v. Grandin*, 125 Mich. 383, 84 N. W. 465; *California Annual Conference v. Seitz*, 74 Cal. 287, 15 Pac. 839; *Guild v. Atchison, T. & S. F. R. Co.* 57 Kan. 70, 33 L.R.A. 77, 57 Am. St. Rep. 312, 45 Pac. 82; *Wurster v. Armfield*, 175 N. Y. 256, 67 N. E. 584; *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565, 57 Atl. 746.

Having failed to raise the objection that the examination of the books without the presence of its counsel would imperil the report, until after the appraisal was completed, the city could not raise the objection then.

Drew v. Drew, 33 Eng. L. & Eq. Rep. 9.

The appraisal cannot be set aside or deprived of full effect as an ascertainment of the purchase price of the company's system of waterworks, except on positive proof of corruption, partiality, or actual misconduct.

Republic of Columbia v. Cauca Co. 106 Fed. 337; *Brush v. Fisher*, 70 Mich. 469, 14 Am. St. Rep. 510, 38 N. W. 446.

The acquisition by the city of Omaha of a system of waterworks is emphatically a matter of public concern.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Wagner v. Rock Island*, 146 Ill. 139, 21 L.R.A. 519, 34 N. E. 545; *Minneapolis Mill Co. v. Water Comrs.* 56 Minn. 485, 58 N. W. 33; *Winters v. Duluth*, 82 Minn. 127, 84 N. W. 788; *Eau Claire Water Co. v. Eau Claire*, 132 Wis. 411, 112 N. W. 458; *De Portibus Maris*, 1 Hargraves Law Tracts, 78; *Munn v. Illinois*, 94 U. S. 113, 126, 24 L. ed. 77, 84; *Budd v. New York*, 143 U. S. 517,

36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; State, Slingerland, Prosecutor, v. Newark, 54 N. J. L. 62, 23 Atl. 129; Kennebec Water Dist. v. Waterville, 96 Me. 234, 52 Atl. 774.

Public policy requires that, in a matter of public concern, the determination of a majority of the appraisers, where all meet to consider the matter, must be taken as the act of the whole.

Grindley v. Barker, 1 Bos. & P. 229; McCoy v. Curtice, 9 Wend. 17, 24 Am. Dec. 113; Cowan v. Murch, 97 Tenn. 598, 34 L.R.A. 538, 37 S. W. 393; Carroll v. Alsup, 107 Tenn. 271, 64 S. W. 193; People ex rel. Washington v. Nichols, 52 N. Y. 478, 11 Am. Rep. 734; Green v. Miller, 6 Johns. 39, 5 Am. Dec. 184; Ex parte Rogers, 7 Cow. 529; Young v. Buckingham, 5 Ohio, 485; Columbia v. Caueca Co. 190 U. S. 524, 47 L. ed. 1159, 23 Sup. Ct. Rep. 704; Wheeling Gas Co. v. Wheeling, 8 W. Va. 320.

If the contrary were to be held in a case like this, then the city might, through the withdrawal or nonconcurrence of its engineer at the end of the case, ascertain the extent and value of the company's property, and then avail itself of choice between completing or refusing to complete a purchase.

Montgomery Gaslight Co. v. Montgomery, 87 Ala. 245, 4 L.R.A. 616, 6 So. 113.

None of the decisions cited by counsel for the city in support of the contention that the report was void, because not concurred in by the three appraisers, is in conflict with the undeviating line of authority that unanimity in final determination is not necessary in matters of public concern. Not only is there no decision presented to the contrary, but in many of the cases cited the distinction is expressly recognized and stated.

Patterson v. Leavitt, 4 Conn. 50, 10 Am. Dec. 98; Harryman v. Harryman, 43 Md. 140; Lowe v. Brown, 22 Ohio St. 463; Hubbard v. Great Falls Mfg. Co. 80 Me. 39, 12 Atl. 878; Weaver v. Powel, 148 Pa. 372, 23 Atl. 1070; Cortis v. Kent Waterworks Co. 7 Barn. & C. 314.

By no means were all of the cases in which the majority rule has been applied of governmental character.

Crocker v. Crane, 21 Wend. 211, 34 Am. Dec. 228; State v. Baltimore & O. R. Co. 15 W. Va. 392, 36 Am. Rep. 803; Durham v. Richmond & D. R. Co. 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1; Perdicaris v. Trenton City Bridge Co. 29 N. J. L. 367.

The estimate of the valuation of these waterworks, for the purpose of their purchase by the city, properly included an estimate of their going value.

National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; Gloucester Water Supply 54 L. ed.

Co. v. Gloucester, 179 Mass. 365, 60 N. E. 977; Norwich Gas & Electric Co. v. Norwich, 76 Conn. 565, 57 Atl. 746.

The interpretation given to a contract by the parties themselves is competent, and oftentimes very weighty, evidence in determining its meaning and force.

Knox County v. Ninth Nat. Bank, 147 U. S. 91, 99, 37 L. ed. 93, 96, 13 Sup. Ct. Rep. 267; Manhattan L. Ins. Co. v. Wright, 61 C. C. A. 138, 126 Fed. 82; District of Columbia v. Gallaher, 124 U. S. 505, 510, 31 L. ed. 526, 527, 8 Sup. Ct. Rep. 535; Brooklyn L. Ins. Co. v. Dutcher, 95 U. S. 269, 273, 24 L. ed. 410, 411.

The city is equitably estopped from now claiming that it has never been its purpose to acquire the entire system of the complainant.

Reynolds v. Adden, 136 U. S. 348, 34 L. ed. 360, 10 Sup. Ct. Rep. 843; Hackett v. Ottawa, 99 U. S. 86, 96, 25 L. ed. 363, 365; Randolph County v. Post, 93 U. S. 502, 513, 23 L. ed. 957, 959; Bissell v. Jeffersonville, 24 How. 287, 300, 16 L. ed. 664, 672; Sullivan Timber Co. v. Mobile, 110 Fed. 198; Brooks v. Laurent, 39 C. C. A. 201, 98 Fed. 647; Garber v. Doersom, 117 Pa. 162, 11 Atl. 777; Monroe v. Danbury, 24 Conn. 199.

A city, like an individual, should act in good faith in carrying out its contracts.

State ex rel. Tarr v. Crete, 32 Neb. 568, 49 N. W. 272; Omaha Water Co. v. Omaha, 85 C. C. A. 54, 156 Fed. 922.

The mayor and council had the undoubted power to provide, on behalf of the city of Omaha, as one of the terms of the contract with Locke, that the city should have the right, at any time after the expiration of twenty years, to purchase the waterworks at an appraised valuation.

Castle Creek Water Co. v. Aspen, 76 C. C. A. 516, 146 Fed. 10, 8 A. & E. Ann. Cas. 660; Indianapolis v. Consumers' Gas Trust Co. 75 C. C. A. 442, 144 Fed. 640; Fayetteville v. Fayetteville Water, Light & P. Co. 135 Fed. 400; Omaha Water Co. v. Omaha, 12 L.R.A. (N.S.) 736, 77 C. C. A. 267, 147 Fed. 7.

There is no inconsistency in the use of the word "municipality" in the act of 1905 in two senses. The word may have, like the word "city" and the word "village," a geographical as well as governmental meaning.

State ex rel. Minturn v. Elliott, 158 Ind. 168, 63 N. E. 222; Miller v. Jacobs, 70 Wis. 122, 35 N. W. 324.

Through the purchase of any part of the company's system of waterworks, the city of Omaha is necessarily going into the water business as a private corporation might do. The supplying of water to the inhabitants of a city is not within the inherent general powers of a municipality. Although necessarily partaking of a public character, it

falls under the head of business powers instead of governmental authority, and can only be undertaken with express legislative sanction.

Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 282; *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 11; *Lehigh Water Co.'s Appeal*, 102 Pa. 515; *White v. Meadville*, 177 Pa. 643, 34 L.R.A. 567, 35 Atl. 693.

With such broad authority in the city of Omaha to contract with adjacent municipalities to supply them with water for all purposes, the question of title to the distribution mains and hydrants within the boundaries of those municipalities becomes a subordinate matter.

National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 864.

Relevant here is the decision in *Peabody v. Westerly Waterworks*, 20 R. I. 176, 37 Atl. 807, where a taxpayer of Westerly, Rhode Island, brought suit to enjoin the purchase by that town of the plant of the waterworks company, located partly in the town and partly in the neighboring towns of Stonington and North Stonington, Connecticut. The supreme court of Rhode Island dismissed the bill, and held the purchase to be valid.

The case before the court is, in certain aspects, not unlike that of *Duluth v. Duluth Gas & Water Co.* 45 Minn. 210, 47 N. W. 781. In that case an attempt to prevent the water company supplying the city of Duluth with water, from furnishing water also to places out of Duluth and in its vicinity, through the mains laid in its streets, under ordinance of its council, was defeated.

Where the legislative intent is apparent, that one municipality shall have authority to own and operate waterworks beyond its own limits, the courts invariably give effect to that intent.

Pittsburgh v. Barce Bros. 158 Pa. 174, 27 Atl. 854; *West Hartford v. Water Comrs.* 68 Conn. 323, 36 Atl. 786; *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 1.

Upon the exercise of the option, the obligation of the defendant to complete the purchase became absolute.

Castle Creek Water Co. v. Aspen, 76 C. C. A. 516, 146 Fed. 8, 8 A. & E. Ann. Cas. 660; *Cherryvale Water Co. v. Cherryvale*, 65 Kan. 219, 69 Pac. 176; *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482, 16 N. E. 420; *Fayetteville v. Fayetteville Water, Light & P. Co. supra.*

*Mr. Justice Lurton delivered the [191 opinion of the court:

This is a bill seeking the specific performance by the city of Omaha of a contract for the purchase and sale of the system of waterworks owned by the appellee company. The waterworks plant in question was constructed in pursuance of legislative authority and municipal ordinance, which need not be considered, for neither party questions the sufficiency of either. The 14th section of the ordinance of 1880, under which the waterworks were constructed by the predecessor of the appellee, was in these words:

"The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said waterworks at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the city council, one by the waterworks company, and these two to select the third: Provided, That nothing shall be paid for the unexpired franchise of said company."

In 1903 the city elected to exercise this option, and a board of appraisers was appointed, one by each of the parties and a third by the two so selected. This board of appraisers organized and proceeded to take evidence, and, after considering the matter for about three years, made an appraisement, fixing the value of the system at \$6,263,295.49. The appraiser appointed by the city did not concur. The city rejected the award. Whereupon the company filed this bill, which, upon final hearing, was dismissed upon the sole ground of misconduct of the appraisers, other objections not being passed upon. Upon appeal, this decree was reversed and the cause remanded for a decree in pursuance of the opinion of the appellate court. 89 C. C. A. 205, 162 Fed. 232, 15 A. & E. Ann. Cas. 498.

The case is here upon a writ of certiorari allowed at a former term.

*There major objections have been [192 urged against the appraisement. First, that it was not concurred in by all; second, that the appraisers heard certain evidence without notice or giving the city an opportunity to hear or rebut; and, third, that the property valued includes a distributing system beyond the corporate limits of Omaha, by which certain suburban villages are supplied, and that to that extent the city made no contract to buy, and, if it did, had no power to do so.

These in their order:

1. The only matter to be determined was the value of the waterworks system, which had long served the public. Its construction had been authorized by legislative enactment under which the municipal ordinance was passed. One section of this or-

dinance provided that the city, at the end of twenty years, might, at its election, purchase the works at a value to be determined by appraisers. The contention is that the refusal of one of the appraisers to concur in the valuation fixed by the majority defeated the appraisal. The matter in question was in no proper sense an arbitration. The contract was in all of its terms agreed upon. One party was to sell and the other to buy, at a valuation determined by the board of appraisers, and unanimity was not stipulated for. Unanimity was hardly to be expected in a board made up as this was. When a matter of purely private concern is submitted to the determination of either arbitrators or appraisers, the rule seems to be that there must be unanimity of conclusion by such board, unless otherwise indicated by the terms of the submission. *Hobson v. M'Arthur*, 16 Pet. 182, 192, 10 L. ed. 930, 933; *Green v. Miller*, 6 Johns. 39, 5 Am. Dec. 184; *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 320, 351, et seq. The rule is, however, otherwise when the submission is one which concerns the public. In such submissions, whether it be the arbitration of a difference or the ascertainment of a value, a majority may act, unless otherwise indicated by the [193] agreement for *submission. Why this distinction should exist is not altogether clear. In both instances the persons to whom the submission is made are acting under a power and must stay within it. The reason probably lies in the fact that public affairs are controlled by majorities, and, by analogy, a majority should control when the submission is a matter which concerns the public. But whatever the reason, so are the authorities. *Colombia v. Cauea Co.* 190 U. S. 524, 47 L. ed. 1159, 23 Sup. Ct. Rep. 704; *People ex rel. Washington v. Nichols*, 52 N. Y. 478, 11 Am. Rep. 734; *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 320; *Grindley v. Barker*, 1 Bos. & P. 229.

The construction and acquisition of a system of water supply and distribution was a public municipal function. The Nebraska legislature, in 1903, went so far as to require municipal ownership of a water supply system in the city of Omaha, and that this should be accomplished either by construction or by the purchase of the existing system. The city, in compliance with and in the exercise of the power conferred when the existing plant was constructed, elected to purchase the existing system under the ordinance of 1880 and the power therein reserved. That in such circumstances the determination of the price to be paid by a submission was a matter of public concern, is too clear for argument. The cases cited above cover the point. The appraisal was 54 L. ed.

not therefore defeated because not concurred in by all.

The distinction suggested by counsel, that the authority for the submission must come from the public, if there be anything of substance in it, does not prevent the operation of the rule here, for the purchase upon a valuation settled by appraisers was in the ordinance of the city, in pursuance of legislative authority, and, in a very true sense, was an authority to submit to appraisers which came from the public.

2. The next objection is that the appraisers heard evidence in the absence of the city and without opportunity *to reply, and [194] that this was such misconduct as to vitiate the valuation. As already hinted, this was not a board of arbitrators. An arbitration implies a difference, a dispute, and involves ordinarily a hearing and all thereby implied. The right to notice of hearings, to produce evidence and cross-examine that produced, is implied when the matter to be decided is one of dispute and difference. But when, as here, the parties had agreed that one should sell and the other buy a specific thing, and the price should be a valuation fixed by persons agreed upon, it cannot be said that there was any dispute or difference. Such an arrangement precludes or prevents difference, and is not intended to settle any which has arisen. This seems to be the distinction between an arbitration and an appraisement, though the first term is often used when the other is more appropriate.

Counsel have cited and pressed upon us the case of *Continental Ins. Co. v. Garrett*, 60 C. C. A. 395, 125 Fed. 589, as a case where an appraisement of a fire loss was set aside because evidence was heard in the absence of the parties. But that was a case where the full amount of the insurance was claimed as the extent of the loss. This was denied. It was therefore a plain case of the submission of a dispute or difference which had to be adjusted. The rule applicable to a judicial proceeding therefore applied. It was in fact an arbitration, though the arbitrators were called appraisers. The dispute concerned the thing which had been destroyed, the value of something which was not to be inspected and valued from observation, because it was not in existence. Evidence was therefore essential to show what had been destroyed as well as its value. The case is wholly unlike the one here presented.

In *Collins v. Collins*, 26 Beav. 306, where there was a contract for the sale of a brewery at a price to be fixed by persons called arbitrators, one chosen by each party and a third by these two, before entering upon valuation, *it was ruled that they [195]

were not arbitrators, but appraisers, and the master of the rolls, Sir John Romilly, said:

"But I do not think that, in this particular case, the fixing of the price of the property is an arbitration, in the proper sense of the term. An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties. It is very true that in one sense it must be implied that although there is no existing difference, still that a difference may arise between the parties; yet I think the distinction between an existing difference and one which may arise is a material one, and one which has been properly relied upon in the case. If nothing has been said respecting the price by the vendor and purchaser between themselves, it can hardly be said that there is any difference between them. It might be that if the purchaser knew the price required by the seller, there would be no difference, and that he would be willing to give it. It may well be that if the vendor knew the price which the purchaser would give, there would be no difference, and that he would accept it. It may well be that the decision of a particular valuer appointed might fix the price and might be equally satisfactory to both; so that it can hardly be said that there is a difference between them. Undoubtedly, as a general rule, the seller wants to get the highest price for his property, and the purchaser wishes to give the lowest, and in that sense it may be said that an expected difference between the parties is to be implied in every case; but unless a difference has actually arisen, it does not appear to me to be an arbitration.' Undoubtedly, if two persons enter into an arrangement for the sale of any particular property, and try to settle the terms, but cannot agree, and after dispute and discussion respecting the price, they say, 'We will refer this question of price to A. B., he shall settle it,' 196] *and thereupon they agree that the matter shall be referred to his arbitration, that would appear to be an 'arbitration,' in the proper sense of the term, and within the meaning of the act; but if they agree to a price to be fixed by another, that does not appear to me to be an arbitration."

In the present case there was not only no antecedent disagreement as to price, but the ordinance under which the purchase was to be made provided that the property was to pass "at an appraised valuation, which shall be ascertained by the estimate of three engineers," etc. The board was accordingly made up of such engineers, selected because they were experts of experience in the service they were expected to

perform. That it was the understanding that these engineers were to examine and estimate the value and acquaint themselves with the condition and extent of the property in question in their own way, and not according to the procedure required in a judicial proceeding, is made clear by the avowals made by the counsel representing the parties at the beginning of the valuation. Thus, the attorney for the city, addressing the valuers, said:

"As to the matter of the procedure to be adopted by your board, as to the method of arriving at the amount of property owned by the water company, and the determination of its value, the city of Omaha suggests that this board, having been appointed as experts in regard to the value of such property, ought to make a personal investigation as to the amount and extent of the property of the water company, together with its condition, and determine therefrom its value. As to the method of arriving at the amount and condition of the property of the water company, the city of Omaha suggests that this board may arrive at such facts by any method or means deemed advisable by it; but that, if the board shall determine to take proof and testimony before it, that it should go no further than to the question of the amount and condition *of the property, and that said testi- [197] mony should not be conclusive upon this board, but simply for its advice and information in the matter. It is not the opinion of the city of Omaha that it would be proper or necessary to call expert witnesses as to the value, since the members of the board have been selected as experts (to) whose judgment the question of value must be submitted upon the examination of the property."

Counsel for the water company appear to have fully concurred in this view of the function of the board.

That the great bulk of the evidence was heard or submitted in the presence of counsel representing both sides is true. This course did not, however, preclude them from enlightening their judgment as experts by either personal inspection or by informing themselves in any other way of the value of the plant in question without calling in counsel, if they desired further information. The thing complained of is that the valuers called upon the company for their books, and that they had these books gone over by an expert auditor of their own selection. This, counsel say, was done without notice to the city, and after the close of the hearings. But it was not done secretly, for the city learned of it and asked an opportunity to be present when the books were submitted. What information was derived from

the books is not shown. We have only the lone fact that the appraisers, of their own motion, asked an opportunity to look over and have audited the company's books, and that the company granted the privilege as "confidential information" for the use of the appraisers only. Neither are counsel justified in saying that the books were called for after the matter was in the hands of the appraisers for conclusion. When the parties had submitted their maps, plats, blue prints, and such other evidence throwing light upon the value of the plant, as they desired, and had been heard in argument and upon brief, the chairman of the board said [198] in substance to *counsel that much time would be necessary to reach a conclusion; that the real work of valuation had been but begun; and that "much more information must be sought by this board."

There is not the slightest evidence in the record of partiality, bad motive, or misconduct affecting the action of the board. Its members appear to have been gentlemen of high character, professionally and otherwise, and if their conclusion is to be set aside, it must be because they deemed it within their power to have a confidential examination made of the books of the company to assist them in arriving at a valuation.

If this was a technical arbitration of a matter of dispute or difference between the parties, to be heard and decided upon evidence submitted, the examination of the company's books without the consent of the city or the presence of its representatives would be such misconduct as would vitiate the award. In such a matter, the rules relating to judicial inquiry would apply. *Continental Ins. Co. v. Garrett*, 60 C. C. A. 395, 125 Fed. 589, and cases cited. But in an appraisement, such as that here involved, the strict rules relating to arbitration and awards do not apply, and the appraisers were not rigidly required to confine themselves either to matters within their own knowledge, or those submitted to them formally in the presence of the parties; but might reject, if they saw fit, evidence so submitted, and inform themselves from any other source, as experts who were at last to act upon their own judgment. *Kelly v. Crawford*, 5 Wall. 786, 790, 18 L. ed. 562, 563; *Green & C. Street Pass. R. Co. v. Moore*, 64 Pa. 79, 91; *Palmer v. Clark*, 106 Mass. 373, 389; *California Annual Conference v. Seitz*, 74 Cal. 287, 15 Pac. 839; *Curry v. Lackey*, 35 Mo. 394.

In the absence of any evidence of actual bad faith, we do not hesitate about agreeing with the circuit court of appeals in the conclusion that there was no such misconduct as to vitiate the valuation.

54 L. ed.

*3. The next contention is that the [199] valuation includes property not within the submission, and which the city did not have power to buy. The point from which the water was taken by the existing water plant was beyond the corporate limits of Omaha. In the immediate suburbs of the city there are several villages outside the corporate limits. The distributing system of the Omaha Water Company has, from time to time, been extended to these outlying suburban towns. It is now said that the appraisers have valued these outlying distributing systems as a part of the plant to be acquired by the city under the ordinance electing to purchase.

As to the power of the city: The charter, Laws of Nebraska, 1879, page 99, provided for the construction and maintenance of waterworks, "either within or without the corporate limits of the city." This is said to only allow the location of pumping works or source of supply outside the city. The city does not therefore object to valuing the supply station and mains extending to the city, as within the contemplated purchase. But it is said that the authority is limited to a distributing system wholly within the corporate limits. That the primary purpose was to supply the people of Omaha with water for public and private purposes is clear. But does that forbid that those who live outside may not be also supplied from the main plant, and, if necessary, by such extensions, not inconsistent with the primary object, as may prove desirable as suburbs grow up around the city?

These powers were supplemented by the charter of 1897 (Laws Neb. 1897, chap. 10). Under § 27 of that charter it was given, among other things, "power to appropriate any waterworks system, plant, or property already constructed, to supply the city and the inhabitants thereof with water, or any part thereof, whether lying within said city or in part without the city, and within 10 miles from the corporate limits of such city, including all real estate, buildings, *machinery, pipes, mains, [200] hydrants, basins, reservoirs, and all appurtenances reasonably necessary thereto, and a part of or connected with said system, plant, or property, and franchises to own and operate the same, if any." This was again supplemented by the act of 1903, chapter 12, providing a method of procedure for acquiring municipal water plants and the creation of a water board for their control and management, being the act under which the city was required to take steps to acquire its own water plant system. Again, by Neb. Comp. Stat. of 1907, chapter 12a, it is, among other things, provided by § 242, that the water board may contract with any mu-

municipality adjacent to said city to supply such municipality with water for domestic, mechanical, public, or fire purposes,—a provision plainly contemplating just such a condition as would ensue if the city should acquire the existing system of works with a distributing system extending to villages adjacent. The review of the legislation touching the power of the city, and the conclusion of the circuit court of appeals from that legislation, that the city had the power to acquire the system as it existed, and has the power to operate so much of it as is intended to supply the suburban towns adjacent which may be acquired, is full and satisfactory, and meets our approval.

We are also satisfied with the conclusion of the circuit court of appeals that the acquisition of the system as it existed at the time the city made its election to purchase was within the contemplation of both the city and the water company, and that the valuation of the system as an entirety was the matter which the appraisers were required to do. What we shall say upon this point will support our conclusion as to the power of the city, for the legislation upon that matter must be read in the light of the subject-matter and of all the known local conditions. The most weighty fact in this connection is, that the system was one single [201] system, having a common source *of supply and common main connections therewith. Its dismemberment is not to be thought of unless it is clear that the ordinance exercising the option is so plainly limited to the purchase of only so much of the distributing system as lay wholly within the corporate limits as to admit of no other meaning. A presumption against dismemberment is not overthrown even if the city had no power to sell water to people or municipalities beyond its limits. If these outside distributing pipes could not be lawfully used by the city for the purpose for which the water company had used them, it does not follow that a contract to buy would be thereby any the less a contract to buy the plant as a unitary system. Aside from contract obligation which may pass with the plant, the city might cut off the supply of water to such outlying environs, if it saw fit, whether it could or could not legally supply water through the distributing pipes which had theretofore reached them. Certain it is that as the several towns adjacent had no source of supply, no pumping station of their own, disintegration would leave the water company with no means of supplying them with water. The distributing pipes underground would, separated from the ownership of the pumping station, reservoir, filling or set-

ting basins, necessarily lose much of the value which attached to them as a part of a going plant.

The reservation in the ordinance under which the works were constructed should be read and interpreted in the light of the almost certain extension of the plant as the expansion and growth of the city might demand. The city, at the time the ordinance was passed, had some 30,000 people. When the election to buy the plant was made, it had, approximately, four times as many. As is usual in respect of growing cities, there had grown up around it groups of population, which, in some cases, expanded into semidependent municipalities. Connected *by continuous streets and ear [202] lines, they made one large community, and constituted greater Omaha. The water company, as was obviously expected from the beginning, expanded with Omaha, and met the public necessities by including these outside populations within its distributing system.

The appraisers, in making their estimate of valuation, included \$562,712.45 for the "going value." This separation of an element contributing to the value of each tangible part was done because required to be done under an order made in the circuit court in a suit in which the water board of the city of Omaha was complainant and the members of the board of appraisers and the water company were defendants. The object of that suit was to instruct the appraisers in respect to the mode and manner in which they should proceed. An order resulted which required the board to report the separate elements making up the aggregate value of the plant.

The option to purchase excluded any value on account of unexpired franchise; but it did not limit the value to the bare bones of the plant, its physical properties, such as its lands, its machinery, its water pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value, in equity and justice, must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers. That kind of good will, as suggested in *Willeox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, is of little or no commercial value when the business is, as here, a natural monopoly, with which the customer must deal, whether he will or no. That there is a difference between even the cost of duplication, less depreciation, of the elements making up the

203] water company plant, and the *commercial value of the business as a going concern, is evident. Such an allowance was upheld in *National Waterworks Co. v. Kansas City*, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853, where the opinion was by Mr. Justice Brewer. We can add nothing to the reasoning of the learned justice, and shall not try to. That case has been approved and followed in *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977, and *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565, 57 Atl. 746. No such question was considered in either *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148, or in *Willeox v. Consolidated Gas Co.* supra. Both cases were rate cases, and did not concern the ascertainment of value under contracts of sale.

Aside from the errors pointed out in the petition for the writ of certiorari, counsel have suggested certain difficulties before a final decree, which are not disposed of in the opinion or decree of the circuit court of appeals. The circuit court had dismissed the bill. The circuit court of appeals considered and decided all of the large questions which were involved under the bill, but did not direct the precise form of the decree which the circuit court should enter, and remanded the case with directions to reverse the decree dismissing the bill, and to proceed in accordance with the opinion. Referring to certain matters left open, the court, in its opinion, said:

"In a transaction of this magnitude there will always be encountered minor obstacles that will readily yield to business methods. What the parties cannot agree upon, the trial court has full power to determine according to principles of right and justice. We refer here to such contentions as that there are two or three properties in the city of Omaha belonging to the company, but not needed in the business, and also that there are supposed defects in its title to other properties. The latter are not of great importance in comparison with the magnitude of the entire system. The property not 204] needed was appraised *separately and it can be excluded from the sale, and the trial court can determine whether the title to other properties is defective. It is not necessary that the title of the company to all the lands upon which its works are built or through which its pipes are laid should be a fee simple, perfect in every particular and subject to no criticism. An irrevocable license, for instance, would be sufficient, or a title based upon prescription. If, however, there should be found substantial defects, opportunity should be given the company to remedy them; and if it is unable

54 L. ed.

to do so, the parts of the property so circumstanced can be valued and the purchase price abated accordingly. It would be expressing too narrow a view to say that an appraisal of a great system of waterworks under a contract of purchase must fail because the title to a small part, not vital to the integrity of the system, was afterwards found to be defective. That the deed tendered by the company was not such as the city was required to take is immaterial. It is sufficient that the company was able, ready, and willing to do what might lawfully be required of it. At some time during the progress of the cause in the trial court, the trustees of the mortgages should be made parties, to the end that the precise amount of outstanding bonds may be ascertained and paid, and the liens discharged concurrently with payment by the city of the purchase price. Doubtless the company will have to use the proceeds of sale in paying its mortgage indebtedness. Or, if an arrangement is desired, such as was made in the *Kansas City* case, whereby the mortgages are assumed by the city, and the company released from liability, the presence in the case of the trustees would facilitate it.

"The decree is reversed and the cause is remanded with direction to proceed to decree in accordance with the views expressed in this opinion."

We do not feel ourselves under any obligation to do *more than to hold that [205] we find no error in the decree of the Circuit Court of Appeals, and to remand the case to the Circuit Court, to be proceeded with accordingly.

Affirmed.

HENRY L. HERTZ, Collector, etc.,
v.

GORDON O. WOODMAN et al.

(See S. C. Reporter's ed. 205-232.)

Stare decisis — discretion.

1. Whether or not the rule of *stare decisis* shall be followed or departed from is a question entirely within the discretion

NOTE. — On cases certified to Federal Supreme Court—see note to *Webster v. Cooper*, 13 L. ed. U. S. 325.

As to taxes on succession and collateral inheritance—see notes to *Re Howe*, 2 L.R.A. 825; *Wallace v. Myers*, 4 L.R.A. 171; *Com. v. Ferguson*, 10 L.R.A. 240; *Re Romaine*, 12 L.R.A. 401; and *Magoun v. Illinois Trust & Sav. Bank*, 42 L. ed. U. S. 1037.

On construction and operation of provisos, exceptions, and saving clauses in statutes—see note to *United States v. Downing*, 76 C. C. A. 381.

of the court when called upon to consider a question once decided.

[For other cases, see Courts, VII. b, in Digest Sup. Ct. 1908.]

Cases certified — propriety of question — stare decisis.

2. Affirmances in the Federal Supreme Court, upon equal division of opinion, of rulings of the circuit courts of appeals against the legality of a tax, are not such authoritative determinations of the question as to preclude one of the latter courts, when called upon again to consider the question, and finding a decision of another circuit court of appeals opposed, from certifying such question to the Supreme Court for determination.

[For other cases, see Cases Certified, III., in Digest Sup. Ct. 1908.]

Stare decisis — affirmance by divided court.

3. An affirmance in the Federal Supreme Court upon equal division of opinion is not an authority for the determination of other cases, either in that court or in the inferior Federal courts.

[For other cases, see Courts, VII. b, in Digest Sup. Ct. 1908.]

Inheritance tax — repeal — saving clause.

4. The inheritance tax imposed by the war revenue act of June 13, 1898 (30 Stat. at L. 464, 465, chap. 448, U. S. Comp. Stat. 1901, pp. 2307, 2308), § 29, although not "due and payable" under § 30 of that act, as amended by the act of March 2, 1901 (31 Stat. at L. 948, chap. 806, U. S. Comp. Stat. 1901, p. 2308), § 11, until one year after the death of the testator, must be deemed to have become an obligation immediately upon the passing by death of a vested right to the present possession or enjoyment of a legacy or distributive share, so as to be within the saving clause of the repealing act of April 12, 1902 (32 Stat. at L. 97, chap. 500, U. S. Comp. Stat. Supp. 1909, pp. 875, 876, 878), § 8, preserving all taxes "imposed" prior to the taking effect of that act, although the testator's death was less than one year prior to such date, in view of U. S. Rev. Stat. § 13, U. S. Comp. Stat. 1901, p. 6, providing that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred thereunder, unless the repealing act shall expressly so provide.

[For other cases, see Statutes, III.; Taxes, IV., in Digest Sup. Ct. 1908.]

[No. 640.]

Argued April 25, 26, 1910. Decided May 31, 1910.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Seventh Circuit, presenting the question whether a legacy is exempt from the Federal inheritance tax where the testator died less than one year prior to the date when

the repealing act took effect. Answered in the negative.†

The facts are stated in the opinion.

Solicitor General Bowers argued the cause and filed a brief for Hertz, Collector:

The thing taxed by the act of 1898 was the transmission of a legacy or distributive share, *i. e.*, the actual accrual to the legatee or next of kin of a present beneficial right in the legacy or distributive share.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Vanderbilt v. Eidman, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331.

The rule concerning the effect of a fair doubt upon the right of the state to a tax concerns only the question of an intention to tax.

Eidman v. Martinez, 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515.

Such intention being established, all other intendments are against the taxpayer. Thus, although "words of exception confining the operation of duty" are to be construed liberally, the rule concerning exemptions is just the contrary.

Ibid.; Sturges v. Carter, 114 U. S. 511, 521, 29 L. ed. 240, 243, 5 Sup. Ct. Rep. 1014.

And a proviso in a revenue law is to be strictly construed.

Cliff v. United States, 195 U. S. 159, 163, 49 L. ed. 139, 141, 25 Sup. Ct. Rep. 1.

Certificates conforming to the exact statutory language no more closely than the certificate in the present case have been treated by this court as sufficient.

Helwig v. United States, 188 U. S. 605, 47 L. ed. 614, 23 Sup. Ct. Rep. 427; United States v. Montana Lumber & Mfg. Co. 196 U. S. 573, 49 L. ed. 604, 25 Sup. Ct. Rep. 367; United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644; Gurvieh v. United States, 198 U. S. 581, 49 L. ed. 1172, 25 Sup. Ct. Rep. 803; United States v. Pridgeon, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746; United States v. Harsha, 172 U. S. 567, 43 L. ed. 556, 19 Sup. Ct. Rep. 294; Wm. J. Moxley v. Hertz, 216 U. S. 344, ante, 510, 30 Sup. Ct. Rep. 305.

Mr. H. T. Newcomb argued the cause, and, with Messrs. Edward Lauterbach and Underwood & Smyser, filed a brief for Woodman et al:

The question was improperly certified and should not be answered, because the circuit court of appeals does not require instruction for the proper decision (Columbus Watch Co. v. Robbins, 148 U. S. 266, 269,

†Leave granted on May 31, 1910, to present petition for rehearing herein within thirty days.

37 L. ed. 445, 446, 13 Sup. Ct. Rep. 594) of the question.

The precise question has twice been argued before this tribunal (*Eidman v. Tilghman*, 69 C. C. A. 139, 136 Fed. 141, 203 U. S. 580, 51 L. ed. 326, 27 Sup. Ct. Rep. 779; and *McCoach v. Philadelphia Trust, S. D. & Ins. Co.* 73 C. C. A. 610, 142 Fed. 120, 205 U. S. 539, 51 L. ed. 921, 27 Sup. Ct. Rep. 793), and four times this court has affirmed judgments which depended upon its affirmative decision (*Eidman v. Tilghman*, supra; *McCoach v. Philadelphia Trust, S. D. & Ins. Co.* two cases, supra). In a fifth case (*United States v. Marion Trust Co.* 74 C. C. A. 439, 143 Fed. 301, 203 U. S. 594, 51 L. ed. 332, 27 Sup. Ct. Rep. 783), a judgment was affirmed which, although involving the estate of an intestate, cannot be reconciled with any theory of interpretation except that which requires an affirmative response to the question certified. In two cases (*United States v. Stephenson*, 212 U. S. 572, 53 L. ed. 656, 29 Sup. Ct. Rep. 682, and *Kinney v. Conant*, 166 Fed. 720, 214 U. S. 526, 53 L. ed. 1068, 29 Sup. Ct. Rep. 703) subsequent to those named, the United States, by its Solicitor General, has sought to bring the identical question again before this court. Reconsideration was refused in each of these cases, with the effect that a judgment against the United States, and involving the affirmative decision of the present question, was so far sanctioned by this court as to become final and binding upon the parties.

Of the five cases in which judgments based upon an affirmative answer to the question certified have become final, two arose within the seventh circuit, and, prior to the present certification, the circuit court of appeals of that circuit had twice decided that the tax was not collectable.

United States v. Marion Trust Co. and *United States v. Stephenson*, supra.

The trial court was bound by the judgment of the circuit court of appeals for the seventh circuit in *United States v. Stephenson* (Decided on May 20, 1908, not reported; certiorari refused, October 19, 1908, 212 U. S. 572, 53 L. ed. 656, 29 Sup. Ct. Rep. 682) and *United States v. Marion Trust Co.* supra; and as it committed no error in following those cases, its judgment should have been affirmed.

The affirmance of the judgments in *Eidman v. Tilghman*; *McCoach v. Philadelphia Trust, S. D. & Ins. Co.*; and *United States v. Marion Trust Co.*,—supra, by the Supreme Court, though by an equally divided court, settled the principle of law so as to bind every tribunal inferior to the Supreme Court.

26 Am. & Eng. Enc. Law, 2d ed. p. 165; 54 L. ed.

Re State, 54 Mich. 444, 23 N. W. 189; *Florance v. Berry*, 62 S. C. 469, 40 S. E. 871; *Krebs v. Carlisle Bank*, 2 Wall. Jr. 49, note; *Durant v. Essex Co.* 7 Wall. 109, 19 L. ed. 154, 7 Wall. 753, Appx.; *Beamish v. Beamish*, 9 H. L. Cas. 274; *Lessieur v. Price*, 12 How. 72, 13 L. ed. 898.

The interpretation of the act of June 13, 1898, should now be regarded as settled, because a contrary conclusion would make the tax operate unequally and create gross injustice.

Knowlton v. Moore, 178 U. S. 41, 77, 44 L. ed. 969, 984, 20 Sup. Ct. Rep. 747.

The tax in question was an ad valorem tax laid upon the receipt of legacies.

Knowlton v. Moore, 178 U. S. 41, 59, 60, 77, 78, 44 L. ed. 969, 977, 984, 20 Sup. Ct. Rep. 747.

Assessment is essential to the existence of an ad valorem tax; without assessment there is no such tax.

1 Cooley, Taxn. 3d ed. p. 597; *New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705.

Originally the government conceded that the tax was not collectable until the estate was actually in shape for distribution.

Treasury Decisions, No. 20,591, Jan. 19, 1899; *Treasury Decisions*, No. 21,024, April 15, 1899; *Knowlton v. Moore*, 178 U. S. 41, 67, 68, 44 L. ed. 969, 980, 981, 20 Sup. Ct. Rep. 747.

The precise question now submitted to the court was decided in *Mason v. Sargent*, 104 U. S. 689, 26 L. ed. 894, and upon its decision rested the determination of that case.

Congress used the word "imposed" in the saving clause of the repealing act in a sense indicative of an act performed by the Executive. This must be the case, for it was unmistakably used in that sense in the refunding amendment, approved on June 27, 1902, to the war revenue law, which was passed a few weeks later in the same session, and as there is not textual indication of variant meaning.

United States v. Freeman, 3 How. 556, 564, 565, 11 L. ed. 724, 727, 728; *Reiche v. Smythe*, 13 Wall. 162, 165, 20 L. ed. 566, 567; 2 *Lewis's Sutherland*, Stat. Constr. 2d ed. pp. 684, 845, 846; *Houston & T. C. R. Co. v. State*, 95 Tex. 523, 68 S. W. 777 (Tex. Civ. App.) 62 S. W. 114.

The earliest date on which the tax could be "imposed" within the meaning of the savings clause was that on which it became due and payable; and if this date was not prior to July 1, 1902, the tax was neither "imposed" nor "saved."

Tilghman v. Eidman, 131 Fed. 652, 69 C. C. A. 139, 136 Fed. 143; *Mason v. Sargent*, supra; *United States v. Marion Trust Co.* 74 C. C. A. 439, 143 Fed. 301; *United States v. Hazard*, 8 Fed. 380.

This court's ruling that the tax was not even a lien until it became due and payable—a ruling reaffirmed in *Sturges v. United States*, 117 U. S. 363, 29 L. ed. 920, 6 Sup. Ct. Rep. 767 (reversing *Hellman v. United States*, 15 Blatchf. 13, Fed. Cas. No. 6,341)—must be regarded as adopted and given statutory force by Congress when it substantially re-enacted the old law.

See *Knowlton v. Moore*, 178 U. S. 41, 76, 44 L. ed. 696, 983, 20 Sup. Ct. Rep. 747; *Vanderbilt v. Eidman*, 196 U. S. 480, 499, 501, 49 L. ed. 563, 570, 571, 25 Sup. Ct. Rep. 331.

In the sense in which the term "contingent beneficial interest" was used in the refunding statute, and therefore in the sense in which it is to be read into the original statute, the interests established by the will of James F. Woodman were "contingent," and did not come into the possession or enjoyment of the beneficiaries prior to July 1, 1902.

Vanderbilt v. Eidman, 196 U. S. 480, 501, 49 L. ed. 563, 571, 25 Sup. Ct. Rep. 331; *Farrell v. United States*, 167 Fed. 643.

The intention to tax any subject can never be implied, and the expression of the sovereign will to tax must always be set forth with completeness and precision.

Eidman v. Martinez, 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515; *Eidman v. Tilghman*, 69 C. C. A. 139, 136 Fed. 143; *Disston v. McClain*, 77 C. C. A. 340, 147 Fed. 117; *Lynch v. Union Trust Co.* 90 C. C. A. 147, 164 Fed. 163; *Cooley*, Taxn. 2d ed. p. 464.

Mr. Justice Lurton delivered the opinion of the court:

This case comes to this court upon a certificate under § 6 of the act of 1891 [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549], creating circuit courts of appeals. The action in the circuit court was one by the executor and legatees under the will of James F. Woodman, to recover an amount of money which had been paid, under protest, as a tax upon legacies under the will of the testator, by virtue of §§ 29 and 30 of the act of June 13, 1898 [30 Stat. at L. 464, 465, chap. 448, U. S. Comp. Stat. 1901, pp. 2307, 2308], and amendments, known as the war revenue act.

The facts certified are: That Woodman died at Chicago, March 15, 1902, leaving a will, which was there duly probated on May 3, 1902, and that the Illinois Trust & Savings Bank qualified as executor. The clear value of legacies payable under the will to the defendants in error was \$166,250. On January 17, 1905, and before the payment of these legacies, the collector claimed and collected, as the amount of duty and tax

due and payable upon said legacies, under the act of Congress before mentioned, the sum of \$2,812.49. After stating the facts, substantially as above, the certificate concludes as follows:

"Upon the foregoing facts the question of law concerning which this court desires the instruction and advice of the Supreme Court is this: Does the fact that the testator dies within one year immediately prior to the taking effect of the repealing act of April 12 1902 ([32 Stat. at L. 97, chap. 500] U. S. Comp. Stat. Supp. [211 1903, p. 279, U. S. Comp. Stat. Supp. 1909, p. 876], relieve from taxation legacies otherwise taxable under §§ 29 and 30 of the act of June 13, 1898, as amended by the act of March 2, 1901 [31 Stat. at L. 946-948, chap. 806, U. S. Comp. Stat. 1901, pp. 2307, 2308]?"

The form of this certificate has been criticized, but we think it sufficiently states both the question and the desire of that court for the instruction of this court that it may make a proper decision. It conforms in substance with the statute, and finds precedents in a number of instances in matter of form. *Helwig v. United States*, 188 U. S. 605, 47 L. ed. 614, 23 Sup. Ct. Rep. 427; *United States v. Pidgeon*, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746; *United States v. Ju Toy*, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644.

It is also urged that the circuit court of appeals for the seventh circuit is precluded from requesting the instruction of this court, because it had in two cases theretofore decided the very question now certified. *United States v. Marion Trust Co.* 74 C. C. A. 439, 143 Fed. 301; *United States v. Stephenson*, not yet reported. In both cases the decision was adverse to the contention of the United States. The first was affirmed by this court without opinion, by an evenly divided court (203 U. S. 594, 51 L. ed. 332, 27 Sup. Ct. Rep. 783); and, in the second, an application by the United States for a writ of certiorari was denied (212 U. S. 572, 53 L. ed. 656, 29 Sup. Ct. Rep. 682). It is further contended that, if not concluded by its own decisions, it was bound to follow the judgments of this court in *Eidman v. Tilghman*, affirming the judgment of the circuit court of appeals of the second circuit, reported in 69 C. C. A. 139, 136 Fed. 141, the affirmance by this court being reported in 203 U. S. 580, 51 L. ed. 326, 27 Sup. Ct. Rep. 779, and similar judgments of affirmance in *McCoach v. Philadelphia Trust, S. D. & Ins. Co.* 73 C. C. A. 610, 142 Fed. 120, and 205 U. S. 539, 51 L. ed. 921, 27 Sup. Ct. Rep. 783, and *United States v. Marion Trust Co.* supra.

All of these cases were affirmances by an

equally divided court of the judgments of the court below in favor of the legatees or distributees who had sued to recover taxes paid upon legacies or shares which had passed to the plaintiffs within one year [212] after the death of the testator *or intestate, the several lower courts having ruled that the tax had not been saved, because it was not due and payable at the time of the repeal of the act under which the tax was claimed.

The circuit court of appeals was obviously not bound to follow its own prior decision. The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided. The court below, in this instance, when called upon to reconsider its former construction of the inheritance tax act, found itself confronted by the fact that this court had been equally divided in opinion as to the proper interpretation of the act, and for that reason alone obliged to affirm the ruling of that and other courts against the legality of the tax which had been collected. If the decision of the court under review had been in favor of the legality of the tax, an affirmance must likewise have resulted from an equal division. That court also found that its own former view of the act had not been satisfactory to the circuit court of appeals for the eighth circuit, which court had decided contrariwise in *Westhus v. Union Trust Co.* 90 C. C. A. 441, 164 Fed. 795. In such circumstances the court below was not only free to regard the question as one open for determination, but one which might well be certified to this court, that the question of law which had never been authoritatively decided by this court might be so determined by an instruction as to how it should decide the matter when thus presented for reconsideration.

When this court, in the exercise of its appellate powers, is called upon to decide whether that which has been done in the lower court shall be reversed or affirmed, it is obvious that that which has been done must stand unless reversed by the affirmative action of a majority. It has *therefore been the invariable practice to affirm, without opinion, any judgment or decree which is not decided to be erroneous by a majority of the court sitting in the cause. The earliest precedent is that of *Etting v. Bank of United States*, 11 Wheat. 59, 78, 6 L. ed. 419, 423. Chief Justice Marshall said at the conclusion of the opinion:

"In the very elaborate arguments which

have been made at the bar, several cases have been cited which have been attentively considered. No attempt will be made to analyze them, or to decide on their application to the case before us, because the judges are divided respecting it. Consequently, the principles of law which have been argued cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it."

In *Durant v. Essex Co.* 7 Wall. 107, 110, 19 L. ed. 154, 156, Mr. Justice Field, for this court, said, in respect of the effect of the affirmance by a divided court:

"There is nothing in the fact that the judges of this court were divided in opinion upon the question whether the decree should be reversed or not, and, therefore, ordered an affirmance of the decree of the court below. The judgment of affirmance was the judgment of the entire court. The division of opinion between the judges was the reason for the entry of that judgment; but the reason is no part of the judgment itself."

To the same effect are *Westhus v. Union Trust Co.* 94 C. C. A. 95, 168 Fed. 617; *Hartman v. Greenhow*, 102 U. S. 672, 676, 26 L. ed. 271, 273. A different rule seems to have been sanctioned in the English courts. *Catherwood v. Caslon*, 13 Mees. & W. 261; *Beamish v. Beamish*, 9 H. L. Cas. 274.

Under the precedents of this court, and, as seems justified by reason as well as by authority, an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the court sitting *prevents the case from becoming [214] an authority for the determination of other cases, either in this or in inferior courts. The affirmance by a divided court in the second case shows this, for if it was not so, the second equal division could not have happened, for the case would have been controlled by the first equal division.

We shall therefore proceed to determine the question of law presented by the certificate of the circuit court of appeals, feeling free to decide it as our judgments may dictate.

The statutes involved and requiring consideration are the 29th section of the act of June 13, 1898 (30 Stat. at L. 464, chap. 448. U. S. Comp. Stat. 1901, p. 2307); the 30th section of the same act, as amended by § 11 of the act of March 2, 1901 (31 Stat. at L. 948, chap. 806, U. S. Comp. Stat. 1901, p. 2308), and §§ 7, 8, and 11 of the act of April 12, 1902 (32 Stat. at L. 97 et seq., chap. 500, U. S. Comp. Stat. Supp.

1909, pp. 875, 876, 878). So much of the sections referred to as is material to the present question is set out in the margin.† 215] *The 7th section of the act of April 12, 1902, which act we shall hereafter refer to as the repealing act, did not go into effect until July 1, 1902. That section explicitly repealed § 29 of the act of June 13, 1898, which was the only section imposing a tax upon inheritances, and the only authority for the tax collected from the defendants in error. The claim of the United States was and is that, as the testator's death occurred prior to July 1, 1902, the tax demanded had been imposed as an obligation before the repeal of the taxing section, and 216] that *the liability thus imposed was saved by the 8th section of the repealing act. For convenience that section is here again set out:

"Sec. 8. That all taxes or duties imposed by section twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, prior to the taking effect of this act, shall be subject, as to lien, charge, collection, and otherwise, to the provisions of section thirty of said

act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, which are hereby continued in force, as follows. . . ."

The question for solution must therefore turn upon the inquiry whether the tax in question had been imposed prior to the going into effect of the repealing act within the intent and effect of the saving clause just set out.

There are cases which go so far as to say that the unqualified repeal of a law as effectually destroys rights and liabilities dependent upon it, not past and concluded, as if the statute had never existed. It is, however, putting it strongly enough to say that an unqualified repeal operates to destroy inchoate rights, as a release of imperfect obligations, and as a remission of penalties and forfeitures dependent upon the destroyed statute. *United States v. Reisinger*, 128 U. S. 398, 32 L. ed. 480, 9 Sup. Ct. Rep. 99; *Curtis v. Leavitt*, 15 N. Y. 9, 152, et seq.; *Belvidere v. Warren R. Co.* 34 N. J. L. 193; 1 *Lewis's Sutherland*, Stat. Constr. §§ 282 et seq.

There has been a marked legislative trend

†Section 29 of the act of June 13, 1898, is as follows:

"That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows, that is to say: . . ." 30 Stat. at L. 464, chap. 448, U. S. Comp. Stat. 1901, p. 2307.

So much of § 30 of the act of June 13, 1898, as amended by § 11 of the act of March 2, 1901, as is material, reads:

"That the tax or duty aforesaid shall be due and payable in one year after the death of the testator, and shall be a lien and charge upon the property of every person who may die as aforesaid, for twenty years, or until the same shall, within that period, be duly paid to and discharged by the United States; and every executor, administrator, or trustee having in charge or trust any legacy or distributive share, as aforesaid, shall give notice thereof, in writing, to the collector or deputy collector of the district where the deceased grantor or bargainor last resided within thirty days after

he shall have taken charge of such trust, and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, or in which the property was located in case of nonresidents, the amount of the duty or tax assessed upon such legacy or distributive share," etc.

Sections 7, 8, and 11 of the act of April 12, 1902, are as follows:

"Sec. 7. That section four of said act of March second, nineteen hundred and one, and sections, six, twelve, eighteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, Schedule A, Schedule B, sections twenty-seven, twenty-eight, and twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and all amendments of said sections and schedules, be, and the same are hereby, repealed.

"Sec. 8. That all taxes or duties imposed by section twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, prior to the taking effect of this act, shall be subject, as to lien, charge, collection, and otherwise, to the provisions of section thirty of said act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, which are hereby continued in force, as follows: . . ."

"Sec. 11. That this act, except as otherwise specially provided for in the preceding section, shall take effect July first, nineteen hundred and two." 32 Stat. at L. pp. 97-99, chap. 500, U. S. Comp. Stat. Supp. 1909, pp. 875, 876, 878.

in the direction of escaping from the serious consequence sometimes incident to this common-law rule of construction, indicated by general statutes saving liabilities, penalties, and forfeitures incurred under repealed statutes. Such a general statute was passed by Congress in 1871 (chap. 71, 16 Stat. at L. 431, U. S. Comp. Stat. 1901, p. 6), the 4th section of which was carried into the revision of 1878, and is now in force as § 13, Rev. Stat. (U. S. Comp. Stat. 1901, p. 6). That section reads as follows:

"The repeal of any statute shall not have 217] the effect to *release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

This provision has been upheld by this court as a rule of construction applicable, when not otherwise provided, as a general saving clause, to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress. *United States v. Reisinger*, 128 U. S. 398, 32 L. ed. 480, 9 Sup. Ct. Rep. 99; *Great Northern R. Co. v. United States*, 208 U. S. 452, 52 L. ed. 567, 28 Sup. Ct. Rep. 313.

In the last case cited the court said of this section that—

"As the section of the Revised Statutes in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment. But while this is true, the provisions of § 13 are to be treated as if incorporated in and as a part of subsequent enactments, and therefore, under the general principles of construction requiring, if possible, that effect be given to all the parts of a law, the section must be enforced unless, either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of § 13. For the sake of brevity we do not stop to refer to the many cases from state courts of last resort, dealing with the operation of general state statutes like unto § 13, Rev. Stat., because we think the views just stated are obvious and their correctness is established by a prior decision of this court concerning that section. *United States v. Reisinger*," *supra*.

This section is not alone applicable to 218] penalties and forfeitures *under penal statutes. It extends as well to "liabilities," and a liability or obligation to pay a tax im-

posed under a repealed statute is not only within the letter, but the spirit and purpose, of the provision. Therefore we must take that general saving clause into consideration as a part of the legislation involved in the determination of whether a "liability" had been incurred by the imposition of a tax prior to the act that destroyed the law under which it had been imposed.

The repealing act here involved includes a saving clause, and if it necessarily, or by clear implication, conflicts with the general rule declared in § 13, the latest expression of the legislative will must prevail. In the case of *Great Northern R. Co. v. United States*, cited above, the question was whether the saving clause in the Hepburn act was so plainly in conflict with the rule of construction found in § 13 as to limit the actions or liabilities saved to those enumerated therein; but the court held that, as the later clause applied to remedies and procedure, it was not, by implication, in conflict with the general provision of § 13, which saved penalties, forfeitures, and liabilities. 208 U. S. 466, 467.

The significance of § 13 is therefore this: That if, prior to the repealing act, the defendants in error were under any liability or obligation to pay the tax or duty imposed by § 29 of the act of June 13, 1898, that obligation or liability was not relieved by the mere repeal of that section, nor as a consequence of the saving clause in the repealing act, unless the special character of that clause, by plain implication, cuts down the scope and operation of the general rule in § 13.

In the light of these principles of interpretation we come, then, to the question as to whether, at the date of the repeal of § 29 of the act of June 13, 1898, the legacies to the defendants in error were subject to any tax or duty under the repealed section which constituted a "liability" under *§ 13, or to a tax or duty "imposed," [219 under the saving clause of the repealing act.

The only section which imposes any tax upon inheritances is the 29th. Any legacy or distributive share, or gift in anticipation of death, "passing after the passage of the act," is, by the express terms of that section, "made subject to a duty or tax to be paid to the United States, as follows," etc.

Section 30 of the same act deals only with the return, payment, and procedure for the collection of "the tax or duty *afore-said*," referring to the tax imposed by § 29.

Now, what is the property, right, or thing which is made subject to the tax? This has been most conclusively answered by *Knowlton v. Moore*, 178 U. S. 41, 56, 44 L. ed. 969, 975, where the section in question is construed as laying a tax upon the

transmission, or the right to succeed to a legacy or distributive share or gift in contemplation of death, passing after the act.

For reasons and upon grounds not necessary to be restated, it has been also conclusively decided in *Vanderbilt v. Eidman*, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331, that the tax or duty does not attach to legacies or distributive shares until the right of succession becomes an absolute right of immediate possession or enjoyment. It was therefore held in the case cited that a legacy upon conditions which might never happen was not subject to the tax or duty prior to the time, if ever, when the right of possession or enjoyment should become absolute.

To repeat, then: The subject of the tax or duty exacted by § 29 is the right of succession which passes by death to a vested beneficial right of possession or enjoyment of a legacy or distributive share.

Upon the facts certified, the right of succession which passed by the death of the testator was an absolute right to the immediate possession and enjoyment,—a right 220] neither *postponed until the falling in of a life estate, as in *Mason v. Sargent*, 104 U. S. 689, 26 L. ed. 894, nor subject to contingencies, as in *Vanderbilt v. Eidman*, supra. No further event could make their title more certain nor their possession and enjoyment more secure. The law, then unrepealed and in full force, operated to fasten, at the moment this right of succession passed by death, a liability for the tax imposed upon the passing of every such inheritance or right of succession. The time for scheduling or listing was practically identical with the time for payment, and the listing or scheduling was required to be done by the executor charged with payment, but might be and was postponed for reasons of grace and of convenience. That is almost universal under any taxing system. The liability attaches at some time before the time for payment. But the liability for the payment of the tax exacted under § 29 of the act of June 13, 1898, accrued or arose the moment the right of succession by death passed to the defendants in error, and the occurrence of no other fact or event was essential to the imposition of a liability for the statutory tax upon the interest thus acquired.

Much has been urged because the tax was not "due and payable" when the repealing act took effect, and the contention is that because not "due and payable," no tax had been theretofore imposed within the intent of the saving clause. What we have already said answers this. But let us see the very unreasonable result which would ensue if we are required to say that by "tax or duty

imposed under § 29" Congress meant a tax or duty due and payable when the repealing act should go into effect.

No one questions but that one effect of this saving clause would be to save any such tax as was "due and payable" one year before July 1, 1902. This being so, it would be very unjust if the tax in the latter case is saved and the other remitted, inasmuch as the thing made subject to *the tax [221] would, in each case, be the same; namely, the transmission of a beneficial right to the possession and enjoyment of a legacy or distributive share at the death of a testator or intestate. In the one case, the tax paid upon the right passing by death would be preserved. In the other, a tax upon a like inheritance would be remitted. The only difference would be that, in one case, the time for payment had arrived, while, in the other, it had not, though, in the latter case, the ultimate obligation to pay was equally as certain and fixed as in the first case.

Now, did Congress intend to make such an unjust distinction as would result from such an interpretation of the saving clause in question as shall make the time limit for payment the test as to whether one tax shall be preserved and the other remitted in a situation otherwise identical?

The saving clause does not, in terms, limit the right saved to a tax or duty which should be due and payable at the date of the repeal. It is, perhaps, an obvious suggestion that if that had been the purpose of Congress, it would have been easy to make that purpose clear.

But, in place of saying in so many words that "all taxes or duties which should be due and payable prior to the taking effect of the act" should be subject to the provisions of § 30, etc., the Congress said that "all taxes or duties imposed by § 29," etc., prior to the taking effect of this act, should be subject to the provisions of § 30. Now it is to be noticed that this § 30, which is the remedial or procedure section, is not one of the sections repealed. The 29th section, which alone imposes any tax, is the one which is repealed. The plain purpose of the saving clause was to preserve some liability which had been imposed under § 29, which would otherwise be lost. This it did by providing that all taxes "imposed" prior to the going into effect of the act should, notwithstanding the repeal of the section which originated the tax, be preserved, and as to collection lien, etc., be *sub- [222] ject to the unrepealed § 30. It must also be borne in mind that this time limit for payment to "one year after the death of the testator" came into the 30th section only by the amendment of March 2, 1901. Up to the

time of that amendment, the only provision as to time was that *still* found in the *later parts of the same section*, namely, that "before payment and distribution to the legatees" the executor, administrator, or trustee "shall pay to the collector . . . the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render (to the collector) a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue thereon, verified," etc. The same original section also provided that, in case of neglect to so pay or deliver the statement required "*within the time hereinbefore provided*," certain penalties should be incurred, and that the collector should make out schedules, etc. This reference to the "time hereinbefore provided" is in the original section, and must, therefore, refer to a time before "payment and distribution" to the legatees and distributees.

It would seem to follow that the purpose and effect of the amendment making such tax "due and payable in one year after the death of the testator" was to advance the time of payment so as to require payment *within one year* if there should be longer delay in paying legacies and distributive shares, leaving in full force the requirement that the tax should be paid before the payment of legacies and distributive shares, if such payment and distribution should be made in less than one year. We have not passed over the fact that this time limit in terms applies only to the tax due under wills, and to the uncertainty as to the time for the payment of the tax upon distributive shares. It, however, seems quite obvious that that time limit was intended to apply to shares in intestate estates, as well [223] as "to legacies from testators, and that the omission may be supplied by necessary implication.

It has been suggested that the lien given by § 30 only attaches when the tax is due and payable. The lien was in the section before the amendment, and, in view of its purpose, would attach with the obligation or liability for the tax. There is no reason which would justify the assumption that the lien only attached when the day of payment might arrive,—a date most indefinite before the insertion of the time limit by the amendment of 1902.

But it has been urged that any conclusion which saves a tax from the effect of a repealing act which was not actually due and payable is in conflict with *Mason v. Sargent*, supra. That case arose under the inheritance tax law of 1864. [13 Stat. at L. 223, chap. 173.] The plaintiff's testator

died while the law was in force, it having been repealed October 1, 1870. The legacy to the plaintiff, which was in that case held to have been illegally taxed, was one payable after the death of the widow of the testator, which did not occur until 1872, and after the repeal of the law under which the tax was claimed. But that case is distinguishable from this in more than one particular. The legacy sought to be taxed did not vest in possession and enjoyment before the repeal of the act under which it was supposed to be taxable. If, therefore, no taxable succession occurred during the existence of the inheritance tax law of 1864, the right to the tax would fail under the very test which this court, in *Vanderbilt v. Eidman*, made the test of whether a tax had been imposed during the operation of the act of June 13, 1898, and the very test which is applied in the present case.

The precise question here involved, and upon which this case must turn, namely, whether a tax is not at once "imposed," by succeeding to an immediate right of possession and enjoyment, during the operation of the act of June 13, 1898, in such sense as to be within the "intent of the saving" [224 clause in the act which repealed that act, was not and could not have been involved in the case cited. The terms, both of the act of 1864, as amended in 1866 [14 Stat. at L. 98, chap. 184], and of the act which repealed that act, and of the saving clause in the repealing act, are, in some important aspects, to be differentiated from the acts here involved. It is enough, however, to say of that case that no taxable succession having occurred before the repeal of the act, there was nothing to save by the saving clause in the repealing act. In the present case it is equally as clear that if no taxable succession actually vested prior to the repeal of the taxing act, no tax would be saved. If, however, there did occur such an absolute right to the possession and enjoyment of the legacies to the present defendants in error as made it subject at once to the imposition of a tax under the law in operation when such succession occurred, a very different question must be decided from any decided in *Mason v. Sargent*.

The conclusion we reach is, that upon the passing by death of a vested right to the immediate possession or enjoyment of a legacy or distributive share, there was imposed the tax or duty exacted upon every such right of succession, which was saved by the saving clause of the repealing act.

The question certified must be answered in the *negative*.

Mr. Justice McKenna, dissenting:

I am unable to agree to the judgment of

the court. I regret that time does not serve to give adequate expression to my views or to consider opposing ones. Some of the elements of dissent I can only hastily give. The question of the interpretation of a statute is, however, seldom in broad compass. The purpose is to get at the meaning of the words, and fortunately there are well-known rules *to assist the process. The first of these is the motive of the law. Whatever construction advances that carries a presumption of truth.

There must be a strict or liberal construction, according to the purpose of the law; the former, if it imposes burdens; the latter, if it relieves from them. The contentions of the government, it seems to me, reverse this order. Their consequences seem to me to be: The law is a taxing one; is concededly of doubtful meaning; it must nevertheless be construed against the taxpayer. It was intended to relieve from burdens; its ambiguities must be resolved to retain them.

These contradictions between intention and result are intensified if we consider the general purpose of the law, proclaimed at the time of its enactment. It was intended as a repeal of war revenue taxation. In other words, to take from a time of peace burdens laid in time of war. A worthy purpose, I submit, and based on wisest considerations of governmental policy, and not to be defeated or impaired in any of its details by resolving the uncertainties of language against it.

There was emphatic and illustrative unanimity in the Committee of Ways and Means of the House of Representatives that reported and recommended the law. There was a difference of opinion in the committee as to the extent of the reduction which should be made, resulting from a difference in other views of its members, but there was no difference as to the necessity of a reduction of revenue.

The majority of the committee recommended a reduction of \$73,000,000; the minority was of opinion it should be \$123,000,000. In the reduction there was a special item of legacies. The figures need no comment. They display the purpose of Congress. Words, however, were added to emphasize it. "Sound business judgment," it was said, "dictates a sweeping reduction [226] of our revenues." *The final word of recommendation of the measure was that "every consideration of prudence commends" its "wisdom." This, then, was the purpose of the measure, sanctioned by the highest considerations of judgment and wisdom. Should it not prevail, certainly have dominance in the interpretation of the law passed to effect it? Even as to a live and continuing law,

the rule of interpretation is that taxes must be expressed in clear and unambiguous language. If there be doubt, it is to be resolved against the government. *Eidman v. Martinez*, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515. Such a rule of interpretation certainly should be applicable to a statute repealing taxation. To what an anomalous contrast does its disregard bring us? Shall a law passed to supply the wants of a deficient treasury have a more restrictive construction than one passed against the burden of a constantly increasing surplus? Indeed, this case presents even a stronger contrast. Under the rule of interpretation announced in *Eidman v. Martinez*, a law providing for the exigencies of war cannot prevail against the right of the taxpayer to resist taxation, the authority for which is equivocally expressed. But peace legislation, it seems, may claim a more determined power, though it have no necessities but the reduction of revenue; though it proclaims that purpose, and is urged to it by governmental policy. It may have a double sense and yet be unfaltering in its exactions, resisting presumptions of law and legal rules, but a war measure may not.

I cannot believe that Congress intended to leave uncertainty, or, if uncertainty should inadvertently result, that it was to be resolved to retain taxes, and not abolish them. And it had the means of certainty, and, I must assume, availed itself of them. Prior cases had given it examples of the interpretation of taxing laws,—indeed, of the special kind of taxing laws which it was repealing; and we may be sure that it had those examples in mind in fixing the scope of its enactment. And this is in accordance *with a familiar rule of interpretation—[227] tion which this court has applied and necessarily will be called upon to apply again. That is, that when provisions which have received judicial interpretation are used in a statute they are supposed to be used with the meaning that had been given to them. Under any other rule judicial decisions would make "not light, but darkness visible."

In *Clapp v. Mason*, 94 U. S. 589, 24 L. ed. 212, a statute passed in 1864 [13 Stat. at L. 223. chap. 173] subjected to a tax legacies and successions. Under it a tax was assessed upon certain real estate devised by Mason to his widow for her life, or until she should cease to occupy the same as a place of residence, and upon her death, or ceasing to occupy the same, to Clapp. The widow occupied the real estate until June 17, 1872. Mason, the testator, died December 4, 1867; the tax was assessed on the 15th of May, 1873. It was paid on the

31st, under protest, to avoid distraint or other forcible process to collect the same.

Under the statute of 1864 the tax would have been a proper one, but by a statute passed July 14, 1870 [16 Stat. at L. 261, chap. 255], the tax imposed by the former act was repealed. The repealing clause, however, continued the provisions of former acts, levying and collecting all taxes properly assessed or liable to be assessed, or accruing under their provisions. It provided also that "any act done, right accrued, or penalty incurred under former acts," should be saved.

The collector insisted that the tax upon succession in question had *accrued* before the repeal of the act of 1864; that is, upon the death of the testator. The devisees contended that it did not *accrue* until they came into possession of the land; and before that occurred, it was asserted, the statute assessing the tax had been repealed.

The court stated the question to be when the right to the tax accrued,—“at the death of the testator, or at the death of the widow, when the plaintiff became entitled to the possession of the land?” In answer to the 228] question, the *court conceded that the will of Mason conveyed an estate to William P. Mason and Charles H. Parker (those who took after the widow), and that, although they were not entitled to immediate possession, they had a vested estate. And it was conceded that not only vested estates, but those in expectancy, were within the statute. The admission, however, the court said, did not aid them in deciding the point before them, as the question of time still arose,—When was the vested estate taxable?

The question was answered by saying, after a consideration of the provisions of the statute, that it would be difficult to carry out its “system in any other manner than by the provision that the succession should not be deemed taxable until such time as the successor should be entitled to its possession.” It was further said:

“The act of 1864 contains no statement or intimation that this duty creates any lien upon the land, or that any obligation arises, or that any right accrues at a period earlier than that fixed for the payment of the duty. See §§ 133, 137.

“It is manifest that the right does not accrue until the duty can be demanded; that is, when it is made payable; in other words, at the end of thirty days after becoming entitled to possession.”

The questions were re-examined and decided same way in *Mason v. Sargent*, 104 U. S. 689, 26 L. ed. 894. The latter case, however, exhibits more clearly the applicability of the principles discussed to the case 54 L. ed.

at bar. Mason died December 4, 1867. He bequeathed by his will certain personal property to the plaintiffs in the action in trust for his widow, and upon her death one half to William P. Mason and one half to Eliza R. Cabot. The widow died in 1872. In April, 1873, the tax in question was assessed. It was paid under protest, and plaintiffs brought the action for the refunding of the tax, on the ground that the property *did not vest in possession of the [229 legatees until the death of the testator's widow, which occurred after the repeal of the legacy succession tax act, and that the tax had not accrued so as to come within the saving clause of the act of repeal.

The act of 1864 (13 Stat. at L. 223, 285, chap. 173, U. S. Comp. Stat. 1901, p. 2268) subjected legacies and distributive shares of personal property to a tax passing from a decedent, in the hands of an executor or administrator, varying in amount according to the degree of relationship of the beneficiary to the decedent. It further provided that the tax or duty should be payable whenever the party interested in the legacy or shares should become entitled to the possession and enjoyment thereof. The repealing act contained the saving clause which has been already set out.

The collector contended that the tax had accrued when the repealing act took effect, October 1, 1870. The opposing contention was that the tax did not become a claim in favor of the government until the legacy itself became payable, which was not until after the death of the widow, June 17, 1872. The latter contention was sustained, and the tax declared to have been illegally demanded.

It was decided that the legacy was the subject of the tax; that it was exempt during the life of the widow, and only became payable upon her death; that it did “not become a subject of taxation until the right” accrued “to reduce it to possession.” The provision of the law which required the trustee to give written notice to the assessor of his trust within thirty days after he should take charge of it was declared “not material to the argument,” and that the provision of the act of 1864, that the tax or duty thereby imposed should be a lien or charge upon the property bequeathed for twenty years, or until the same be paid within that period, determined nothing as to the time when the tax accrued.

Clapp v. Mason was cited as applicable, and the court *concluded as follows: [230 “No right to the payment of the tax had accrued at the date when the repealing act took effect; and, therefore, none to collect it can be deduced from its saving clauses.”

Clapp v. Mason and Mason v. Sargent were followed as determinative of when, under § 7 of the act of April 12, 1902 [32 Stat. at L. 97, chap. 500, U. S. Comp. Stat. Supp. 1909, p. 875] (the act now in question), the tax should be regarded as "imposed" in *Tilghman v. Eidman*, by Circuit Judge Lacombe at circuit, and also by the circuit court of appeals of the second circuit. 131 Fed. 652, 69 C. C. A. 139, 136 Fed. 141. The judgment was affirmed by this court by an equal division of its members. 203 U. S. 580, 51 L. ed. 326, 27 Sup. Ct. Rep. 779.

A distinction is made between those cases and that at bar, and there is some distinction in the facts; but not such, in my opinion, as to take this case out of the principle announced in them. They were made to turn upon the fact that the tax or duty was upon the legacy or distributive shares. In this they were applied in *Sturges v. United States*, 117 U. S. 363, 29 L. ed. 920, 6 Sup. Ct. Rep. 767, and followed in *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, and *Vanderbilt v. Eidman*, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331, in which the act of June 13, 1898, was interpreted. It is said in *Knowlton v. Moore*, "that the provisions of the act of 1864 were in mind when" the act of June 13, 1898 [30 Stat. at L. 448, chap. 448, U. S. Comp. Stat. 1901, p. 2286], was drafted. The cases of *Clapp v. Mason* and *Mason v. Sargent* were decided when that act was drafted. Is it not a fair inference that it and its repealing act were intended to have the same meaning and interpretation which had been given to its prototype and its repealing act?

Those cases were also made to turn on the fact that, as the tax was upon the legacy or distributive share, there could be no tax nor claim in favor of the government until such legacy or share was vested in the possession and enjoyment of the legatee or distributee. In this again they were followed in *Vanderbilt v. Eidman*. And it seems to me, therefore, that there is such resemblance of the provisions of the act of 231] 1864 to those of the act of June 13, 1898, as to make the cases interpreting the former decisive precedents of the meaning of the latter.

The time of payment is in both acts at a date subsequent to the death of the testator. In the act of 1898, one year after his death; in the act of 1864, when the legacy came into possession and enjoyment. This difference in time can make no difference with the principle that the tax does not accrue until it becomes due and payable. And, I submit, is not "imposed" until then. does not become a claim in favor of the

government until then, and, not being such, is not saved by § 8 of the repealing act. The lien does not attach until then. By § 30 of the act of 1898, the tax is due one year after the death of the testator, and is secured by a lien; but when the lien attaches is not stated. There is the same silence in the act of 1864. The omission was supplied by *Mason v. Sargent*, which declared that the lien presupposed the existence of the tax, and only attached when the tax accrued. This must also be the meaning of § 20, and we have a further parallel between the acts, completing the application of the cited cases. Mark, too, the words of § 8 of the repealing act, associating the tax and the lien, showing how closely the legislative mind followed the judicial decisions and gave its legislation, as I think, the certain meaning that the interpretation of the prior enactments afforded. Section 8 provides as follows: "That all taxes or duties imposed by § 29 . . . shall be subject as to lien, charge, collection, and otherwise to the provisions of § 30. . . ."

An argument is made to show that a tax may be said to be imposed, though it be not due and payable. The argument is answered, I think, by what I have said. A tax is not imposed by a mere provision for it. Illustrations of this will readily come to mind besides those afforded by the cited cases. However, I will not attempt to further review the contentions of the government or the opposing ones, nor [222 consider from which the greater embarrassments, if any, will result. The force of the conflicting contentions, and of course they have force, establish the ambiguity of the statute and the different meanings that can be ascribed to it. In such situation the rule of interpretation which I have announced, and which I have shown is sanctioned by this court, should turn decision against the tax. I will not quote the circuit courts and the circuit courts of appeal, which have so thought and have pronounced against the government. They make a body of authority, persuasive in their numbers and rank. And this court has divided in opinion. I do not mention the fact as a circumstance which should preclude consideration of the question, but I bring it forward as an element of some power in the discussion. It may not have the "true, fixed, and resting quality" of *stare decisis*, but it has nevertheless strong appeal and persuasion. It has persisted through quite a period of time and against many attempts to disturb it. It is certainly something more patent than inaction. It gave authority to the decision

of the circuit court of appeals in *Eidman v. Tilghman* [69 C. C. A. 139, 136 Fed. 141], and that again determined other judgments and became a rule of decision for the settlement of estates.

54 L. ed.

I think the question certified should be answered in the affirmative.

I am authorized to say that the CHIEF JUSTICE and Mr. Justice Day concur in this dissent.

1013

THE DECISIONS
OF THE
Supreme Court of the United States

AT
OCTOBER TERM, 1910.

233] *UNITED STATES, Appt.,
v.
CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY.

(See S. C. Reporter's ed. 233-244.)

Public lands — swamp lands — reservation from railway land grant.

1. Proceedings instituted prior to the definite location of a railway, for the purpose of bringing under the operation of the swamp land act of September 28, 1850, certain lands within the place limits of the land grant made to the railway company by the act of May 12, 1864, do not except such lands from the railway land grant as being previously reserved, if they were not in fact swamp or overflowed lands.

[For other cases, see Public Lands, 168-183, in Digest Sup. Ct. 1908.]

Courts — conclusiveness of decisions of Land Department — swamp lands — railway land grant.

2. A railway company will not be required to account to the United States in equity for the proceeds of the sale of lands patented to the company as within the place limits of the railway land grant made by the act of May 12, 1864, on the theory that what was done under or in execution of the swamp land act of September 28, 1850, prior to the filing of the map of definite location, operated to except such lands from the railway land grant as being previously reserved, where to grant such relief would be to disregard a subsequent decision of the

Commissioner of the General Land Office, made after full notice and hearing, that such lands were not in fact swamp or overflowed, and that neither the state nor any of its counties claiming them as such were entitled to said lands, which decision has never been appealed from, and still remains after nearly thirty years, unreversed and unmodified.

[For other cases, see Courts, 260a-267a, in Digest Sup. Ct. 1908.]

[No. 11.]

Argued April 26, 27, 1910. Decided October 17, 1910.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of Iowa, dismissing the bill in a suit to compel a railway company to account to the United States for the proceeds of the sale of lands within the place limits of its land grant, on the ground that, being selected as swamp lands, they were excepted from such grant. Affirmed.

See same case below, 87 C. C. A. 592, 160 Fed. 818.

The facts are stated in the opinion.

Mr. Barton Corneau argued the cause and filed a brief for appellant:

The state had a right to present claims to swamp lands to the Interior Department, and to have those claims adjudicated.

Rogers Locomotive Mach. Works v. American Emigrant Co. 164 U. S. 559, 570, 41 L. ed. 552, 557, 17 Sup. Ct. Rep. 188; Wright v. Roseberry, 121 U. S. 488, 500-510, 30 L. ed. 1039, 1041-1045, 7 Sup. Ct. Rep. 985.

Since the state had the right to make claim for those lands which it believed to be

NOTE.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

On conclusiveness and effect of decisions of Land Department—see notes to Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co. 57 C. C. A. 207; Carson City Gold & S. Min. Co. v. North Star Min. Co. 28 C. C. A. 344; and Hartman v. Warren, 22 C. C. A. 38.

54 L. ed.

swampy within the meaning of the grant of 1850, the presentation of its claims to the proper officer necessarily called for an adjudication by such officer or his superior, and consequently such claims became *sub judice* immediately upon such presentation.

Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; Whitney v. Taylor, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112; Bardon v. Northern P. R. Co. 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856.

Valid pre-emption or homestead claims cannot be defeated even by the refusal of the land officers to permit them to be filed.

Ard v. Brandon, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406; Weeks v. Bridgman, 159 U. S. 541, 40 L. ed. 253, 16 Sup. Ct. Rep. 72; Nelson v. Northern P. R. Co. 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302.

If "recognition" of the state's claims to these lands was necessary, there is conclusive evidence of it in the record.

Although the grant was of alternate odd-numbered sections of "land," the word "land," as used in the grant, meant public lands.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Newhall v. Sanger, 92 U. S. 761, 23 L. ed. 769.

The assertion and pendency of a claim to land segregates it from the public domain, so as to prevent it from passing by a grant of public lands.

Newhall v. Sanger, *supra*; Doolan v. Carr, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; United States v. McLaughlin, 127 U. S. 429, 32 L. ed. 213, 8 Sup. Ct. Rep. 1177; Carr v. Quigley, 149 U. S. 652, 37 L. ed. 885, 13 Sup. Ct. Rep. 961; Southern P. R. Co. v. United States, 200 U. S. 354, 50 L. ed. 512, 26 Sup. Ct. Rep. 298; Northern Lumber Co. v. O'Brien, 204 U. S. 190, 51 L. ed. 438, 27 Sup. Ct. Rep. 249.

The reservation referred in terms to lands reserved for purposes of internal improvement, and obviously, therefore, included all lands which were, at the time the grant was made, held by the government for the purpose of being ultimately conveyed to the states under the various internal improvement grants.

Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 689; Williams v. Baker, 17 Wall. 144, 21 L. ed. 561; Burlington & M. R. Co. v. Fremont County, 9 Wall. 89, 19 L. ed. 563; Hannibal & St. J. R. Co. v. Smith, 9 Wall. 95, 19 L. ed. 599; Wolsey v. Chapman, 101 U. S. 755, 25 L. ed. 915.

The fundamental purpose of the various exceptions in these railroad grants was to

avoid conflicts between different claimants to the same lands, and hence the reservations are liberally construed in favor of the government.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 746, 23 L. ed. 639; Southern P. R. Co. v. United States and Kansas P. R. Co. v. Dunmeyer, *supra*.

The subsequent disallowance of the state's claims in 1876 could not inure to the benefit of the railway company. Its rights under the land grant act must be determined as of the date that act took effect.

Wolcott v. Des Moines Nav. & R. Co.; Newhall v. Sanger; Leavenworth, L. & G. R. Co. v. United States; Kansas P. R. Co. v. Dunmeyer; Hastings & D. R. Co. v. Whitney; Bardon v. Northern P. R. Co.; Whitney v. Taylor; Southern P. R. Co. v. United States; and Northern Lumber Co. v. O'Brien,—*supra*.

Mr. Charles E. Vroman argued the cause and filed a brief for appellee:

While the swamp land act of 1850 was a grant *in presenti*, yet it only passed an "inchoate title" to the state. The lands must first be identified as actually swamp and overflowed, and thereby made unfit for cultivation; which being done, and not before, the title became perfect as of the date of the granting act.

Rogers Locomotive Mach. Works v. American Emigrant Co. 164 U. S. 570, 571, 41 L. ed. 557, 17 Sup. Ct. Rep. 188; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208; Brown v. Hitchcock, 173 U. S. 476, 43 L. ed. 773, 19 Sup. Ct. Rep. 485; Hoyt v. Weyerhaeuser, 88 C. C. A. 404, 161 Fed. 324; Sjoli v. Dreschel, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154.

The second section of the act of 1850 expressly conferred upon the Secretary of the Interior the power and duty to identify, list, and plat the particular lands which came within the operation of the act. This necessarily involved the power and duty of determining and deciding what lands were swamp and what were not swamp.

French v. Fyan, 93 U. S. 171, 23 L. ed. 813; Rogers Locomotive Mach. Works v. American Emigrant Co. *supra*; Barden v. Northern P. R. Co. 154 U. S. 320, 321, 38 L. ed. 999, 1000, 14 Sup. Ct. Rep. 1030.

Until the decision of the Secretary is made and the patent issued to the state, the grant is in process of administration, the legal title remains in the United States, and the land remains subject to the jurisdiction of the Land Department.

Michigan Land & Lumber Co. v. Rust, 168 U. S. 592, 593, 42 L. ed. 592, 593, 18 Sup. Ct. Rep. 208.

Field notes of public surveys have no

binding force in determining the actual character of lands (whether mineral or swamp), because the law does not leave the determination of such questions to the surveyor general or his subordinates.

Barden v. Northern P. R. Co. 154 U. S. 320, 38 L. ed. 999, 14 Sup. Ct. Rep. 1030; *Cole v. Markley*, 2 Land Dec. 849.

The decision of the Commissioner of the Land Office constitutes a final adjudication that the lands in controversy were never swamp lands, and that they did not pass to the state of Iowa under the swamp act of 1850, but did pass to the defendant company under the railroad grant of 1864. Such decision is binding and conclusive upon the courts.

McCormick v. Hayes, 159 U. S. 332, 40 L. ed. 171, 16 Sup. Ct. Rep. 37; *Barden v. Northern P. R. Co.* 154 U. S. 327, 328, 38 L. ed. 1001, 1002, 14 Sup. Ct. Rep. 1030; *Heath v. Wallace*, 138 U. S. 585, 34 L. ed. 1068, 11 Sup. Ct. Rep. 380; *Chandler v. Calumet & H. Min. Co.* 149 U. S. 79, 37 L. ed. 657, 13 Sup. Ct. Rep. 798; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 450, 27 L. ed. 227, 1 Sup. Ct. Rep. 389; *French v. Fyan*, *supra*; *United States v. Winona & St. P. R. Co.* 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 948.

A mere selection or claim by the beneficiary could not make lands swamp if not so in fact, or have any weight whatever in determining that question.

Barden v. Northern P. R. Co. 154 U. S. 321, 38 L. ed. 999, 14 Sup. Ct. Rep. 1030; *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 601, 42 L. ed. 595, 18 Sup. Ct. Rep. 208.

The "selections" made by state representatives, considered either as agents or informants of the Secretary, were not his acts or selections until formally adopted and ratified by him.

Humbird v. Avery, 195 U. S. 507, 49 L. ed. 298, 25 Sup. Ct. Rep. 123.

The land grant of May 12, 1864, was a grant *in presenti*.

St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 5, 35 L. ed. 79, 11 Sup. Ct. Rep. 389; *United States v. Southern P. R. Co.* 146 U. S. 593, 36 L. ed. 1097, 13 Sup. Ct. Rep. 152.

Mr. Justice Harlan delivered the opinion of the court:

By an act approved March 3d, 1887, chap. 376 (amended by act of February 12th, 1896, chap. 18, and by act of March 2d, 1896, chap. 39), Congress provided for the adjustment of land grants theretofore made in aid of the construction of railroads, and for the forfeiture of unearned lands, and for the relinquishment or reconveyance to the United States of lands which had been

certified or patented to or for the use of any railroad company. 24 Stat. at L. 556; U. S. Comp. Stat. 1901, p. 1595; 29 Stat. at L. 6, 42, U. S. Comp. Stat. 1901, pp. 1596, 1603.

If, upon completing such adjustment, it appeared that, from any cause, lands had been erroneously certified or patented by the United States, to or for the use of a railroad company, by, through, or under grant from the United States, to aid in the construction of a railroad, then it became the duty of the Secretary of the Interior to demand the relinquishment or reconveyance of such lands to the United States, whether within granted or indemnity limits; and if such demand was not complied with by a named time, then the Attorney General was to institute the necessary proceedings to cancel all patents, certificates, or other evidence of title issued for such lands, and to restore the title to the United States. Provision was made for the protection, by patents, of purchasers in good faith from the grantee company, and the Secretary of the Interior was required to demand, on behalf of the United States, "payment from the company which has so disposed of such lands of an amount equal to the government price for similar lands;" and if payment was refused, within a time named, "the Attorney General was to institute suits against the company for such amount." *Ibid*.

Under the authority of that act, the present suit was brought by the United States in 1903. It relates to about *4,300 [235 acres of lands in Kossuth, Palo Alto, and Dickinson counties, Iowa, which, the United States alleges, were erroneously patented (in 1880) to the defendant railway company. That company sold the lands to purchasers in good faith, and refuses to account to the United States for the proceeds of such sales.

The relief asked is a decree compelling the railway company to account for such proceeds, and declaring such indebtedness to be a lien upon all funds in its hands realized from the above sales. The company took issue with the government by answer, but before the cause was heard, the material facts were stipulated by the parties. The circuit court dismissed the bill, and its judgment was affirmed by the circuit court of appeals.

In order that the grounds upon which the lower courts proceeded may fully appear, the circumstances under which the defendant railroad company became connected with the lands must be stated.

By an act passed May 12th, 1864, chap. 84, Congress, in aid of the construction of certain railroads, granted to the state of

Iowa, for the use and benefit of the McGregor Western Railroad Company, "every alternate section of land designated by odd numbers for ten sections in width on each side of said roads; but, in case it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved; or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached, as aforesaid, which lands thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by the state of Iowa for the uses and purposes aforesaid: *Provided*, That the lands so selected shall in no case be located more than twenty miles from the lines of said roads: *Provided, further*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said roads through such reserved lands, in which case the right of way shall be granted, subject to the approval of the President of the United States." 13 Stat. at L. 72. The provisions of this act were duly accepted by the state in 1866. Laws of Iowa, 1866, chap. 42, p. 189.

The McGregor & Western Railroad Company failed to comply with the conditions of the above act. Thereupon, all lands and rights to land granted to it by the act of 1864 (the lands now in dispute being part of those so granted) were "absolutely and entirely resumed by the state of Iowa," by an act of February 27th, 1868, which declared that "the same be and are as fully and absolutely vested in the state as if the same had never been granted to said railroad company." Laws of Iowa, 1868, p. 20. The state then, by an act of March 31st, 1868, gave the benefit of the grant for the road in question to the McGregor & Sioux City Railway Company, which accepted the terms prescribed by that act. Laws of

Iowa, 1868, chap. 58, p. 70. But that company also failed to comply with the terms of the grant, and the lands and rights of lands granted were again resumed by the state, and afterwards were passed upon certain terms and conditions to the Chicago, Milwaukee, & St. Paul Railway Company, [237] by an act passed February 27th, 1878. The latter company accepted the provisions of that grant, and, in recognition of its rights, the United States, in 1880, patented to the state for the benefit of that company the following lands, covered by the act of 1864: 320 acres in Dickinson county, by patent of April, 1880; 3754.81 in Kossuth and Palo Alto counties. These lands embraced all sued for except two tracts aggregating 200 acres in Kossuth county, to which the present defendant asserted no title. Laws of Iowa, 1878, chap. 21, p. 18. Upon compliance with the terms and conditions prescribed in that act, the governor of Iowa was authorized to patent and transfer to the present defendant, the Chicago, Milwaukee, & St. Paul Railway Company, the lands mentioned in the act of Congress of 1864.

In 1864 and 1869 maps of definite location, designating the line of said road in Iowa, as indicated in the act of 1864, were filed in the office of the Commissioner of the General Land Office.

It is alleged in the bill of complaint that, at the date of such definite location, all the lands the proceeds of the sale of which the government new claims, and which were within the 10-mile or place limits of the railroad, were covered by existing claims of record in the office of the Commissioner of the General Land Office, consisting of homestead entries, pre-emption declaratory statements, warrant locations, etc., and were pending before the Department of the Interior for adjudication. If that were true, then, by the very terms of the act of Congress, the lands in question would have been excepted from the grant of 1864. But the defendant denied in its answer that such fact existed, and it does not appear from the evidence that any homestead entry, pre-emption declaratory statement, or warrant location had been made prior to the definite location of the line of the railroad. On the contrary, it was stipulated in the case that prior to and on *August 30th, 1864,—[238] which was after the passage by Congress of the original granting act, and was the date of the filing of the plat of definite location of the road,—none of the lands described in the bill of complaint had been covered by any homestead entry, pre-emption declaratory statement, or warrant location or other existing claims of record in the office of the Commissioner of the General Land Office.

In that view, and if this were the whole case, then, beyond all question, the law would be in favor of the railway company; for the grant of 1864 was one *in præsenti* for the purposes therein mentioned, and according to the settled doctrines of this court, the beneficiary of the grant was entitled to the lands granted in place limits which had not been appropriated or reserved by the United States for any purpose, or to which a homestead or pre-emption right had not attached *prior to the definite location of the road* proposed to be aided. The grant plainly included odd-numbered sections, within 10 miles on each side of the road, which were part of the public domain, not previously appropriated or set apart for some specific purpose at the time of the definite location.

But the government insists that before the passage of the act of 1864 these lands had been reserved by what was done under or in execution of what is known as the swamp land act of September 28th, 1850 [9 Stat. at L. 519, chap. 84, U. S. Comp. Stat. 1901, p. 1586], and cannot, therefore, be regarded as granted by, but were excepted from, the operation of the act of 1864. 13 Stat. at L. 72, § 1, chap. 84. Consequently, it is contended by the United States, patents could not have been legally issued to the railway company under the act of 1864. The contention of the railway company, on the other hand, is that the lands in question were not, in fact, swamp or overflowed lands granted by the act of 1850, to which any right could legally attach in behalf of the state under that act; therefore, it is contended that nothing done under that act availed or could have availed the state ex-239] cept a decision *or ruling by competent authority, in due form, that these lands were in fact within the class of swamp or overflowed lands mentioned in the act of 1850.

In view of what has been said, it becomes necessary to inquire into the scope and effect of the swamp land act of 1850.

By the act of Congress of September 28th, 1850, chap. 84, Congress granted to Arkansas all the *swamp and overflowed lands* unfit for cultivation, within its limits, and which remained unsold at the time, to enable the state to construct the necessary levees and drains to reclaim such lands. That act provided that it should be "the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the state of Arkansas, and, at the request of said governor, cause a patent to be issued to the state therefor; and on that

patent, the fee simple to said lands shall vest in the said state of Arkansas, subject to the disposal of the legislature thereof: *Provided, however*, that the *proceeds* of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, *as far as necessary*, to the purpose of reclaiming said lands by means of the levees and drains aforesaid" (§ 2); that "in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom" (§ 3); and that "the provisions of this act be extended to, and their benefits be conferred upon, each of the other states of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated" (§ 4). 9 Stat. at L. 519, chap. 84, U. S. Comp. Stat. 1901, p. 1587.

We have seen that by the act of 1864 the railroad company, by the grant *in præsenti* in that act contained, was *to get the [240 odd-numbered sections within 10 miles on each side of its line, and not sold by the United States before definite location, or to which no right of pre-emption or homestead settlement had attached at the time of such location, or which had not been previously reserved by the United States for some purpose. It is stipulated that when the line of the railroad was definitely located, none of the lands in question "were covered by any homestead entry, pre-emption declaratory statements, or warrant locations, or other existing claims of record in the office of the Commissioner of the General Land Office of the Department of the Interior." But the United States contends that what was done, prior to the definite location of the road, for the purpose of bringing these lands under the operation of the act of 1850 as swamp and overflowed lands, created a claim that covered or attached these lands. But this contention of the government must be considered in the light of the fundamental inquiry whether the latter claim can avail anything whatever *if the lands were not in fact swamp or overflowed lands*; for only lands of that character were granted by the act of 1850, and no mere claim that they were swamp or overflowed lands could make them such, unless it was sustained by some decision or ruling by competent authority to that effect. There never was any such decision or ruling. It is true that Dickinson, Palo Alto, and Kossuth counties—acting, we may assume, for the purposes of this case, under the sanction of the state—made selections of those lands as swamp lands; but it is stipulated and agreed in this case

that those selections were never adopted, ratified, or confirmed in any manner by the Interior or Land Department, but remained pending and undetermined therein down to the year 1876; that "during that time the state of Iowa claimed said lands as being swamp and overflowed lands granted to it under and by virtue of said act of Congress of September 28, 1850, and as having been 241] selected *as such by said several counties under authority of an act of its legislature, approved January 13, 1853; and said McGregor Western Railroad Company and said McGregor & Sioux City Railway Company (afterwards McGregor & Missouri River Railway Company) successively made claims to the same lands as being neither swamp nor overflowed in character, but as inuring to them respectively, under the act of Congress of May 12, 1864, as place lands, within the 10-mile limits of said grant, under the plat of definite location filed August 30, 1864; that on May 31, 1876, and on October 21, 1876, the Commissioner of the General Land Office, upon public hearings of the matter of such respective claims, and after due notice to all parties interested, duly held and adjudged in writing that the lands in said Dickinson, Kosuth, and Palo Alto counties, Iowa, mentioned and described in complainant's exhibit 'A' and in paragraphs 11 and 12 of defendant's answer in this cause, were not *in fact swamp or overflowed lands*, and were not of a *character embraced* in said act of Congress of September 28, 1850, and known as the swamp land act; and that the state of Iowa and said several counties were never entitled to said lands, or any part thereof, under said act. Said hearings were had pursuant to the requirements of the act of Congress of March 5, 1872 [17 Stat. at L. 37, chap. 39], and said findings and decisions of the Commissioner were never appealed from, reversed, or modified in any manner, as shown by the records of said General Land Office." Nearly thirty years have passed since this decision of the Land Department, and the United States, without ever appealing from the decision of the Land Department, now comes forward and asks a court of equity to cancel the patent issued in 1880 and 1881, under which the railway claims. Touching this aspect of the case, the circuit court of appeals said: "Since then most, if not all, of the lands have been sold and conveyed to numerous purchasers of small tracts, who bought them in good faith and 242] for value. *Twenty-five years or more of quiet enjoyment of the land in question have now elapsed. No fraud or unfair practices in any stage of the proceedings leading up to the final patents are charged against the railway company or any persons acting

for it. In such circumstances, it would, in our opinion, be inequitable and conducive of no good results to grant the relief sought by this bill." [87 C. C. A. 600, 160 Fed. 826.]

In determining this case, it must not be overlooked that the act of Congress confers upon the Secretary of the Interior, and upon him alone, the power to identify particular lands as swamp and overflow lands embraced by the act of 1850. Referring to the 2d section of that act, Mr. Justice Miller, speaking for the court in *French v. Fyan*, 93 U. S. 169, 171, 23 L. ed. 812, 813, said: "It was under the power conferred by this section that the patent was issued under which defendant holds the land. We are of opinion that this section devolved upon the Secretary, as the head of the Department which administered the affairs of the public lands, the duty, and conferred on him the power, of determining what lands were of the description granted by that act, and *made his office the tribunal whose decision on that subject was to be controlling.*" To the same effect, on this point, are *Ehrhardt v. Hogaboom*, 115 U. S. 67, 68, 29 L. ed. 346, 5 Sup. Ct. Rep. 1157, and *Rogers Locomotive Mach. Works v. American Emigrant Co.* 164 U. S. 559, 571, 41 L. ed. 552, 557, 17 Sup. Ct. Rep. 188. In the latter case the court said: "The identification of lands embraced by the swamp land act was therefore necessary before the state could claim a patent or exercise absolute control of them."

We repeat that it must be taken that these lands were not swamp or overflowed lands that had been reserved by the United States under the act of 1850. That fact must be regarded as conclusively established, as between the present parties. We say conclusively established; for, after full notice to all parties who were concerned in the matter, and who had asserted titles to these lands, the *Commissioner of the Gen- [243] eral Land Office decided, in 1876, after full hearing, that these lands were not, in fact, swamp or overflowed lands, and that *neither the state nor any of its counties were entitled to them or any of them under the act of 1850.* That hearing by the Commissioner was had pursuant to said act of Congress of March 5th, 1872, chap. 39, which provided, among other things, that the decision should be "without prejudice to legal entries or the rights of bona fide settlers under the homestead and pre-emption laws of the United States prior to the date of this act." 17 Stat. at L. 37. In any view, that decision was, in contemplation of law, one by the Secretary of the Interior, who, by the original act of 1850, was directed to make out accurate lists or plats of the lands described by that act as swamp and overflowed

lands. *Wilcox v. Jackson*, 13 Pet. 498, 10 L. ed. 264; *Wolsey v. Chapman*, 101 U. S. 755, 768, 25 L. ed. 915, 919. The decision was never appealed from, and has never been reversed or modified. The United States now comes, many years after such decision, and in disregard of the unreversed decision of the Land Department, asks a decree which cannot be rendered except upon the theory that these lands were, in fact, swamp or overflowed lands. We cannot adopt this theory nor make any such decree as that asked. By the act of 1850, Congress granted *in præsenti* to the state only swamp and overflowed lands within its limits; and the state legally, we may concede, for the purposes of this case, passed its interest in such lands to the counties in which they were situated. A dispute arose between the parties interested in the question before the Land Department, among whom were the counties claiming, by sanction of the state, to have legally selected the lands under the act of 1850, as to whether the lands were, in fact, swamp or overflowed lands. That dispute, upon notice and hearing, as we have seen, was decided adversely to the contentions of the state and of the counties in question, by the Department which alone [244] had authority to *determine what were and what were not swamp or overflowed lands. We perceive no sound reason why that decision, unreversed and unmodified in any respect, should not be accepted as conclusive of the essential facts upon which it was based. In that view, the United States has no standing in a court of equity to obtain a decree that will be in disregard of the fact thus conclusively found by the Land Department. Therefore, their certification to the state for the benefit of the railway company, under the act of 1864, cannot be held to have been an error. It is, in substance, admitted—at any rate, the record shows—that if the lands were not swamp or overflowed, the company was entitled to them under the act of 1864, as lands not previously reserved, but granted for the benefit of the railway company. If, notwithstanding the decision of the Land Department, the court should determine the rights of the parties according to the facts presented to that Department, it would be confronted with the fact, established by the record, that the lands in question were not swamp or overflowed. We omit any reference to other questions, which, if determined, would lead to the same result as above stated. The decree dismissing the bill was right and the judgment of the Circuit Court of Appeals is sustained.

*JAMES H. HOLT, Plff. in Err., [245 v.

UNITED STATES.

(Sec S. C. Reporter's ed. 245-254.)

Indictment — sufficiency of allegations — place within exclusive Federal jurisdiction.

1. An allegation in an indictment for murder that the crime was committed "within the Fort Worden Military Reservation, a place under the exclusive jurisdiction of the United States," charges with sufficient clearness that such reservation was under the exclusive jurisdiction of the United States at the time of the murder.

[For other cases, see *Indictment and Information*, II. h, in *Digest Sup. Ct.* 1908.]

Indictment — murder — allegations of felony and malice aforethought.

*2. An indictment for murder which charges that the acts constituting the assault were made feloniously and with malice aforethought need not contain such allegations in the preliminary averment of assault.

[For other cases, see *Indictment and Information*, II. h, in *Digest Sup. Ct.* 1908.]

Indictment — quashing — incompetency of evidence before grand jury.

3. An indictment need not be quashed because the grand jury considered testimony of admissions by the prisoner which were obtained under circumstances that made them incompetent.

[For other cases, see *Indictment and Information*, IV., in *Digest Sup. Ct.* 1908.]

Appeal — discretion below — challenge to juror.

4. The trial court's refusal to sustain a challenge to a juror for cause will not be disturbed by an appellate court, where it appears from the examination of such juror that he had not talked with anyone who purported to know about the case of his

NOTE. — On charge of time and place in indictment for homicide—see note to *Com. v. Snell*, 3 L.R.A. (N.S.) 1019.

On the sufficiency of an indictment for murder—see note to *Bergemann v. Backer*, 39 L. ed. U. S. 845.

On personal knowledge of facts to be proved as affecting competency of juror—see note to *State v. Stentz*, 63 L.R.A. 807.

On reversal of conviction because of unfair or irrelevant argument or statement of facts by prosecuting attorney—see note to *People v. Fielding*, 46 L.R.A. 641.

On permitting separation of jury in capital case—see note to *Armstrong v. State*, 24 L.R.A. (N.S.) 776.

On admissibility in evidence against accused of documents or other things taken from him—see note to *State v. Edwards*, 59 L.R.A. 465.

On the presumption of innocence—see note to *Coffin v. United States*, 39 L. ed. U. S. 481.

As to what constitutes a reasonable doubt in criminal cases—see note to *Lovett v. State*, 17 L.R.A. 705.

own knowledge, but that he had taken newspaper statements for facts, that he had no opinion other than that derived from the newspapers, and that evidence would change it very easily, although it would take some evidence to remove it, and he testified that if the evidence failed to prove the facts alleged in the newspaper, he would decide according to the evidence or lack of evidence at the trial, and thought he could try the case solely upon the evidence, fairly and impartially.

[For other cases, see Appeal and Error, VIII. 1, 6, in Digest Sup. Ct. 1908.]

Appcal — discretion below — refusal to exclude jury during argument.

5. The refusal to exclude the jurors during counsel's argument over the admissibility of admissions alleged to have been made by the accused is not an abuse of the trial court's discretion; where the evidence to which they listened was simply evidence of facts deemed by the judge sufficient to show that the statements, if any, were not freely made, and no evidence was admitted that the prisoner had made any confession, and his statements were excluded,—especially since the judge stated that the jurors were to decide the case on the testimony as it came from the witnesses on the stand, and not on what counsel might say, and told them in the strongest terms that the preliminary evidence that he was hearing had no bearing on the question they had to decide.

[For other cases, see Appeal and Error, VIII. 1, 6, in Digest Sup. Ct. 1908.]

Appeal — prejudicial error — remarks of counsel.

6. The conduct of a Federal district attorney on a trial for murder, in characterizing as confessions certain alleged statements of the prisoner which were excluded because they were not freely made, does not require a reversal of the conviction, where the court told the jurors that they were to decide the case on the testimony of the witnesses, and not on what counsel might say.

[For other cases, see Appeal and Error, VIII. m, 5, in Digest Sup. Ct. 1908.]

Appeal — discretion below — permitting jurors to separate and read newspapers.

7. The trial court does not abuse its discretion in refusing to grant a motion for a new trial in a capital case because the jury, being allowed to separate, read the local daily newspapers with articles about the case, while the trial was in progress.

[For other cases, see Appeal and Error, VIII. 1, 8, in Digest Sup. Ct. 1908.]

Documentary evidence — proving scene of crime to be within exclusive Federal jurisdiction.

8. The deeds and condemnation proceedings under which the United States claims title to a military reservation, the scene of a crime, and the official maps in the Engineer's Department, made from original surveys under the authority of the War Department, and a book showing titles to the reservation, compiled under the same

authority, are admissible in evidence to show that the premises in question were within the exclusive jurisdiction of the United States.

[Documentary Evidence generally, see Evidence, IV., in Digest Sup. Ct. 1908.]

Evidence — sufficiency — showing that scene of crime was within exclusive Federal jurisdiction.

9. The evidence is sufficient to sustain the finding of the jury that the scene of a homicide was within the exclusive Federal jurisdiction, where the deeds and condemnation proceedings assented to by state legislation and authorized by Congress, under which the United States claimed title to the premises as a military reservation, were put in evidence, together with official maps in the Engineer's Department, made from original surveys under the authority of the War Department, and a book showing titles to such reservation, compiled under the same authority, even if evidence of the *de facto* exercise of exclusive jurisdiction was not enough.

[For other cases, see Evidence, XII. h, in Digest Sup. Ct. 1908.]

Criminal law — self-incrimination — exhibition of self.

10. The protection against self-incrimination afforded by U. S. Const., 5th Amend., extends to the use against the accused of communications extorted from him by physical or moral compulsion, but not to evidence obtained from the exhibition of his person, such as testimony as to the fit of a blouse which he was forced to put on.

[For other cases, see Criminal Law, III. b, 2, in Digest Sup. Ct. 1908.]

Evidence wrongfully obtained — admissibility.

11. Testimony that the accused put on a blouse, and that it fitted him, is not made inadmissible on the question whether or not it belonged to him, because the prisoner did this under duress, since, even assuming that such evidence was improperly obtained, it is still competent.

[For other cases, see Evidence, VIII., in Digest Sup. Ct. 1908.]

Appeal — refusing requested instruction.

12. The refusal of the trial court to give requested instructions as to the presumption of innocence and as to reasonable doubt is not error, where the jury were otherwise fully and correctly instructed on these matters.

[For other cases, see Appeal and Error, 5127-5141, in Digest Sup. Ct. 1908.]

Trial — instructions — presumption of innocence.

13. The jury is correctly instructed as to the presumption of innocence where the court states that a criminal prosecution begins with the presumption that the defendant, although accused, is innocent, and that to overcome this legal presumption the evidence must be clear and convincing, and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty.

[For other cases, see Trial, VIII. c, in Digest Sup. Ct. 1908.]

Appeal — exception to instruction — sufficiency.

14. An instruction as to reasonable doubt, which, after defining such doubt as an actual doubt which a juror is conscious of after reviewing in his mind the entire case, giving consideration to all the testimony, and one which he believes would cause a reasonable man in any matter of like importance to hesitate to act, denies the notion that any mere possibility is sufficient ground for such a doubt, and adds that, in the performance of jury service, jurors should decide controversies as they would any important question in their own affairs, is good as against a general exception.

[For other cases, see Appeal and Error, 3619-3639, in Digest Sup. Ct. 1908.]

Trial — requested instruction — repetition.

15. The trial court need not give a requested instruction which it has already given in its charge.

[For other cases, see Trial, 819-822, in Digest Sup. Ct. 1908.]

[No. 231.]

Argued October 13, 14, 1910. Decided October 31, 1910.

IN ERROR to the Circuit Court of the United States for the Western District of Washington to review a conviction for murder, alleged to have been committed in a place within the exclusive Federal jurisdiction. Affirmed.

See same case below on motion for new trial, 168 Fed. 141.

The facts are stated in the opinion.

Mr. Hugh M. Caldwell argued the cause, and, with Messrs. C. F. Riddell and John Lewis Smith, filed a brief for plaintiff in error:

The indictment is not according to approved forms.

Wharton, *Precedents of Indictments & Pleas*, 14, 16.

Every ingredient of which the offense is composed must be accurately and clearly expressed in the indictment, and must be charged positively, and not inferentially.

United States v. Simmons, 96 U. S. 360, 24 L. ed. 819; United States v. Mann, 95 U. S. 580, 24 L. ed. 531; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; United States v. Cook, 17 Wall. 168, 21 L. ed. 538; United States v. Hess, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; Evans v. United States, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; United States v. Cooly, 4 Cranch, C. C. 707, Fed. Cas. No. 14,859; 1 Bishop, Crim. Proc. 2d ed. § 81; Archbold Crim. Pl. & Ev. 18th ed. 54, 265; Archbold, Crim. Pr. & Pl. 87; United States v. Potter, 56 Fed. 103; People v. Willis, 24 Misc. 537, 54 N. Y. 54 L. ed.

Supp. 136; State v. Rowell, 70 Vt. 411, 41 Atl. 430; Pritchard v. People, 149 Ill. 50, 36 N. E. 103; State v. Gaffrey, 3 Pinney (Wis.) 371; State v. Patrick, 3 Wis. 814; Fouts v. State, 8 Ohio St. 113; Thomas v. Com. 2 Rob. (Va.) 795; State v. Gallagher, 123 Iowa, 378, 98 N. W. 906; State v. Ashpole, 127 Iowa, 680, 104 N. W. 281; State v. Hagan, 164 Mo. 654, 65 S. W. 249; State v. Gassard, 103 Mo. App. 143, 77 S. W. 473; State v. Furgerson, 152 Mo. 92, 53 S. W. 427; Moline v. State, 67 Neb. 164, 93 N. W. 228; State v. Eddy, 46 Or. 625, 81 Pac. 941, 82 Pac. 707; Kearney v. State, 48 Md. 16; People v. Logan, 1 Nev. 110; State v. Halder, 2 M'Cord, L. 377, 13 Am. Dec. 738; Cook v. State, 72 Miss. 517, 17 So. 228; Banks v. State, 157 Ind. 197, 60 N. E. 1090; State v. Rector, 126 Mo. 328, 23 S. W. 1074.

The indictment was insufficient in that the assault is not charged to be felonious.

Wharton, *Precedents of Indictments & Pleas*, 42; Chase v. State, 50 Wis. 517, 7 N. W. 376.

Where the defendant is compelled to testify before the grand jury, or confessions are obtained from him by hope inspired by assurances of immunity, or by fear induced by threats, and such confessions caused the indictment, the same is invalid, as no one can be compelled, in a criminal case, to be a witness against himself.

State v. Froiseth, 16 Minn. 296, Gil. 260; People v. Haines, 6 N. Y. Crim. Rep. 103, 1 N. Y. Supp. 55; Boone v. People, 148 Ill. 440, 36 N. E. 99; Cullen v. Com. 24 Gratt. 624; Com. ex rel. Jack v. Crans, 2 Clark (Pa.) 172; People v. Singer, 18 Abb. N. C. 96, 5 N. Y. Crim. Rep. 2; Royce v. Territory, 5 Okla. 61, 47 Pac. 1083; Corley v. State, 50 Ark. 305, 7 S. W. 255; United States v. Charles, 2 Cranch, C. C. 76, Fed. Cas. No. 14,786; United States v. Farrington, 5 Fed. 343; United States v. Kilpatrick, 16 Fed. 774; United States v. Jones, 69 Fed. 978; Joyce, *Indictments*, § 103; State v. Houston, 50 Iowa, 512.

Evidence of confessions ought never to be admitted before a grand jury, except under the direction of the court, or unless the prosecuting officer of the government is present and carefully makes the preliminary inquiry necessary to render the evidence admissible.

United States v. Kilpatrick, 16 Fed. 771.

The rule which may be adduced from the authorities, and which seems most consistent with the policy of the law, is that whenever it becomes essential to ascertain what has transpired before a grand jury, it may be shown, no matter by whom; and the only limitation is that it may not be shown how the individual jurors voted, or what they said during their investigations, because

this cannot serve any of the purposes of justice.

United States v. Farrington, 5 Fed. 347; State v. Campbell, 73 Kan. 688, 9 L.R.A. (N.S.) 533, 85 Pac. 784, 9 A. & E. Ann. Cas. 1203; Royce v. Territory and United States v. Charles, supra; United States v. Coolidge, 2 Gall. 364, Fed. Cas. No. 14,858; Low's Case, 4 Me. 439, 16 Am. Dec. 271; Burdick v. Hunt, 43 Ind. 381; Manion v. People, 29 Ill. App. 532; Bressler v. People, 117 Ill. 422, 8 N. E. 62; State v. Wood, 53 N. H. 484; Com. v. Hill, 11 Cush. 137; Com. v. Mead, 12 Gray, 167, 71 Am. Dec. 741; Way v. Butterworth, 106 Mass. 75; State v. Van Buskirk, 59 Ind. 384, 3 Am. Crim. Rep. 353; Com. v. Green, 126 Pa. 531, 12 Am. St. Rep. 894, 17 Atl. 878, 8 Am. Crim. Rep. 391; Gordon v. Com. 92 Pa. 216, 37 Am. Rep. 672; Huidekoper v. Cotton, 3 Watts, 56; Doyle v. State, 17 Ohio, 222; People v. Haines and People v. Singer, supra; People v. Shattuck, 6 Abb. N. C. 33; People v. Hulbut, 4 Denio, 133, 47 Am. Dec. 244; State v. Benner, 64 Me. 267; State v. Ivey, 100 N. C. 539, 5 S. E. 407, 7 Am. Crim. Rep. 245; State v. Broughton, 29 N. C. (7 Ired. L.) 96, 45 Am. Dec. 507; Territory v. Hart, 7 Mont. 42, 14 Pac. 768; State v. Will, 97 Iowa, 58, 65 N. W. 1010; State v. Clifford, 86 Iowa, 550, 41 Am. St. Rep. 518, 53 N. W. 299; Ex parte Schmidt, 71 Cal. 212, 12 Pac. 55, 7 Am. Crim. Rep. 224; United States v. Kirkwood, 5 Utah, 123, 13 Pac. 234; State v. Moran, 15 Or. 262, 14 Pac. 419; Thomas v. Com. supra; Little v. Com. 25 Gratt. 921; State v. Grady, 84 Mo. 220; Crocker v. State, Meigs, 127; People v. Lauder, 82 Mich. 151, 46 N. W. 956; 4 Wigmore, Ev. § 2362; 1 Bishop, New Crim. Proc. § 857; Thompson & M. Juries § 793; 1 Wharton, Ev. § 601; 3 Rice, Crim. Ev. p. 409.

Error in the selection of the jury deprived the defendant of a trial before an impartial jury.

Rose v. State, 2 Wash. 310, 26 Pac. 264; State v. Murphy, 9 Wash. 204, 37 Pac. 420; State v. Wilcox, 11 Wash. 215, 39 Pac. 386; State v. Rutten, 13 Wash. 203, 43 Pac. 30; State v. Moody, 18 Wash. 165, 51 Pac. 356; State v. Lattin, 19 Wash. 57, 52 Pac. 314; State v. Stentz, 30 Wash. 134, 63 L.R.A. 807, 70 Pac. 241; State v. Riley, 36 Wash. 441, 78 Pac. 1001; Crawford v. United States, 212 U. S. 183, 196, 53 L. ed. 465, 470, 29 Sup. Ct. Rep. 260, 15 A. & E. Ann. Cas. 392; Ex parte Vermilyea, 6 Cow. 565; People v. Vermilyea, 7 Cow. 108.

It is error to refuse to exclude the jury from the court room during the presentation of the arguments of law and testimony improper for the jury to hear, and calculated to prejudice the jury against the defendant.

Carter v. State, 37 Tex. 362; Ellis v.

State, 65 Miss. 44, 7 Am. St. Rep. 634, 3 So. 188; Draughn v. State, 76 Miss. 574, 25 So. 153, 11 Am. Crim. Rep. 192; Corley v. State, supra; Hall v. State, 65 Ga. 37; Woolfolk v. State, 81 Ga. 551, 8 S. E. 724; Kirk v. Territory, 10 Okla. 46, 60 Pac. 797; State v. Vey, 21 S. D. 612, 114 N. W. 719; State v. Williams, 31 Nev. 360, 102 Pac. 974; State v. Allison (S. D.) 124 N. W. 747; Wigmore, Ev. §§ 861, 1451, 1808; Ammons v. State, 80 Miss. 592, 18 L.R.A. (N.S.) 768, 92 Am. St. Rep. 607, 32 So. 9, 12 Am. Crim. Rep. 82.

The district attorney was permitted to use unfair and unjust means to procure a conviction in this case, warranting a reversal.

12 Cyc. Law & Proc. p. 571; People v. Wells, 100 Cal. 459, 34 Pac. 1078; Newby v. People, 28 Colo. 16, 62 Pac. 1035; Holder v. State, 58 Ark. 473, 25 S. W. 279; Tucker v. Henniker, 41 N. H. 317; People v. Shanley, 49 App. Div. 63, 33 N. Y. Supp. 454; People v. Milks, 55 App. Div. 384, 66 N. Y. Supp. 889; Hardtke v. State, 67 Wis. 552, 30 N. W. 723, 7 Am. Crim. Rep. 577; Sasse v. State, 68 Wis. 530, 32 N. W. 849; Wyatt v. State (Tex. Crim. Rep.) 124 S. W. 929; Hall v. United States, 150 U. S. 76, 37 L. ed. 1003, 14 Sup. Ct. Rep. 22; Graves v. United States, 150 U. S. 118, 37 L. ed. 1021, 14 Sup. Ct. Rep. 40.

Persistence on the part of the district attorney in asking questions which he knows, or has reason to suppose from their character, the court will not permit to be answered, constitutes reversible error.

People v. Mullings, 83 Cal. 138, 17 Am. St. Rep. 223, 23 Pac. 229; Cargill v. Com. 12 Ky. L. Rep. 143, 13 S. W. 916; Gale v. People, 26 Mich. 157; Barton v. Bruley, 119 Wis. 329, 96 N. W. 815; People v. Derbert, 138 Cal. 467, 71 Pac. 564; People v. Smilie, 118 App. Div. 611, 103 N. Y. Supp. 348; State v. Trueman, 34 Mont. 249, 85 Pac. 1024; State v. Blydenburg, 135 Iowa, 264, 112 N. W. 634, 14 A. & E. Ann. Cas. 443; Spencer v. Com. 32 Ky. L. Rep. 880, 107 S. W. 342; Wigmore, Ev. § 1808.

It is error for the prosecutor to make any statement in the presence of the jury implying that the accused has confessed the crime for which he is being tried, unless evidence tending to prove such matter is submitted to the jury.

State v. Williams and Hardtke v. State, supra.

That remarks or proceedings inherently prejudicial to the accused, and having a tendency to deprive him of a fair trial, are ground for reversal and new trial, has been repeatedly held, notwithstanding the fact that an attempt has been made to ob-

literate from the minds of the jurors the prejudicial effects of the same.

Rudd v. United States, 97 C. C. A. 462, 173 Fed. 912; Starr v. United States, 153 U. S. 614, 626, 38 L. ed. 841, 845, 14 Sup. Ct. Rep. 919.

The presumption always is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice, and could not have prejudiced, the complaining party, that the rule that error without prejudice is no ground for reversal is applicable.

People v. Altman, 147 N. Y. 473, 42 N. E. 180; People v. Smilie and People v. Wells, supra; People v. Bowers, 79 Cal. 415, 21 Pac. 752; Union P. R. Co. v. Field, 69 C. C. A. 536, 137 Fed. 14; United States v. Gentry, 55 C. C. A. 658, 119 Fed. 75; Moores v. Citizens' Nat. Bank, 104 U. S. 625, 26 L. ed. 870; Gilmer v. Higley, 110 U. S. 47, 28 L. ed. 62, 3 Sup. Ct. Rep. 471; Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 103, 30 L. ed. 299, 7 Sup. Ct. Rep. 118; Mexia v. Oliver, 148 U. S. 664, 37 L. ed. 602, 13 Sup. Ct. Rep. 754; Boston & A. R. Co. v. O'Reilly, 158 U. S. 337, 39 L. ed. 1008, 15 Sup. Ct. Rep. 830; Peck v. Heurich, 167 U. S. 629, 43 L. ed. 304, 17 Sup. Ct. Rep. 927; Decry v. Cray, 5 Wall. 807, 808, 18 L. ed. 657; Smith v. Shoemaker, 17 Wall. 639, 21 L. ed. 719.

The record fails to show exclusive Federal jurisdiction over the place where the crime was laid.

Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 539, 541, 29 L. ed. 264, 270, 5 Sup. Ct. Rep. 995; United States v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867; People v. Collins, 105 Cal. 504, 39 Pac. 16; Phillips v. Payne, 92 U. S. 130, 23 L. ed. 649; Western U. Teleg. Co. v. Chiles, 214 U. S. 274, 53 L. ed. 994, 29 Sup. Ct. Rep. 613; Battle v. United States, 209 U. S. 36, 52 L. ed. 670, 28 Sup. Ct. Rep. 422; United States v. Jackalow, 1 Black, 484, 17 L. ed. 225; Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283; United States v. Palmer, 3 Wheat. 610, 4 L. ed. 471.

Compelling the defendant to put on his coat forced him to give evidence against himself.

Stokes v. State, 5 Baxt. 619, 30 Am. Rep. 72; Cooper v. State, 86 Ala. 610, 4 L.R.A. 766, 11 Am. St. Rep. 84, 6 So. 110; Day v. State, 63 Ga. 667; People v. McCoy, 45 How. Pr. 216.

The phrase "moral certainty" is equivalent to the phrase "reasonable doubt."

Miles v. United States, 103 U. S. 304, 312, 26 L. ed. 481, 484; Perovich v. United States, 205 U. S. 86, 92, 51 L. ed. 722, 724, 27 Sup. Ct. Rep. 456; Com. v. Webster, 5 Cush. 320, 52 Am. Dec. 711; Fowler v. State, 100 Ala. 97, 14 So. 860; Jones v. 54 L. ed.

State, 100 Ala. 88, 14 So. 772; Carlton v. People, 150 Ill. 181, 41 Am. St. Rep. 346, 37 N. E. 244, 9 Am. Crim. Rep. 62; Com. v. Costley, 118 Mass. 1; Territory v. Owings, 3 Mont. 137; People v. Smith, 105 Cal. 676, 39 Pac. 38; People v. Ferry, 84 Cal. 31, 24 Pac. 33; State v. Whitson, 111 N. C. 695, 16 S. E. 332; Hornsby v. State, 94 Ala. 55, 10 So. 522; People v. Cheong Foon Ark, 61 Cal. 527; Loggins v. State, 32 Tex. Crim. Rep. 364, 24 S. W. 512.

Guilt need not be proven to an "absolute certainty."

Com. v. Webster, supra; United States v. Barrett, 65 Fed. 67; Welsh v. State, 96 Ala. 93, 11 So. 450; Rippey v. Miller, 46 N. C. (1 Jones, L.) 479, 62 Am. Dec. 184.

The failure to instruct that a reasonable doubt may arise from the lack of evidence as well as from the evidence itself was error.

Hale v. State, 72 Miss. 140, 16 So. 387; Densmore v. State, 67 Ind. 306, 33 Am. Rep. 96; Wright v. State, 69 Ind. 163, 35 Am. Rep. 212; State v. Andrews, 77 N. J. L. 108, 71 Atl. 109; Mackey v. People, 2 Colo. 18; Brown v. State, 105 Ind. 385, 5 N. E. 903; Governor v. State, 5 Ga. App. 357, 63 S. E. 241.

Especially is this true where the case depends solely upon circumstantial evidence.

Hamilton v. State, 96 Ga. 301, 22 S. E. 528; People v. Bonifacio, 190 N. Y. 150, 82 N. E. 1100; People v. Bennett, 49 N. Y. 137; Territory v. Lermo, 8 N. M. 566, 46 Pac. 16; Wantland v. State, 145 Ind. 38, 43 N. E. 931; Banks v. State, 157 Ind. 190, 60 N. E. 1087.

In a case depending upon circumstantial evidence alone, the finding of one fact inconsistent with the defendant's guilt is sufficient to raise a reasonable doubt.

Burrill, Circumstantial Ev. § 136; Walker v. State, 153 Ala. 31, 45 So. 640; Simmons v. State, 158 Ala. 8, 48 So. 606; People v. Dole, 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 585; Howard v. State, 108 Ala. 571, 18 So. 813.

After the jury has separated in a murder trial, the burden is upon the prosecution to show that the defendant has not been prejudiced thereby.

Coker v. State, 20 Ark. 53; Frame v. State, 73 Ark. 501, 84 S. W. 711; Ince v. State, 77 Ark. 418, 88 S. W. 818; People v. Brannigan, 21 Cal. 337; People v. Symonds, 22 Cal. 348; People v. Maughs, 149 Cal. 253, 86 Pac. 187; Gamble v. State, 44 Fla. 429, 60 L.R.A. 547, 103 Am. St. Rep. 150, 33 So. 471, 1 A. & E. Ann. Cas. 285, 12 Am. Crim. Rep. 638; Bird v. State, 18 Fla. 493; Barrow v. State, 80 Ga. 191, 5 S. E. 64; Creek v. State, 24 Ind. 151; French v. Com. 100 Ky. 63, 37 S. W. 269;

Thacker v. Com. 23 Ky. L. Rep. 745, 63 S. W. 737; Green v. State, 59 Miss. 501; Cartwright v. State, 71 Miss. 82, 14 So. 526; State v. Orrick, 106 Mo. 111, 17 S. W. 176, 329; State v. Sansone, 116 Mo. 1, 22 S. W. 617; State v. Schaeffer, 172 Mo. 335, 72 S. W. 518; State v. Howell, 117 Mo. 307, 23 S. W. 263; Caw v. People, 3 Neb. 357; Roper v. Territory, 7 N. M. 255, 33 Pac. 1014; Com. v. Eisenhower, 181 Pa. 470, 59 Am. St. Rep. 670, 37 Atl. 521; Com. v. Cressinger, 193 Pa. 326, 44 Atl. 433; Com. v. Williams, 209 Pa. 529, 58 Atl. 922; Stone v. State, 4 Humph. 27; Hines v. State, 8 Humph. 597; Cartwright v. State, 12 Lea, 620; People v. Shafer, 1 Utah, 260; Phillips v. Com. 19 Gratt. 485; Keenan v. State, 8 Wis. 132; Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559; State v. Dolling, 37 Wis. 396; Hempton v. State, 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657; State v. Harrison, 36 W. Va. 729, 18 L.R.A. 224, 15 S. E. 982, 9 Am. Crim. Rep. 626.

But in the states of Arkansas, Illinois, and Texas it has been held that it is incumbent upon the defendant to show that he has been prejudiced by the separation.

Reeves v. State, 84 Ark. 569, 106 S. W. 945; Reins v. People, 30 Ill. 256; Adams v. People, 47 Ill. 376; Gott v. People, 187 Ill. 249, 58 N. E. 293; Marzen v. People, 190 Ill. 81, 60 N. E. 102; Ogle v. State, 16 Tex. App. 361.

A prisoner ought not to be asked in a capital case to consent to a separation of the jury, nor should such consent be implied; he is not in a situation to exercise a fair choice, but may consent for fear that his refusal may prejudice the jury against him. It would seem, therefore, that in a capital case, any separation of the jury, with or without the prisoner's consent, from which they might have been subject to improper influences, vitiates the verdict, and a new trial should be granted.

People v. Shafer, supra; Woods v. State, 43 Miss. 364; Early v. State, 1 Tex. App. 248, 28 Am. Rep. 409; Peiffer v. Com. 15 Pa. 468, 53 Am. Dec. 605; State v. Collins, 81 Mo. 652; McCampbell v. State, 37 Tex. Crim. Rep. 607, 40 S. W. 496; State v. Craighead, 114 La. 84, 38 So. 28; State v. Parrant, 16 Minn. 178, Gil. 157; Hare v. State, 4 How. (Miss.) 187.

The newspaper articles read by the jurors deprived the defendant of a fair trial.

Mattox v. United States, 146 U. S. 140, 149, 151, 36 L. ed. 917, 920, 921, 13 Sup. Ct. Rep. 50; State v. Caine, 134 Iowa, 147, 111 N. W. 443.

Assistant Attorney General **Fowler** argued the cause and filed a brief for defendant in error:

It was within the discretion of the court to allow or to refuse the withdrawal of the plea, and the filing of the demurrer, and the entry of the motion to quash.

McGregor v. United States, 69 C. C. A. 477, 134 Fed. 187; Radford v. United States, 63 C. C. A. 491, 129 Fed. 51.

To justify the quashing of an indictment on motion or plea in abatement, on the ground that the grand jury received incompetent evidence, it must appear that the entire evidence presented to the grand jury was inadmissible; and the mere fact that some of the evidence introduced was incompetent does not invalidate the indictment.

Mencheca v. State (Tex. Crim. Rep.) 28 S. W. 203; People v. Lauder, 82 Mich. 109, 46 N. W. 956; Hope v. People, 83 N. Y. 422, 38 Am. Rep. 460; State v. Dayton, 23 N. J. L. 49, 53 Am. Dec. 270; State v. Logan, 1 Nev. 516.

Gilchrist had not formed such an opinion as disqualified him for service as a juror.

Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; Spies v. Illinois, 123 U. S. 131, 179, 31 L. ed. 80, 90, 8 Sup. Ct. Rep. 21, 22; Hopt v. Utah, 120 U. S. 430, 434, 30 L. ed. 708, 709, 7 Sup. Ct. Rep. 614; Press Pub. Co. v. McDonald, 19 C. C. A. 516, 38 U. S. App. 557, 73 Fed. 441; Gallot v. United States, 31 C. C. A. 44, 58 U. S. App. 243, 87 Fed. 449; State v. Dugay, 35 La. Ann. 327; O'Mara v. Com. 75 Pa. 428.

Under the rule adopted by the supreme court of the state of Washington, it was not error for the challenge of juror Gilchrist to be denied.

Rose v. State, 2 Wash. 311; State v. Lattin, 19 Wash. 57, 61, 52 Pac. 314; State v. Royse, 24 Wash. 445, 64 Pac. 742; State v. Boyce, 24 Wash. 514, 521, 64 Pac. 719; State v. Farris, 26 Wash. 210, 66 Pac. 412; State v. Cronney, 31 Wash. 125, 71 Pac. 783.

The record fails to disclose that competent and fair jurors were not obtained, or that the jury was not composed entirely of individuals acceptable to the accused.

Northern P. R. Co. v. Herbert, 116 U. S. 642, 646, 29 L. ed. 755, 758, 6 Sup. Ct. Rep. 590.

It was proper for the jury to remain during the preliminary examination of the witnesses.

Wilson v. United States, 162 U. S. 613, 624, 40 L. ed. 1090, 1096, 16 Sup. Ct. Rep. 895; Com. v. Preece, 140 Mass. 276, 5 N. E. 494, 5 Am. Crim. Rep. 107; People v. Howes, 81 Mich. 396, 45 N. W. 961; Thomas v. State, 84 Ga. 613, 10 S. E. 1016; Hardy

v. United States, 3 App. D. C. 35; Bailey v. State, 80 Ga. 359, 9 S. E. 1072; State v. Storms, 113 Iowa, 387, 86 Am. St. Rep. 380, 85 N. W. 610; Com. v. Burrough, 162 Mass. 513, 39 N. E. 184; Roesel v. State, 62 N. J. L. 238, 41 Atl. 408; State v. Moore, 160 Mo. 443, 61 S. W. 199; People v. Cassidy, 133 N. Y. 612, 30 N. E. 1003; Burdige v. State, 53 Ohio St. 517, 42 N. E. 594; Com. v. Epps, 193 Pa. 517, 44 Atl. 570, 12 Am. Crim. Rep. 185; Rains v. State, 33 Tex. Crim. Rep. 294, 26 S. W. 398.

If any prejudice might otherwise have arisen from the presence of the jury while the matters in question were considered, it was cured by the positive and repeated instruction given by the court to the jury that those were matters entirely for him, and were not for their consideration.

Carroll v. United States, 83 C. C. A. 245, 154 Fed. 429; Osborne v. Wilkes, 108 N. C. 665, 13 S. E. 285.

The matters which transpired in the presence of the jury were not sufficient to justify a reversal, even if the court had given no warning or instructions to the jury.

Kansas City, Ft. S. & M. R. Co. v. McDonald, 2 C. C. A. 53, 4 U. S. App. 563, 51 Fed. 181.

The statements made by the United States attorney in the presence of the jury constitute no ground for reversal.

Frazier v. State, 135 Ind. 38, 34 N. E. 817; State v. Preston, 77 Mo. 294; Wooten v. State, 50 Tex. Crim. Rep. 151, 94 S. W. 1060; Watters v. State (Tex. Crim. Rep.) 94 S. W. 1039; State v. Ruck, 194 Mo. 431, 92 S. W. 706, 5 A. & E. Ann. Cas. 976; Jones v. State, 50 Tex. Crim. Rep. 329, 96 S. W. 930; Johnson v. Com. 29 Ky. L. Rep. 675, 94 S. W. 631; Parker v. State, 39 Tex. Crim. Rep. 264, 45 S. W. 812.

Whether Fort Worden was a military reservation within the exclusive jurisdiction of the United States, and whether the offense was committed within this jurisdiction, were submitted as questions of fact by the court to the jury, which found in favor of the government; and as there was evidence to support this finding, it is conclusive upon this court.

Burton v. United States, 202 U. S. 344, 373, 50 L. ed. 1057, 1067, 26 Sup. Ct. Rep. 688, 6 A. & E. Ann. Cas. 362.

Moreover, the court will take judicial knowledge of the fact that Fort Worden was a military reservation, because of the withdrawal of a portion of these lands from the public domain, which was done in 1866; and the purchase of the remainder and the assumption of jurisdiction thereover are matters of record in the War Department, and this court will take judicial notice thereof.

54 L. ed.

Knight v. United Land Asso. 142 U. S. 161, 169, 35 L. ed. 974, 978, 12 Sup. Ct. Rep. 258.

It was not error for the court to admit, over objection, the testimony which showed that the blouse introduced before the jury fitted the plaintiff in error.

Adams v. New York, 192 U. S. 585, 597, 48 L. ed. 575, 580, 24 Sup. Ct. Rep. 372; State v. Douglass, 20 W. Va. 770; Sprouse v. Com. 81 Va. 378; O'Brien v. State, 125 Ind. 42, 9 L.R.A. 323, 25 N. E. 137; State v. Garrett, 71 N. C. 85, 17 Am. Rep. 1; Walker v. State, 7 Tex. App. 245, 32 Am. Rep. 595; People v. Goldenson, 76 Cal. 347, 19 Pac. 161; People v. Gardner, 144 N. Y. 129, 28 L.R.A. 699, 43 Am. St. Rep. 741, 38 N. E. 1003, 9 Am. Crim. Rep. 82; State v. Jones, 153 Mo. 460, 55 S. W. 80; State v. Reasby, 100 Iowa, 231, 69 N. W. 451; State v. Johnson, 67 N. C. 55; State v. Graham, 74 N. C. 646, 21 Am. Rep. 493, 1 Am. Crim. Rep. 182.

It was not error to refuse to submit the instruction requested on the presumption of innocence because:

(a) The court had already, in the charge, given a correct exposition of the law with reference to that presumption.

Agnew v. United States, 165 U. S. 36, 51, 41 L. ed. 624, 629, 17 Sup. Ct. Rep. 235.

(b) The assertion in the request that the presumption of innocence starts with the charge at the beginning of the trial, and goes with defendant until the determination of the case, is not correct; and a part of the request being erroneous, the court cannot be put in error for refusing to charge it as a whole.

Allen v. United States, 164 U. S. 492, 500, 41 L. ed. 528, 530, 17 Sup. Ct. Rep. 154; Wilson v. United States, 162 U. S. 613, 619, 40 L. ed. 1090, 1094, 16 Sup. Ct. Rep. 895.

(c) The proposition that the presumption of innocence is evidence in the defendant's favor, and should be so considered and weighed, is not correct.

Agnew v. United States and Allen v. United States, supra; 4 Wigmore, Ev. § 2511; Thayer, Evidence at Common Law, 551-566.

No error was committed by the trial court in charging, or refusing to charge, requests on the question of reasonable doubt.

Hopt v. Utah, 120 U. S. 430, 439, 30 L. ed. 708, 711, 7 Sup. Ct. Rep. 614; Dunbar v. United States, 156 U. S. 185, 199, 39 L. ed. 390, 395, 15 Sup. Ct. Rep. 325; 12 Cyc. Law & Proc. p. 627.

The case should not be reversed in consequence of the publication of the newspaper articles set out in the record.

Mattox v. United States, 146 U. S. 140, 147, 36 L. ed. 917, 920, 13 Sup. Ct. Rep.

50; *Henderson v. Moore*, 5 Cranch, 11, 3 L. ed. 22; *Newcomb v. Wood*, 97 U. S. 581, 24 L. ed. 1085.

Mr. Justice Holmes delivered the opinion of the court:

The plaintiff in error was indicted in the circuit court for murder, alleged to have been committed "within the Fort Worden Military Reservation, a place under the exclusive jurisdiction of the United States." There was a trial and a verdict of guilty, without capital punishment, as allowed by statute. He was sentenced to imprisonment for life, and thereupon brought this writ of error. 168 Fed. 141.

247] *The seriousness of some of the questions raised is somewhat obscured by a number of meticulous objections. We shall dispose of the latter summarily, and shall discuss at length only matters that deserve discussion. We shall follow in the main the order adopted by the plaintiff in error.

The indictment is well enough. The words quoted at the outset convey with clearness sufficient for justice that the Fort Worden Military Reservation was under the exclusive jurisdiction of the United States at the time of the murder. It is alleged that Holt did with force and arms an assault make upon one Henry E. Johnson with a certain iron bar, and did then and there feloniously, wilfully, knowingly, and with malice aforethought, strike, beat, and mortally wound him, the said Henry E. Johnson, with said iron bar, etc. As the acts constituting the assault are alleged to have been made feloniously and with malice aforethought, there was no need to make such allegations in the preliminary averment of assault.

It is pressed with more earnestness that the court erred in not granting leave to withdraw the plea of not guilty, and to interpose a plea in abatement and motion to quash. The ground on which leave was asked was an affidavit of the prisoner's counsel that they had been informed by Captain Newton, of the Coast Artillery Corps, that he testified before the grand jury to admissions by the prisoner, but that these admissions were obtained under circumstances that made them incompetent. The affidavit added that, aside from the above testimony, there was very little evidence against the accused. Without considering how far, if at all, the court is warranted in inquiring into the nature of the evidence on which a grand jury has acted, and how far, in case of such an inquiry, the discretion of the trial court is subject to review (*United States v. Rosenburgh*, 7 Wall. 580, 19 L. ed. 263), it is enough to say that there is no reason for re-
248] viewing it here. *All that the affidavit

1028

disclosed was that evidence in its nature competent, but made incompetent by circumstances, had been considered along with the rest. The abuses of criminal practice would be enhanced if indictments could be upset on such a ground. *McGregor v. United States*, 69 C. C. A. 477, 134 Fed. 187, 192; *Radford v. United States*, 63 C. C. A. 491, 129 Fed. 49, 51; *Chadwick v. United States*, 72 C. C. A. 343, 141 Fed. 225, 235.

Next it is said that there was error in not sustaining a challenge for cause to a jurymen; with the result that the prisoner's peremptory challenges were diminished by one. On his examination it appeared that this jurymen had not talked with anyone who purported to know about the case of his own knowledge, but that he had taken the newspaper statements for facts; that he had no opinion other than that derived from the papers, and that evidence would change it very easily, although it would take some evidence to remove it. He stated that if the evidence failed to prove the facts alleged in the newspapers, he would decide according to the evidence or lack of evidence at the trial, and that he thought he could try the case solely upon the evidence, fairly and impartially. The finding of the trial court upon the strength of the jurymen's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest, which it is far from being in this case. See *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; *Spies v. Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22. If the decisions of the state of Washington are of especial importance, we do not understand *Rose v. State*, 2 Wash. 310, 312, 26 Pac. 264; *State v. Croney*, 31 Wash. 122, 125, 126, 71 Pac. 783, and intervening cases to be overruled by *State v. Riley*, 36 Wash. 441, 447, 448, 78 Pac. 1001.

Before the above-mentioned motion to withdraw the plea of not guilty was argued, the judge was asked to exclude the twelve jurors who had been selected, although *not [249] sworn. He replied that he was unwilling to exclude the jury from any part of the proceedings in the trial. Later, after the jury had been sworn, he pursued the same course while hearing preliminary evidence of the circumstances in which the prisoner was alleged to have made statements, and while hearing arguments as to admitting the statements. The district attorney spoke of the admissibility of "confessions" in the course of his remarks. Exceptions were taken and the judge's refusal is urged with much earnestness to have been error. But we are of opinion that it was within the dis-

cretion of the judge to allow the jury to remain in court. Technically the offer of the evidence had to be made in their presence before any question of excluding them could arise. They must have known, even if they left the court, that statements relied on as admitting part or the whole of the government's case were offered. The evidence to which they listened was simply evidence of facts deemed by the judge sufficient to show that the statements, if any, were not freely made, and it could not have prejudiced the prisoner. No evidence was admitted that the prisoner had made any confession, and his statements were excluded. Moreover, the judge said to the jury that they were to decide the case on the testimony as it came from the witnesses on the stand; not what counsel might say or the newspapers publish; that he was not excluding them, because he assumed that they were men of experience and common sense and could decide the case upon the evidence that the court admitted. He also told them in the strongest terms that the preliminary evidence that he was hearing had no bearing on the question they had to decide. No doubt the more conservative course is to exclude the jury during the consideration of the admissibility of confessions, but there is force in the judge's view that if juries are fit to play the part assigned to them by our law, they will be able [250] to do what a judge has to do "every time that he tries a case on the facts without them, and we cannot say that he was wrong in thinking that the men before him were competent for their task.

Objections similar to the last are taken to the conduct of the district attorney. They are stated and argued, like the last, with many details, which we have examined, but think it unnecessary to reproduce. In his opening the district attorney stated that the prisoner admitted that a coat with soot marks upon it, and a gunner's badge were his, and was going on to recite further statements, when they were objected to. The district attorney answered that these were voluntary confessions, but that he would omit them, if objected to, until the proper time, and desisted. Objection was made to the word "confessions," and the judge replied that he did not hear any statement that the prisoner made any confession. No instruction was asked, but, as we have said, the judge told the jury that they were to regard only the evidence admitted by him, not statements of counsel, etc. The attempt to get in the evidence is criticized also as unduly pressed. We see no reason to differ from the judge's statement upon a motion for a new trial, that the United States attorney was guilty of no misconduct. The exceptions on this point also are overruled

We will take up in this connection another matter not excepted to, but made one of the grounds for demanding a new trial, and also some of its alleged consequences, because they also involve the question how far the jury lawfully may be trusted to do their duty when the judge is satisfied that they are worthy of the trust. The jurymen were allowed to separate during the trial, always being cautioned by the judge to refrain from talking about the case with anyone, and to avoid receiving any impression as to the merits except from the proceedings in court. The counsel for the prisoner filed his own affidavit that members of the jury had stated to him that "they had read [251] the Seattle daily papers with articles on the case, while the trial was going on. He set forth articles contained in those papers, and moved for a new trial. The court refused to receive counter affidavits, but, assuming in favor of the prisoner that the jurors had read the articles, he denied the motion. This court could not make that assumption if the result would be to order a new trial, but the probability that jurors, if allowed to separate, will see something of the public prints, is so obvious, that, for the purpose of passing on the permission to separate, it may be assumed that they did so in this case.

We are dealing with a motion for a new trial, the denial of which cannot be treated as more than matter of discretion or as ground for reversal, except in very plain circumstances indeed. *Mattox v. United States*, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50. See *Holmgren v. United States*, 217 U. S. 509, 54 L. ed. 861, 30 Sup. Ct. Rep. 588. It would be hard to say that this case presented a sufficient exception to the general rule. The judge did not reject the affidavit, but decided against the motion on the assumption that more than it ventured to allege was true. As to his exercise of discretion, it is to be remembered that the statutes or decisions of many states expressly allow the separation of the jury, even in capital cases. Other states have provided the contrary. The practice has varied, with perhaps a slight present tendency in the more conservative direction. If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day. Without intimating that the judge did not go further than we should think desirable on general principles, we do not see in the facts before us any conclusive ground for saying that his expressed belief that the trial was fair and that the prisoner has nothing to complain of is wrong.

Several objections were taken to the ad-

252] mission and *sufficiency of evidence. The first is merely an attempt to raise technical difficulties about a fact which no one really doubts; namely, that the band barracks, the undisputed place of the crime, were within the exclusive jurisdiction of the United States. A witness testified that they were within the inclosure of Fort Worden, under military guard and control, from which all unauthorized persons are excluded, and that he knew that the fence was coincident with the boundaries shown on a map objected to but admitted. He identified the band barracks as described in certain condemnation proceedings. The state of Washington had assented by statute to such proceedings and Congress had authorized them. The deeds and condemnation proceedings under which the United States claimed title were introduced. The witness relied in part upon the correctness of official maps in the Engineer's Department, made from original surveys under the authority of the War Department, but not within his personal knowledge, and he referred to a book showing the titles to Fort Worden compiled under the same authority. The documents referred to are not before us, but they properly were introduced, and, so far as we can see, justified the finding of the jury, even if the evidence of the *de facto* exercise of exclusive jurisdiction was not enough, or if the United States was called on to try title in a murder case. We think it unnecessary to discuss this objection in greater detail.

Another objection is based upon an extravagant extension of the 5th Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition 253] of the use of physical or moral *compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent. *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372.

The remaining exceptions relate to the charge. One was to a refusal to embody an instruction requested as to reasonable

doubt. The court, however, gave full and correct instructions on the matter, and indeed, rather anxiously repeated and impressed upon the jury the clearness of the belief they must entertain in order to convict. See *Dunbar v. United States*, 156 U. S. 185, 199, 39 L. ed. 390, 395, 15 Sup. Ct. Rep. 325; 4 Wigmore, Ev., § 2497. Another exception was to the refusal to give an instruction that "the presumption of innocence starts with the charge at the beginning of the trial, and goes with [the accused] until the determination of the case. This presumption of innocence is evidence in the defendant's favor," etc. The judge said: "The law presumes innocence in all criminal prosecutions. We begin with a legal presumption that the defendant, although accused, is an innocent man. Not that we take that to be an absolute rule, but it is the principle upon which prosecutions must be conducted; that the evidence must overcome the legal presumption of innocence. And in order to overcome the legal presumption, as I have already stated, the evidence must be clear and convincing, and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty," with more to the same effect. This was correct, and avoided a tendency in the closing sentence quoted from the request to mislead. *Agnew v. United States*, 165 U. S. 36, 51, 52, 41 L. ed. 624, 629, 630, 17 Sup. Ct. Rep. 235. See also 4 Wigmore, Ev. § 2511.

*After the jury had been sent out, [254 they returned and asked the court what constituted a reasonable doubt. The court replied: "A reasonable doubt is an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to have the benefit." He denied the notion that any mere possibility was sufficient ground for such a doubt, and added that, in the performance of jury service, they should decide controversies as they would any important question in their own affairs. This was excepted to generally, and the court was asked to add that if the jury found one fact inconsistent with the guilt of the defendant, they should acquit. The court already had given this instruction in the charge, and was not called upon to repeat it. As against a general exception, the instructions given were

correct. Some other details in the trial are criticized, but we have dealt with all that seem to us to deserve mention, and find no sufficient reason why the judgment should not be affirmed.

Judgment affirmed.

255] *A. GUION JENNINGS, Plff. in Err.,
v.
PHILADELPHIA, BALTIMORE, & WASH-
INGTON RAILWAY COMPANY.

(See S. C. Reporter's ed. 255-258.)

Appeal — bill of exceptions — allowing after term.

1. A bill of exceptions may not be allowed by the supreme court of the District of Columbia when not presented until after the close of the term at which the judgment sought to be reversed has become final, and an appeal has been allowed and perfected, although the thirty-eight days allowed by common-law rule No. 55 of that court have not yet elapsed, since this rule is applicable only so long as the judgment term is running, and does not operate to extend the power of the trial judge over the record beyond the term.

[For other cases, see Appeal and Error, 3473-3482, in Digest Sup. Ct. 1908.]

Appeal — allowing bill of exceptions after term — consent.

2. The silence of counsel for appellee when a proposed bill of exceptions was presented to the court after the close of the term, and after it had lost all judicial power over the record, does not show that the appellee consented to the filing and allowance of the bill *nunc pro tunc*.

[For other cases, see Appeal and Error; 3474-3483, in Digest Sup. Ct. 1908.]

[No. 10.]

Submitted April 26, 1910. Decided October 31, 1910.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, after granting a motion to strike the bill of exceptions from the record. Affirmed.

See same case below, 31 App. D. C. 173. The facts are stated in the opinion.

Messrs. E. Hilton Jackson and Henry E. Davis submitted the cause for plaintiff in error.

Messrs. Frederic D. McKenney, John Spalding Flannery, and William Hitz submitted the cause for defendant in error.

Mr. Justice Lurton delivered the opinion of the court:

This case turns primarily upon the ques-
54 L. ed.

tion of whether the supreme court of the District exceeded its jurisdiction *in al- [256] lowing a bill of exceptions after the close of the term at which the judgment sought to be reversed had become final. The judgment was rendered on December 20, 1907. The term closed December 31st, and a new term began on January 1, 1908. On January 10, 1908 an appeal bond was approved and filed. On January 14th the appellant, having given eight days' notice, under rule 55 of the court, presented a bill of exceptions to the court for allowance. The stipulation in respect of this recites: "In pursuance of common-law rule No. 55, counsel for the appellee was present, having received the eight-day notice, together with a copy of appellant's proposed bill of exceptions, required by said rule. The proposed bill of exceptions was submitted to the court by counsel for the appellant in the presence of, and without objection from, counsel for the appellee."

Common-law rule 55, under which the appellant claimed the right to have his bill of exceptions filed within thirty-eight days after the rendition of the judgment, was applicable only so long as the judgment term was running, and did not operate to extend the power of the trial judge over the record beyond the term. No order had been made in term time for the filing of such a delayed bill. Not only had the term closed, but an appeal had been allowed and perfected. The trial court had thereby lost control of the cause, and had no authority to add to or take from the record.

In *Michigan Ins. Co. v. Eldred*, 143 U. S. 293, 298, 36 L. ed. 162, 163, 12 Sup. Ct. Rep. 450, 452, this court said:

"By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, *they must [257] be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end."

See also *Morse v. Anderson*, 150 U. S. 156, 37 L. ed. 1037, 14 Sup. Ct. Rep. 43; *Müller v. Ehlers*, 91 U. S. 249, 23 L. ed. 319; *Mor-*

chants' Ins. Co. v. Buckner (C. C. A. 6th C.) 39 C. C. A. 19, 98 Fed. 222.

But it is urged that if the appellee consented that an order might be entered *nunc pro tunc*, permitting the filing and allowance of a bill of exceptions, such consent should be given the force of an order in term or a rule of court. But if this be granted, the order in this case does not profess to have been founded upon consent. The stipulation recites that the proposed bill was presented to the court "in the presence of, and without objection from, counsel for the appellee."

The proceeding was *coram non judice*. Appellee was not in court or before a court. The judge and the court had lost all power over the cause, the parties, and the record. The appellant was pretending to proceed under rule 55. The appellee might well sit silent and let the matter rest upon the claim; it was not asked to say whether it consented. A different case might arise if, by its failure to object, the appellant had been misled to his injury. But there was nothing left undone which might have been done, and nothing done to his prejudice. The plain question was, Did the court have power, under rule 55, or under any order of the court or controlling practice, to allow a bill of exceptions after the close of the term? The appellee might fairly say nothing.

So grave a matter as the allowance of a bill of exceptions after the close of the term 258] and after the court had lost all judicial power over the record should not rest upon a mere implication from silence. There should be express consent, or conduct which should equitably estop the opposite party from denying that he had consented. There was nothing of that kind in this case, and the judgment of the Court of Appeals must be affirmed.

RICKEY LAND & CATTLE COMPANY,
Petitioner,
v.

MILLER & LUX. (No. 4.)

RICKEY LAND & CATTLE COMPANY,
Petitioner,
v.

HENRY WOOD, James O. Birmingham,
Charles Snyder, and Charles Johnston.
(No. 5.)

(See S. C. Reporter's ed. 258-263.)

Courts — concurrent jurisdiction — water rights in interstate stream — exclusiveness of jurisdiction first acquired.

1. The Federal circuit court for the district of Nevada and the California state

courts have concurrent jurisdiction to determine the relative rights of parties claiming, the one in Nevada and the other in California, to be entitled to appropriate, as against each other, the waters of an interstate stream, and whichever court first acquires jurisdiction is entitled to proceed to final determination without interference from the other.

[For other cases, see Courts, VI. b; VI. g, in Digest Sup. Ct. 1908.]

Lis pendens — purchaser pendente lite.

2. The doctrine of *lis pendens* applies to a corporation to which the defendant, in a suit brought in a Federal court sitting in another state, conveys his water rights within the state in an interstate stream, which are the subject of the litigation, with the intent to evade the jurisdiction of that court.

[For other cases, see Lis Pendens, II., in Digest Sup. Ct. 1908.]

Federal courts — ancillary jurisdiction.

3. Cross bills filed by some of the defendants in a suit brought in a Federal circuit court to establish the relative rights of the parties as appropriators of the waters of the same stream are maintainable, although they may admit the right of complainants, since a decree as between themselves and the other defendants may be necessary to prevent a decree for complainants from working injustice.

[For other cases, see Courts, V. c, 9, in Digest Sup. Ct. 1908.]

[Nos. 4 and 5.]

Argued January 18, 19, 1910. Ordered for reargument January 31, 1910. Reargued October 24, 25, 1910. Decided November 7, 1910.

ON Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review decrees which affirmed decrees of the Circuit Court for the District of Nevada, restraining proceedings in suits in the California courts over

NOTE.—On concurrent jurisdiction of Federal and state courts—see notes to Copp v. Louisville & N. R. Co. 12 L.R.A. 725, and Smith v. M'Iver, 6 L. ed. U. S. 152.

As to conflict of jurisdiction between Federal and state courts—see notes to Louisville Trust Co. v. Cincinnati, 22 C. C. A. 356, and J. I. Case Plow Works v. Finks, 26 C. C. A. 50.

As to jurisdiction as affected by possession of the subject-matter—see note to Adams v. Mercantile Trust Co. 15 C. C. A. 6.

On the doctrine of *lis pendens*—see notes to Green v. Rick, 2 L.R.A. 48; Houston v. Timmerman, 4 L.R.A. 716; and Benton v. Shafer, 7 L.R.A. 812.

On ancillary jurisdiction of the Federal courts—see notes to Rosenbaum Bros. v. Council Bluffs Ins. Co. 3 L.R.A. 190, and Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. 36 C. C. A. 195.

water rights in an interstate stream on the ground that the Federal court had acquired jurisdiction before the California actions were begun. Affirmed.

The facts are stated in the opinion.

See same case below, No. 4, 81 C. C. A. 207, 152 Fed. 11; No. 5, 81 C. C. A. 218, 152 Fed. 22.

Messrs. **Charles C. Boynton** and **James F. Peck** argued the cause, and, with Mr. **Frederic D. McKenney**, filed a brief for petitioner in No. 4:

A Federal court, in enjoining an action begun in a state court, does not proceed on any of the ordinary equitable grounds of relief, as that the prosecution of the action in the state court is contrary to good conscience, or involves a multiplicity of suits, etc. The power of the Federal court is limited to protecting its own jurisdiction already acquired; it being deemed an impairment of the jurisdiction of the Federal court to have the same issues and subject-matter which have once been tendered and litigated in said court thereafter tendered for litigation by the same parties in a state court.

Bates, Fed. Eq. Proc. § 541; Buck v. Colbath, 3 Wall. 334, 18 L. ed. 257; Fisk v. Union P. R. Co. 10 Blatchf. 518, Fed. Cas. No. 4,830; Abeel v. Culberson, 56 Fed. 329; Northern P. R. Co. v. Cannon, 49 Fed. 517; Central Trust Co. v. Western North Carolina R. Co. 112 Fed. 471; Terre Haute & I. R. Co. v. Peoria & P. Union R. Co. 82 Fed. 945.

The petitioner might, in the courts of the state of California, quiet its title to roll stones or run waters or flood gases over lands in the state of California; but there are no courts sitting in the state of California that have jurisdiction to establish any right in petitioner to roll stones or run water or flood gases onto lands in the state of Nevada.

Conant v. Deep Creek & C. Valley Irrig. Co. 23 Utah, 627, 90 Am. St. Rep. 721, 66 Pac. 188; Guarantee Trust & S. D. Co. v. Delta & P. Land Co. 43 C. C. A. 396, 104 Fed. 5; Story, Conf. L. 7th ed. § 543; Carpenter v. Strange, 141 U. S. 87-105, 35 L. ed. 640-647, 11 Sup. Ct. Rep. 960; Watts v. Waddle, 6 Pet. 389, 8 L. ed. 437; Watkins v. Holman, 16 Pet. 25, 10 L. ed. 873; Corbett v. Nutt, 10 Wall. 464, 19 L. ed. 976; Bates, Fed. Eq. Proc. §§ 70, 75.

The distinction between local and transitory actions exists as much in equity as at law, and an action to enjoin a trespass on real estate in a local action.

Northern Indiana R. Co. v. Michigan C. R. Co. 15 How. 233, 14 L. ed. 674; Stillman v. White Rock Mfg. Co. 3 Wood & M. 539, Fed. Cas. No. 13,446; Morris v. Remington,

1 Pars. Sel. Eq. Cas. 387; Bump, Fed. Proc. p. 138; Angell, Watereourses, 7th ed. ¶ 418; 22 Enc. Pl. & Pr. p. 1158; Gould, Pl. p. 112; Mersey & I. Mfg. Co. v. Douglas, 2 East, 498; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770; 1 Bates, Fed. Eq. Proc. §§ 71, 75; United States v. Winans, 73 Fed. 72; Pom. Eq. Jur. §§ 298, 1318; Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311; 1 Lewin, Trusts, p. 130, **48, 49; Norris v. Chambres, 29 Beav. 246, 3 De G. & F. 583; Dicey, Conf. L. p. 214; Harrison v. Harrison, L. R. 8 Ch. 342; Jenkins v. Lester, 131 Mass. 355; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Greeley v. Lowe, 155 U. S. 58, 76, 39 L. ed. 69, 76, 15 Sup. Ct. Rep. 24; Story, Conf. L. 7th ed. § 543, p. 685; Atlantic Dredging Co. v. Bergen Neck R. Co. 44 Fed. 208; People ex rel. Van Dyke v. Colorado C. R. Co. 42 Fed. 638; Atlantic & P. Teleg. Co. v. Baltimore & O. R. Co. 14 Jones & S. 377; Western U. Teleg. Co. v. Western & A. R. Co. 8 Baxt. 54; Marshall v. Turnbull, 34 Fed. 827; Western U. Teleg. Co. v. Pacific & A. R. Co. 49 Ill. 90; Fargo v. Redfield, 22 Blatchf. 527, 22 Fed. 373; Port Royal R. Co. v. Hammond, 58 Ga. 523; Lindsley v. Union Silver Star Min. Co. 26 Wash. 301, 66 Pac. 382; Texas & P. R. Co. v. Gay, 86 Tex. 571, 25 L.R.A. 52, 26 S. W. 599; Guarantee Trust & S. D. Co. v. Delta & P. Land Co. supra; Baltimore Bldg. & L. Asso. v. Alderson, 32 C. C. A. 542, 61 U. S. App. 636, 90 Fed. 142; Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; Farmers' Loan & T. Co. v. Northern P. R. Co. 69 Fed. 871; Washb. Easements, 3d ed. 692; Smith, Lead. Cas. p. 1064; 14 Enc. Pl. & Pr. pp. 1106, 1122; Gilbert v. Moline Water Power & Mfg. Co. 19 Iowa, 319; People v. Central R. Co. 42 N. Y. 283; Wood, Nuisances, 3d ed. § 830; Horn v. Buffalo, 49 Hun, 76, 1 N. Y. Supp. 801; Buck v. Ellenbolt, 84 Iowa, 394, 15 L.R.A. 187, 51 N. W. 22.

The Federal court sitting in Nevada had no jurisdiction over rights and interests inherent in and located in the stream of Walker river in the state of California.

Northern Indiana R. Co. v. Michigan C. R. Co. supra; Livingston v. Jefferson, 1 Brock. 203, Fed. Cas. No. 8,411; McKenna v. Fisk, 1 How. 241, 11 L. ed. 117; Massie v. Watts, 6 Cranch, 148, 3 L. ed. 181; Conant v. Deep Creek & C. Valley Irrig. Co. supra; Davis v. Headley, 22 N. J. Eq. 115; Carpenter v. Strange, 141 U. S. 105, 35 L. ed. 647, 11 Sup. Ct. Rep. 960; Guarantee Trust & S. D. Co. v. Delta & P. Land Co. supra; Story, Conf. L. 7th ed. p. 685; Watts v. Waddle; Watkins v. Holman; and Corbett

v. Nutt,—supra; Boyce v. Grundy, 9 Pet. 275, 9 L. ed. 127; Baltimore Bldg. & L. Asso. v. Alderson and Farmers' Loan & T. Co. v. Northern P. R. Co. supra; Bates, Fed. Eq. Proc. §§ 70-75; Texas & P. R. Co. v. Gay, supra; New York v. Pine, 185 U. S. 93, 46 L. ed. 820, 22 Sup. Ct. Rep. 592; People v. Central R. Co. supra; Wharton, Conf. L. 2d ed. § 288; 1 Lewin, Trusts, p. 129, *48, *49; Norris v. Chambres, supra; Dicey, Conf. L. pp. 214, 216; Harrison v. Harrison and Jenkins v. Lester, supra.

If the first suit is strictly a suit *in personam* in which nothing more than a personal judgment is sought, no reason is perceived why a subsequent action may not be brought and maintained in another jurisdiction, although it involves the determination of the same issue or issues on which the right to recover in the first suit depends. The bringing of the second suit under the circumstances supposed does not oust the court in which the first suit was instituted of its jurisdiction, or delay or obstruct it in the exercise of its jurisdiction, or lead to a conflict of authority.

Merritt v. American Steel-Barge Co. 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 232; Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; Baltimore & O. R. Co. v. Wabash R. Co. 57 C. C. A. 322, 119 Fed. 678.

The Rickey Land & Cattle Company could not have brought an action in a court sitting in the state of Nevada, either state or Federal, to quiet its title to its water rights in the state of California.

Conant v. Deep Creek & C. Valley Irrig. Co. 23 Utah, 627, 90 Am. St. Rep. 721, 66 Pac. 188; Lamson v. Vailes, 27 Colo. 201, 61 Pac. 231; Carpenter v. Strange and Mississippi & M. R. Co. v. Ward, supra; Stillman v. White Rock Mfg. Co. 3 Woodb. & M. 539, Fed. Cas. No. 13,446; Banigan v. Worcester, 30 Fed. 394.

To sustain the decree herein, it is necessary to apply the doctrine of *lis pendens*. To do so, this court must hold that the subject-matter of a local action commenced in the state of Nevada is real property situate in the state of California.

Black, Judgm. § 550; Freeman, Judgm. §§ 196, 197; Carr v. Lewis Coal Co. 96 Mo. 149, 9 Am. St. Rep. 328, 8 S. W. 907; Shelton v. Johnson, 4 Sneed, 683, 70 Am. Dec. 265.

Messrs. Charles C. Boynton and James F. Peck also argued the cause and filed a brief for petitioner in No. 5:

A water right inheres in the stream, and the locus of the stream determines the venue of any proceeding which will affect the title to its waters. And the particular

state where the right to invade it is claimed determines the forum of the trial of that right. This forum is exclusive, not concurrent, as to the determination of that right.

Stillman v. White Rock Mfg. Co. 3 Woodb. & M. 539, Fed. Cas. No. 13,446; Gould, Waters, 3d ed. § 446; 14 Enc. Pl. & Pr. p. 1106.

The cross bill in the Federal court, to be ancillary, and to be permitted, where the parties to the cross bill are citizens of the same state, must be in aid of the defense made by the cross complainants to the original controversy.

Stuart v. Hayden, 18 C. C. A. 618, 36 U. S. App. 462, 72 Fed. 402; Vannerson v. Leverett, 31 Fed. 376.

Any judgment in the original case must, because of the limit upon the jurisdiction of the circuit court of Nevada, be one *in personam*.

Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; Pom. Eq. Jur. § 298; Watkins v. Holman, 16 Pet. 25, 10 L. ed. 873.

The doctrine of *lis pendens* has no application to a judgment that is personal.

Baltimore & O. R. Co. v. Wabash R. Co. 57 C. C. A. 322, 119 Fed. 678; Merritt v. American Steel-Barge Co. 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 228.

The doctrine of *lis pendens* is confined to the territorial jurisdiction of the court, and does not cross beyond it.

Carr v. Lewis Coal Co. 96 Mo. 149, 9 Am. St. Rep. 328, 8 S. W. 907; Shelton v. Johnson, 4 Sneed, 683, 70 Am. Dec. 265.

Another rule of *lis pendens* is that the complaint must specially describe the property to be affected, so that the purchaser from the defendant may be able, by examining the records, to ascertain what particular property of the defendant is the subject of litigation.

Black, Judgm. § 550; Freeman, Judgm. §§ 196, 197; Houston v. Timmerman, 17 Or. 499, 4 L.R.A. 716, 11 Am. St. Rep. 848, 21 Pac. 1037; Bate Refrigerating Co. v. Gillett, 30 Fed. 685.

Mr. James F. Peck, for petitioner on reargument:

The source of the right to divert and use the waters of streams in California is the law of the state of California; equally is the source of the right to divert and use the waters of streams in Nevada the law of Nevada.

Kansas v. Colorado, 206 U. S. 47, 51 L. ed. 958, 27 Sup. Ct. Rep. 655.

The question of the respective rights to the waters of the Walker river in the states of California and Nevada, if disputed by

the states themselves, can be adjudicated by this court under its grant of original jurisdiction.

Ibid.

These rights may be settled between the states by compact or agreement, by congressional sanction under § 10 of art. 1 of the Constitution.

Kansas v. Colorado, 185 U. S. 139, 46 L. ed. 843, 22 Sup. Ct. Rep. 552; 2 Story, Const. §§ 1402, 1403.

The considerations of expediency argue that the determination of the question of the rights of a state to the absolute, unrestricted control and use of the waters within its boundaries cannot be litigated before any court, in any proceeding, at the instance of private parties, and can only be litigated in the Supreme Court of the United States at the instance of the states interested.

Georgia v. Tennessee Copper Co. 206 U. S. 237, 51 L. ed. 1044, 27 Sup. Ct. Rep. 618, 11 A. & E. Ann. Cas. 488; Kansas v. Colorado, 185 U. S. 139, 46 L. ed. 843, 22 Sup. Ct. Rep. 552.

The individual rights of many private citizens to be protected by the state, not the interest of the state as the owner of property directly affected, was the basis of the jurisdiction, as stated by this court in Georgia v. Tennessee Copper Co. *supra*; Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331.

It being a question of sovereignty, and no dispute existing between the sovereign states, the state courts must treat all within the territory of California as belonging to California, and all within Nevada as belonging to Nevada. In such courts the lines of the states' boundaries are to conclusively determine the state's rights. Nature's laws and the advantages that each state may have from them are not to be questioned by these courts. The boundaries of the states as to these courts are the fixed monuments of authority to all the waters within.

Mannville Co. v. Worcester, 138 Mass. 89, 52 Am. Rep. 261.

The jurisdiction *in personam*, to the most liberal extent claimed by respondent, would still be *in personam*. It could never affect the title outside of the jurisdiction, so as to prevent purchasers of the property from maintaining suits to quiet the title.

Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A. (N.S.) 924, 30 Sup. Ct. Rep. 3; Watkins v. Holman, 16 Pet. 25, 57, 10 L. ed. 873, 886; Corbett v. Nutt, 10 Wall. 464, 19 L. ed. 976; Carpenter v. Strange, 141 U. S. 87, 105, 35 L. ed. 640, 647, 11 Sup. Ct. Rep. 960; 3 Pom. Eq. Jur. §§ 1317, 1318.
54 L. ed.

Mr. Aldis B. Browne argued the cause, and, with Messrs. W. B. Treadwell, Alexander Britton, Frank H. Short, Isaac Frohman, and Edward F. Treadwell, filed a brief for respondents:

The issues in the actions brought by petitioner in the state court are issues in the suit of Miller & Lux v. Rickey; and those actions would materially interfere with that suit, and impede and embarrass the circuit court in disposing of it.

Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398; Pitt v. Rodgers, 43 C. C. A. 600, 104 Fed. 387; Riverdale Cotton Mills v. Alabama & G. Mfg. Co. 111 Fed. 431; Home Ins. Co. v. Virginia-Carolina Chemical Co. 109 Fed. 681; State Trust Co. v. Kansas City, P. & G. R. Co. 110 Fed. 10; Central Trust Co. v. Western North Carolina R. Co. 112 Fed. 471; Mercantile Trust & D. Co. v. Roanoke & S. R. Co. 109 Fed. 3; Stewart v. Wisconsin C. R. Co. 117 Fed. 782; Starr v. Chicago, R. I. & P. R. Co. 110 Fed. 3.

That a purchaser *pendente lite* is bound by a decree in equity in a Federal court to the same extent as if he had been expressly made a party is elementary law.

Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 370, 33 L. ed. 178, 184, 9 Sup. Ct. Rep. 781; 1 Freeman, Judgm. §§ 191, 193; Majors v. Cowell, 51 Cal. 478; Whiteside v. Haselton, 110 U. S. 296, 300, 28 L. ed. 152, 154, 4 Sup. Ct. Rep. 1.

The propriety of the injunction against the Rickey Land & Cattle Company may be justified on much broader grounds than the doctrine of *lis pendens*.

High, Inj. § 1548; Ahlers v. Thomas. 24 Nev. 407, 77 Am. St. Rep. 820, 56 Pac. 93; Wimpy v. Phinizy, 68 Ga. 188; Bate Refrigerating Co. v. Gillett, 30 Fed. 685; New York v. New York & S. I. Ferry Co., 64 N. Y. 622.

Especially would this be true where the formation of the corporation was a clear subterfuge to avoid the effect of the judgment.

New York v. New York & S. I. Ferry Co. *supra*.

The cross bills here in question were regular, and jurisdictionally sufficient against Rickey.

Ames Realty Co. v. Big Indian Min. Co. 146 Fed. 169.

As a water course running through both states is common to both, then it must follow that there is concurrent jurisdiction over the water stream as such, and the rule would hence justly obtain that the court first obtaining jurisdiction of the matter would retain such exclusive jurisdiction until final determination of the cause.

Shelby v. Bacon, 10 How. 56, 68, 13 L.

ed. 323, 331; Weil, *Water Rights*, 2d ed. pp. 168-175; *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939, 93 Pac. 210; *Kansas v. Colorado*, 206 U. S. 46, 85, 51 L. ed. 956, 969, 27 Sup. Ct. Rep. 655; *Elliot v. Fitchburg R. Co.* 10 Cush. 193, 57 Am. Dec. 85.

Where jurisdiction of a cause in a Federal court is once obtained by diverse citizenship existing when the suit was commenced, it is not thereafter lost if such diverse citizenship should cease by subsequent change of domicile.

Morgan v. Morgan, 2 Wheat. 290, 297, 4 L. ed. 242, 244; *Koenigsberger v. Richmond Silver Min. Co.* 158 U. S. 41-49, 39 L. ed. 889-892, 15 Sup. Ct. Rep. 751; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 566, 43 L. ed. 1081, 1088, 19 Sup. Ct. Rep. 817.

The same rule obtains here. As the jurisdiction by diverse citizenship alone properly attached when the suit was commenced, the court has full power to administer all relief, legal or equitable, as the nature of the suit may permit. Hence, if the cross bill is otherwise unobjectionable, the fact that it is filed after proper commencement of the suit, and is on its face between citizens of the same state, could not, on reason or authority, defeat the right to relief therein prayed. The rule is the other way.

Stewart v. Dunham, 115 U. S. 61, 64, 29 L. ed. 329, 330, 5 Sup. Ct. Rep. 1163; *Phelps v. Oaks*, 117 U. S. 236, 240, 29 L. ed. 888, 890, 6 Sup. Ct. Rep. 714; *Hardenbergh v. Ray*, 151 U. S. 112, 118, 38 L. ed. 93, 94, 14 Sup. Ct. Rep. 305.

Mr. Edward F. Treadwell for respondents on reargument. Messrs. Aldis B. Browne and Alexander Britton were on the brief:

Property rights in a water course, whether they be said to be acquired from the Federal government by virtue of the grant of public lands, or by virtue of the recognition by the Federal government of the right to appropriate the same, or from the state in which the rights are claimed, extend through the entire course of the river, and exist irrespective of political lines.

Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655; *United States v. Rio Grande Dam & Irrig. Co.* 174 U. S. 690, 703, 704, 43 L. ed. 1136, 1141, 1142, 19 Sup. Ct. Rep. 770; *Rundle v. Delaware & R. Canal*, 1 Wall. Jr. 275, Fed. Cas. No. 12,139, affirmed without reference to this point in 14 How. 80, 14 L. ed. 335; *Howell v. Johnson*, 89 Fed. 556; *Morris v. Bean*, 123 Fed. 618; *Hoge v. Eaton*, 135 Fed. 411; *Anderson v. Bassman*, 140 Fed. 14.

Where water is wrongfully diverted in one state (necessarily the upper state), to

the injury of land entitled to the water in another state (necessarily the lower state), the courts of either state have jurisdiction to grant relief, and, in the exercise of such jurisdiction, to determine the relative rights of the parties to divert water from the stream in either state. This is the common-law rule as to counties.

Bulwer's Case, 7 Coke, 1a; *Comyn's Digest*, title Action, N. 11; 1 *Saunders*, Pl. & Ev. 413; *Scott v. Brest*, 2 T. R. 238; *Barden v. Crocker*, 10 Pick. 383; *Pilgrim v. Mellor*, 1 Ill. App. 448; *Oliphant v. Smith*, 3 Penr. & W. 180; *Gould*, Pl. 105; *Taylor v. Cole*, 3 T. R. 292; *Doulson v. Matthews*, 4 T. R. 503; *Livingston v. Jefferson*, 1 Brock. 203 Fed. Cas. No. 8,411.

The rule is applicable to states.

Rundle v. Delaware & R. Canal, *supra*.

Courts of a lower state have jurisdiction of acts committed on an interstate stream in an upper state.

Thayer v. Brooks, 17 Ohio, 489, 49 Am. Dec. 474; *Deseret Irrig. Co. v. McIntyre*, 16 Utah, 398, 52 Pac. 628; *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; *Taylor v. Inlett*, 15 Idaho, 265, 19 L.R.A.(N.S.) 535, 97 Pac. 37; *California Development Co. v. New Liverpool Salt Co.* 97 C. C. A. 214, 172 Fed. 792; *Smith v. Southern R. Co.* 136 Ky. 162, 26 L.R.A.(N.S.) 927, 123 S. W. 678.

Courts of the upper state, at the suit of a party injured in the lower state, may grant the necessary relief.

Stillman v. White Rock Mfg. Co. 3 Woodb. & M. 539, Fed. Cas. No. 13,446; *Banigan v. Worcester*, 30 Fed. 392; *Ducktown Sulphur, Copper & Iron Co. v. Barnes* (Tenn.) 60 S. W. 606; *Howell v. Johnson*, 89 Fed. 556; *Hoge v. Eaton*, 135 Fed. 411; *Anderson v. Bassman*, 140 Fed. 14.

Where two courts have concurrent jurisdiction, the first court which acquires jurisdiction of the subject-matter in controversy will retain that jurisdiction to the end, and may enjoin the parties from prosecuting any other suit in any other tribunal, involving the same issues.

Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398; *Pitt v. Rodgers*, 43 C. C. A. 600, 104 Fed. 387; *Riverdale Cotton Mills v. Alabama & G. Mfg. Co.* 111 Fed. 431; *Home Ins. Co. v. Virginia-Carolina Chemical Co.* 109 Fed. 681; *State Trust Co. v. Kansas City P. & G. R. Co.* 110 Fed. 10; *Central Trust Co. v. Western North Carolina R. Co.* 112 Fed. 471; *Mercantile Trust & D. Co. v. Roanoke & S. R. Co.* 109 Fed. 3; *Stewart v. Wisconsin C. R. Co.* 117 Fed. 782; *Starr v. Chicago, R. I. & P. R. Co.* 110 Fed. 3; *Gage v. Riverside Trust Co.* 86 Fed. 988.

A court of the United States which has

acquired jurisdiction of a particular controversy may enjoin the parties thereto from prosecuting a subsequent action in relation thereto in the courts of a state.

Taylor v. Taintor, 16 Wall. 370, 21 L. ed. 290; *French v. Hay* (*French v. Stewart*) 22 Wall. 253, 22 L. ed. 858; *Kern v. Huidekoper*, 103 U. S. 494, 26 L. ed. 357; *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Harkrader v. Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119.

Where a court of equity has acquired jurisdiction by reason of its jurisdiction over property within the territorial jurisdiction of the court, or by reason of its jurisdiction of parties residing within its jurisdiction, and against whom an equitable cause of action exists, growing out of fraud, trust, contract, or other basis of equitable jurisdiction, it may retain jurisdiction and give complete relief, although it may be necessary, in so doing, to pass upon rights to property situated in another state or country.

Great Falls Mfg. Co. v. Worster, 23 N. H. 462; *Selmaltz v. York Mfg. Co.* 204 Pa. 1, 59 L.R.A. 907, 93 Am. St. Rep. 782, 53 Atl. 522; *Alexander v. Tolleston Club*, 110 Ill. 65; *Williams v. Ayrault*, 31 Barb. 364; *Manley v. Carter*, 7 Kan. App. 86, 52 Pac. 915; *Willey v. St. Charles Hotel Co.* 52 La. 1581, 28 So. 182; *Clad v. Paist*, 181 Pa. 148, 37 Atl. 194; *Remer v. McKay*, 54 Fed. 434; *Massie v. Watts*, 6 Cranch, 148, 3 L. ed. 181; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Phelps v. McDonald*, 99 U. S. 298, 25 L. ed. 473; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *Moran v. Sturges*, 154 U. S. 286, 38 L. ed. 991, 14 Sup. Ct. Rep. 1019; *Dull v. Blackman*, 169 U. S. 243, 42 L. ed. 733, 18 Sup. Ct. Rep. 333; *Fall v. Eastin*, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3.

Mr. Justice Holmes delivered the opinion of the court:

These cases are brought to this court by certiorari. The facts material to the understanding and decision of them are these: *Miller & Lux* is a corporation using the water of the Walker river in Nevada, and claiming rights in the same. The two branches of this river, known as East Fork and West Fork, rise in California and unite in Nevada above *Miller & Lux*. One *Rickey* used the water of both of these branches in California, and claimed rights superior to those of the parties lower down on the stream. On June 10, 1902, *Miller & Lux* brought a bill in equity in the circuit court for the district of Nevada against *Rickey* 54 L. ed.

and certain other defendants, some of whom are respondents in the second of the present cases, to enjoin interference with its use of water. *Rickey* appeared, pleaded to the jurisdiction that the diversion of water by him was in California (127 Fed. 573), and, later, answered. But, after appearing, he, with other members of his family, organized the petitioning corporation, and he conveyed his lands and rights in California to it. On October 15, 1904, this corporation began two actions in a state court of California against *Miller & Lux*, the defendants in the bill of *Miller & Lux* other than *Rickey*, and others, to quiet its title and establish its prior right to 1575 cubic feet per second on the West Fork, and to 504 feet on the East Fork. In December, a few days before they were served with process in the last-mentioned suits, other defendants in [260 the bill brought by *Miller & Lux* brought a cross bill against their codefendant *Rickey* to establish their priority as against him. In 1906, the bills in these present cases were brought by *Miller & Lux*, and defendants other than *Rickey* in the original *Miller & Lux* suit, to restrain proceedings in the California actions, on the ground that the United States court for Nevada had acquired jurisdiction before the California actions were begun. Injunctions were granted as prayed, and now are before this court for review. 81 C. C. A. 207, 152 Fed. 11, affirming 146 Fed. 574, 581, 588.

The petitioner contends that there is no conflict of jurisdiction, and that the proceedings in the California court should go on. Its argument is this: When a right is asserted in favor of land in one jurisdiction over land in another, different principles are involved from those that suffice when both parcels are subject to the same law. When such rights have been recognized, it has been on the ground of an assumed "concurrence between the two states, the one, so to speak, offering the right, the other permitting it to be accepted. *Mannville Co. v. Worcester*, 138 Mass. 89," 52 Am. Rep. 261. *Missouri v. Illinois*, 200 U. S. 496, 521, 50 L. ed. 572, 579, 26 Sup. Ct. Rep. 268. But still there are two parcels of land subject to different systems of law; and although the rights and liabilities in respect of each may require a consideration of the other if they are to be dealt with completely, the fact remains that each may be regulated by the state where the land lies according to its sovereign will. *Kansas v. Colorado*, 206 U. S. 46, 93, 51 L. ed. 956, 973, 27 Sup. Ct. Rep. 655. If, then, the courts of one state are about to deal with one parcel, they should not be indirectly interfered with by a foreign court that has no power to control the use of the res. It is

said to be a general principle that apart from some privity, such as is created by contract, trust, or fraud, courts of equity recognize the impropriety of using their power [261] over the *person to achieve such a result. Northern Indiana R. Co. v. Michigan C. R. Co. 15 How. 233, 242-244, 14 L. ed. 674-679; Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; Norris v. Chambres, 29 Beav. 246, 253, 254, s. c. 3 De G. F. & J. 583, 584. It is conceivable, to be sure, that the decisions of this court may determine that the states have rights as against each other *in invitum* in streams that flow through the land of both. Kansas v. Colorado, 206 U. S. 46, 84, 51 L. ed. 956, 969, 27 Sup. Ct. Rep. 655; Missouri v. Illinois, 200 U. S. 496, 519, 520, 50 L. ed. 572, 578, 579, 26 Sup. Ct. Rep. 268. These rights may vary according to the system of law required by natural conditions. They may be more or less analogous to common-law rights between upper and lower proprietors, where irrigation is not necessary, as in most of the older states. See New York v. Pine, 185 U. S. 93, 96, 46 L. ed. 820, 821, 22 Sup. Ct. Rep. 592. There may be some, perhaps limited, right of appropriation in the upper state, at least in the watershed of the stream, where irrigation is the condition of using the land. See Kansas v. Colorado, 206 U. S. 46, 100-104, 117, 51 L. ed. 956, 975-977, 983, 27 Sup. Ct. Rep. 655. But whatever this court may decide, if a private owner should derive advantage from such a decision it would not be in his own right, but by reason of and subordinate to the rights of his state, and those rights, the petitioner insists, can, or at least should be, determined only in a suit brought by the state itself.

But if for any reason the foregoing argument should not have prevailed as against Rickey if he had brought the actions in California after the beginning of the suit in Nevada, the present petitioner is not affected by the proceedings against Rickey, as they were purely personal, and did not concern a purchaser of land outside the jurisdiction. To affect a purchaser with a suit against his vendor, it is said that at least the *res* must be within the territorial jurisdiction of the court in which the suit is brought. See Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A.(N.S.) 924, 30 Sup. Ct. Rep. 3.

We are of opinion that the petitioner fails to establish the conclusion for which it con- [262] tends. The alleged rights *of Miller & Lux involve a relation between parcels of land that cannot be brought within the same jurisdiction. This relation depends as well upon the permission of the laws of Nevada as upon the

compulsion of the laws of California. It is true that the acts necessary to enforce it must be done in California, and require the assent of that state so far as this court does not decide that they may be demanded as a consequence of whatever right, if any, it may attribute to Nevada. But, leaving the latter possibility on one side, if California recognizes private rights that cross the border line, the analogies are in favor of allowing them to be enforced within the jurisdiction of either party to the joint arrangement. Great Falls Mfg. Co. v. Worster, 23 N. H. 462. Full justice cannot be done and anomalous results avoided unless all the rights of the parties before the court in virtue of the jurisdiction previously acquired are taken in hand. To adjust the rights of the parties within the state requires the adjustment of the rights of the others outside of it. Of course, the court sitting in Nevada would not attempt to apply the law of Nevada, so far as that may be different from the law of California, to burden land or water beyond the state line, but the necessity of considering the law of California is no insuperable difficulty in dealing with the case. Foreign law often has to be ascertained and acted upon, and one court ought to deal with the whole matter.

We are of opinion, therefore, that there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were so far the same that the court first seised should proceed to the determination without interference, on the principles now well settled as between the courts of the United States and of the states. Prout v. Starr, 188 U. S. 537, 544, 47 L. ed. 584, 587, 23 Sup. Ct. Rep. 398; Ex parte Young, 209 U. S. 123, 161, 162, 52 L. ed. 714, 729, 730, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441.

As to the argument that the Rickey Land Company is not affected by any priority that may have been gained *as against [263 Rickey, it might be a question, even if the petitioner was a purchaser without notice, whether the purchaser would not be confined to asserting its rights in the pending cause. See Whiteside v. Haselton, 110 U. S. 296, 301, 28 L. ed. 152, 154, 4 Sup. Ct. Rep. 1. But in this case, if the judge below was of opinion as matter of fact on what appears that the institution of the petition was merely a device to dodge the jurisdiction of the Nevada court, and that the Rickey Land & Cattle Company was merely Rickey under another name, we could not say that his finding was wrong.

It is urged that the cross bills on which the bill and injunction in the second case were based were not maintainable because

not in aid of the defenses to the original suit of Miller & Lux. But it might very well be, as was shown by the argument for the respondents, that even if they admitted the right of Miller & Lux, still a decree as between themselves and other defendants would be necessary in order to prevent a decree for Miller & Lux from working injustice. See further, *Ames Realty Co. v. Big Indian Min. Co.* 146 Fed. 166. The cross bills being maintainable, the jurisdiction in respect of them follows that over the principal bill.

Decrees affirmed.

264] *†LEHIGH VALLEY RAILROAD
COMPANY, Appt.,
v.

CORNELL STEAMBOAT COMPANY,
Claimant of Steam Tug Ira M. Hedges.

(See S. C. Reporter's ed. 264-271.)

**Direct appeal from district court —
jurisdiction below.**

1. The jurisdiction of the Federal Supreme Court of a direct appeal from a decree of a Federal district court sitting as a court of admiralty, which dismissed a libel for contribution in favor of a joint wrongdoer who had paid a judgment recovered against him in a suit at common law, founded on the wrong, to which the other wrongdoer was not made a party, cannot be defeated on the theory that the dismissal, although expressed to be for want of jurisdiction, is really upon the merits, because payment of a judgment at common law is not a ground for contribution from a wrongdoer not a party to the suit.

[For other cases, see *Appeal and Error*, 895-918, in *Digest Sup. Ct.* 1908.]

Admiralty jurisdiction — contribution.

2. A court of admiralty has jurisdiction of a libel to enforce contribution from the owner of one of two vessels, which were both at fault for a collision with a third, in favor of the charterer of the other vessel at fault, who has paid a judgment recovered against him in a suit at common law, founded upon the wrong, to which the other wrongdoer was not made a party.

[For other cases, see *Admiralty*, I. f, 13, in *Digest Sup. Ct.* 1908.]

[No. 18.]

Argued October 27, 1910. Decided November 7, 1910.

†This case is reported by the Official Reporter under the name of "The Ira M. Hedges."

NOTE.—On direct review in Federal Supreme Court of judgments or decrees of district or circuit courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.
54 L. ed.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree dismissing for want of jurisdiction a libel for contribution. Reversed.

The facts are stated in the opinion.

See same case below, 163 Fed. 587.

Mr. William S. Montgomery argued the cause, and, with Mr. George H. Emerson, filed a brief for appellant.

Mr. J. Parker Kirlin argued the cause, and, with Mr. Amos Van Etten, filed a brief for appellee.

Mr. Justice Holmes delivered the opinion of the court:

This is a libel for contribution. The libel was excepted to by the claimant and was dismissed on the ground that the district court, sitting as a court of admiralty, had no jurisdiction to enforce contribution between the parties on the facts.

The facts alleged are as follows. The appellant was in possession of the tug Slatington under a demise, and the tug was crossing the North river with car float No. 22 alongside on the port side. The tug Ira M. Hedges was coming up the river on the port side with two stone scows in tow, one on each side. There was a collision between one of those scows, the Helen, and car float No. 22, which was caused or contributed to by the Ira M. Hedges. The owner of the Helen, not being the owner of the Ira M. Hedges, brought an action at common law and recovered a judgment against the appellant, the owner of the Ira M. Hedges not being made a party defendant in that suit. The appellant paid the judgment and brought this libel against the Ira M. Hedges, in terms to recover the amount of the claim set forth in the libel, but, it fairly may be held, in substance to recover, if not the whole, *then contribution for what [270 the libellant has had to expend.

The first question is whether this court has jurisdiction of the appeal. It is said that the dismissal of the libel, although expressed to be for want of jurisdiction, really is on the merits, because payment of a judgment at common law is not a ground for contribution from a joint wrongdoer, not a party to the suit. There sometimes is difficulty in distinguishing between matters going to the jurisdiction and those determining the merits. (*Fauntleroy v. Lum*, 210 U. S. 230, 235, 52 L. ed. 1039, 1041, 28 Sup. Ct. Rep. 641), and, no doubt, this case presents that difficulty. But perhaps it may be said that the two considerations coalesce here. The admiralty has a limited jurisdiction. If there are no merits in the claim, it is of a kind that the admiralty not only

ought not to enforce, but has no power to enforce. At all events, the form of the decree must be taken to express the meaning of the judge. If the decree was founded, as it purports to be, on a denial of jurisdiction in the court, this court has jurisdiction of the appeal. For all admiralty jurisdiction belongs to courts of the United States as such, and therefore the denial of jurisdiction brings the appeal within the established rule. See *The Jefferson*, 215 U. S. 130, 138, 54 L. ed. 125, 128, 30 Sup. Ct. Rep. 54.

Coming to the substance, we are of opinion that the decision was wrong. The right to contribution belongs to the substantive law of the admiralty. *Erie R. Co. v. Erie & W. Transp. Co.* 204 U. S. 220, 51 L. ed. 450, 27 Sup. Ct. Rep. 246. It is not a mere incident of a form of procedure. Therefore the fact, over which the libellant had no control, that the injured party saw fit to sue at common law, cannot take that right away. The passing of the claim against the libellant into the form of a judgment before the claim was satisfied has no bearing upon the question whether the right to contribution remains. It does not matter to this question, even if it be true, as thought by 271] the court below, *that the libellant might have required the owner of the *Ira M. Hedges* to be made a party. For it still would have rested with the plaintiff in the former suit to collect from the appellant alone if it saw fit, and, if it had done so, it is at best but a speculation to suggest that the libellant could have recovered from its codefendant at common law.

The question as to what is conclusively established by the common-law judgment is not before us, but only the jurisdiction of the court. But we may add that the appellant seeks to recover contribution for the amount paid, not as *res judicata*, but as one of the consequences of a joint tort from which it could not escape, and which its fellow wrongdoer was bound to contemplate. The claimant, of course, does not desire to dispute the appellant's negligence. It is free to deny its own. Whether if it were so minded it could controvert the amount of the damage as determined by the judgment need not be discussed. No doubt it would have been a prudent course for the appellant to give notice to the owner of the *Ira M. Hedges* to take part in the defense, with a view to its possible ultimate liability. Whether a failure to do so would affect its rights is not before us to decide. We do not mean to intimate that the failure is material where there has been a bona fide defense.

Decree reversed.

*ONG CHANG WING and Kwong [272
Fok, Pliffs. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 272-280.)

Constitutional law — due process of law — affirmation of conviction under statute since repealed.

The due process of law secured to the people of the Philippine Islands by the act of July 1, 1902 (32 Stat. at L. 692, chap. 1369), § 5, was not denied by the affirmation in the supreme court of the Philippine Islands of a conviction of the offense described in Philippine Penal Code, article 343, which was repealed after the conviction and sentence in the court of first instance by the act of the Philippine Commission of October 9, 1907, act No. 1757, the repealing act also providing for the punishment of the same offense, and within limitations not exceeded by the sentence imposed under the former act.

[For other cases, see Constitutional Law, IV, b, 9, in Digest Sup. Ct. 1908.]

[No. 418.]

Argued October 21, 1910. Decided November 7, 1910.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a conviction in the Court of First Instance for the City of Manila for keeping a gambling house. Affirmed.

The facts are stated in the opinion.

See same case below, 12 Philippine, 779.

Mr. Charles F. Consaul argued the cause, and, with Messrs. Charles C. Heltman and Frank B. Ingersoll, filed a brief for plaintiffs in error.

Mr. Edwin P. Grosvenor argued the cause, and, with Mr. William S. Kenyon, filed a brief for defendant in error.

Mr. Justice Day delivered the opinion of the court:

The plaintiffs in error bring this case here for review by writ of error to the supreme court of the Philippine Islands, upon the

NOTE.—As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gammon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

As to the effect of repeal without saving clause of penal statute or municipal ordinance upon prior conviction under it—see note to *Wichita v. Murphy*, 23 L.R.A. (N.S.) 243.

ground that the effect of the judgment of that court has been to deprive them of due process of law, in violation of § 5 of the act of Congress of July 1, 1902 (32 Stat. at L. 692, chap. 1369), enacting the due process clause of the Federal Constitution as a part of the statute for the government of those islands. No other question is presented in the record which we can review.

The plaintiffs in error were tried, convicted, and sentenced on October 4, 1907, in the court of first instance, for violation of § 343 of the Philippine Penal Code, which makes it an offense to conduct a gambling house, or to be a banker therein. Plaintiffs in error were sentenced in the court of first instance to two months and one day of arresto mayor, with the accessories of § 61, and to pay a fine of 625 pesetas, and in default thereof to suffer subsidiary imprisonment, not to exceed one third of the principal penalty, and costs.

Upon appeal to the supreme court of the Philippine Islands, that court held that the guilt of the appellants was fully established, and affirmed the judgment of the court of first instance. In the supreme court the plaintiffs in error made the objection, which is the foundation of the proceedings here, that they were convicted under the provisions of article 343 of the Philippine 278] Code for an *offense committed on the 15th of September, 1907; that thereafter the Philippine Commission, on October 9, 1907, by an act numbered 1757, repealed, among others, article 343 of the Philippine Penal Code, and that consequently the court had no authority to impose upon the appellants the penalty prescribed in the repealed article of the Code. The supreme court of the islands denied this contention upon the authority of another decision in the same court. *United States v. Cuna*, 12 Philippine, 241. A reference to the *Cuna* Case shows that the supreme court of the Philippines, construing the articles of the local Penal Code, and applying what was deemed the applicable Spanish law, held that whether an act was punishable after the repeal of the act under which it was undertaken to be inflicted depended upon whether or not, at the time of the commission of the act, there was a law in force which penalized it. The court reserved the question whether the punishment provided in the repealing act could alone be inflicted if such penalty is more favorable to the accused than that prescribed in the former act, because of the provisions of article 22 of the Code, which provides that penal laws shall have a retroactive effect in so far as they favor persons convicted of a crime or misdemeanor.

It appears that the new act, No. 1757, which took the place of the repealed act, 54 L. ed.

article No. 343 of the Philippine Penal Code, did not undertake to wipe out the offense of gambling, or keeping a gambling house in the Philippine Islands, but substantially re-enacted the former law with more elaboration and detail in its provisions than were contained in the former law.

In the new act § 2 defines a gambling house to be a building or structure or vessel, or part thereof, in which gambling is frequently carried on. Under article 343 of the Penal Code of the Philippine Islands, as it existed when the sentence in this case was imposed, the bankers *and pro- [279 priators of houses where games of chance, stakes, or hazard are played were punished. The decision of the court of first instance, found in the record in this case, held that, in order to punish the crime of gambling, in accordance with article 343 of the Penal Code, it must appear that the house where the gambling took place was a house devoted to encouraging gambling, as held in various decisions of the Supreme Court of Spain applicable to the case at bar, and that such facts had been fully established by the proof in the case.

The sentence imposed was within the limits provided in act No. 1757, under which the keeping of a gambling house can be punished. The case, therefore, presented for our consideration, is one of conviction under a statute which was repealed after the conviction and sentence in the court of first instance, the repealing act also providing for the punishment of the same offense, and within limitations not exceeded by the sentence imposed under the former act.

The precise question then is, Did the supreme court of the Philippine Islands deny the plaintiffs in error due process of law in affirming a conviction under the circumstances stated? It is argued that the supreme court of the Philippines misapplied the provisions of the Penal Code and the Spanish law in the light of which it was interpreted. On the part of the government it is insisted that, even at common law, the affirmation of a conviction under a law valid when it was had was not erroneous, and that it was within the power of a reviewing court so to do; but we are not concerned with this question. Our sole province is to determine whether the judgment of the supreme court of the Philippine Islands amounts to a denial of due process of law.

This court has had frequent occasion to consider the requirements of due process of law as applied to criminal procedure, and, generally speaking, it may be said that *if an accused has been heard in [280 a court of competent jurisdiction, and proceeded against under the orderly proc-

esses of law, and only punished after inquiry and investigation, upon notice to him, with an opportunity to be heard, and a judgment awarded within the authority of a constitutional law, then he has had due process of law. *Rogers v. Peck*, 199 U. S. 435, 50 L. ed. 260, 26 Sup. Ct. Rep. 87; *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14, and the cases therein cited.

In the present case there can be no doubt that the lawmaking power in the Philippine Islands could, by statutory enactment, have preserved the right to prosecute and punish offenses committed in violation of the former law while in force in the islands, notwithstanding the repeal of the act. The effect of the decision of the Philippine supreme court is to hold that under the law and local statutes, the repealing act re-enacting substantially the former law, and not increasing the punishment of the accused, the right still exists to punish the accused for an offense of which they were convicted and sentenced before the passage of the later act. In other words, the effect of the decision construing the local law is to accomplish what it was clearly within the power of the legislative authority to do by an express act saving the right to proceed as to offenses already committed. The accused have not been punished for a crime which was not punishable when committed by the sentence imposed. The supreme court has only held that the right to impose the penalty of the law under the Philippine Penal Code has not been taken away by the subsequent statute. We are unable to see that due process of law, which is the right of a person accused of a crime, when prosecuted within a jurisdiction wherein the Constitution of the United States, or a statute embracing its provisions, is in force, has been denied.

The judgment of the Supreme Court of the Philippine Islands will be affirmed.

Affirmed.

281] *ROBERT EARL KERFOOT, Plff. in Err.,
v.

FARMERS & MERCHANTS BANK, First National Bank of Trenton, Missouri, et al.

(See S. C. Reporter's ed. 281-288.)

National banks — power to take real property in trust — who may question.

1. The United States alone can object to the want of authority of a national bank, under U. S. Rev. Stat. § 5137, U. S. Comp.

1042

Stat. 1901, p. 3460, to accept a conveyance of real property to be held in trust. [For other cases, see *Banks*, IV. g, in *Digest Sup. Ct. 1908.*]

Error to state court — questions reviewable — finding of fact.

2. The decision of a state court that a trust deed was accepted by a national bank is a finding of fact not reviewable by the Federal Supreme Court on writ of error to the state court.

[For other cases, see *Appeal and Error*, 2175-2208, in *Digest Sup. Ct. 1908.*]

[No. 6.]

Argued October 25, 1910. Decided November 7, 1910.

IN ERROR to the Supreme Court of the state of Missouri to review a decree which affirmed a decree of the Circuit Court of Grundy County, in that state, in favor of defendants in a suit to set aside a conveyance of real property to a national bank in trust. Affirmed.

The facts are stated in the opinion.

See same case below, 145 Mo. 418, 46 S. W. 1000.

Messrs. **Homer Hall** and **George Hall** argued the cause, and, with Messrs. **Frank Hall** and **W. B. C. Brown**, filed a brief for plaintiff in error.

Mr. Thomas J. Beall argued the cause, and, with Messrs. **Beall & Kemp** and **Harber & Knight**, filed a brief for defendants in error.

Mr. Justice Hughes delivered the opinion of the court:

This action was brought in 1894, in the circuit court of Grundy county, state of Missouri, to set aside a deed of real property made by **James H. Kerfoot** to the First National Bank of Trenton, Missouri, and also a deed by which that bank purported to convey the same property to the defendants **Hervey Kerfoot**, **Alwilda Kerfoot**, and **Lester R. Kerfoot**, and for the recovery of possession. The plaintiffs in the action, which was brought shortly after the death of **James H. Kerfoot**, were **Homer Hall**, administrator of his estate, and **Robert Earl Kerfoot**, his infant grandson, who claimed to be his only heir at law, and sued by **Homer Hall** as next friend. The petition contained two counts, one in equity, the other in ejectment. Upon the trial, the circuit

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L.R.A. 571.

As to review of facts on writ of error to state court—see note to *Smiley v. Kansas*, 49 L. ed. U. S. 546.

218 U. S.

court found the issues for defendants, and the judgment in their favor was affirmed by the supreme court of Missouri. 145 Mo. 418, 46 S. W. 1000. On his coming of age, Robert Earl Kerfoot sued out this writ of error.

The plaintiff in error challenges the conveyance made by James H. Kerfoot to the bank, upon the ground that under § 5137 of the Revised Statutes of the United States 286] (U. S. Comp. Stat. 1901, p. 3460), *relating to national banks, the bank was without power to take the property, and hence that no title passed by the deed, but that it remained in the grantor, and descended to the plaintiff in error as his heir at law. It appears that the deed, which was absolute in form, with warranty, and expressing a substantial consideration, was executed in pursuance of an arrangement by which the title to the property was to be held in trust, to be conveyed upon the direction of the grantor; and the supreme court of Missouri decided that a trust was in fact declared by the grantor in favor of Hervey, Alwilda, and Lester R. Kerfoot, to whom ran a quitclaim deed, which he prepared and forwarded to the bank, to be signed and acknowledged by it and then returned to him.

But while the purpose of this transaction was not one of those described in the statute for which a national bank may purchase and hold real estate, it does not follow that the deed was a nullity, and that it failed to convey title to the property.

In the absence of a clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter is not void, but voidable, and the sovereign alone can object. Neither the grantor nor his heirs nor third persons can impugn it upon the ground that the grantee has exceeded its powers. *Smith v. Sheeley*, 12 Wall. 358, 20 L. ed. 430; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Reynolds v. First Nat. Bank*, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; *Leazure v. Hillegas*, 7 Serg. & R. 313. Thus, although the statute by clear implication forbids a national bank from making a loan upon real estate, the security is not void, and it cannot be successfully assailed by the debtor or by subsequent mortgagees because the bank was without authority to take it; and the disregard of the provisions of the act of Congress upon that subject only lays the 287] bank open to proceedings *by the government for exercising powers not conferred by law. *Union Nat. Bank v. Mat-*
54 L. ed.

thews and National Bank v. Whitney, supra; *Swope v. Leffingwell*, 105 U. S. 3, 26 L. ed. 939.

In *Union Nat. Bank v. Matthews*, supra, viewing that case in this aspect, the court said:

"The opinion of the supreme court of Missouri assumes that the loan was made upon real-estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But, conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined.

"Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Leazure v. Hillegas*, supra; *Goundie v. Northampton Water Co.* 7 Pa. 233; *Rumyan v. Coster*, 14 Pet. 122, 10 L. ed. 382; *Banks v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706; *McIndoe v. St. Louis*, 10 Mo. 577. See also *Union Gold-Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648."

This rule, while recognizing the authority of the government to which the corporation is amenable, has the salutary effect of assuring the security of titles and of avoiding the injurious consequences which would otherwise result. In the present case a trust was declared, and this trust should not be permitted to fail and the property *to be diverted from those for whom [288 it was intended, by treating the conveyance to the bank as a nullity, in the absence of a clear statement of legislative intent that it should be so regarded.

The cases in this court which are relied upon by the plaintiff in error are not applicable to the facts here presented, and are in no way inconsistent with the doctrine to which we have referred. *McCormick v. Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739.

It was also urged by the plaintiff in error that the deed was not accepted by the bank,

and was inoperative for that reason. The supreme court of Missouri held upon the evidence that it was accepted, and this court, on a question of that character, does not review the findings of fact which have been made in the state court. *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Clipper Min. Co. v. Eli Min. & Land Co.* 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632.

Assuming that the deed was accepted by the bank, it was effective to pass the legal title, and the plaintiff in error, as heir at law of the grantor, cannot question it.

Judgment affirmed.

289] *R. R. RICHARDSON, Appt.,
v.

SANTIAGO AINSA, Administrator with the Will Annexed of the Estate of Frank Ely, Deceased.

(See S. C. Reporter's ed. 289-298.)

Appeal — conclusiveness of prior decision on subsequent appeal.

1. The decision of the Federal Supreme Court on a former appeal, that the lower court had jurisdiction of the case, is conclusive on a second appeal.

[For other cases, see *Appeal and Error*, IX. o, 2, in *Digest Sup. Ct.* 1908.]

Private land claims — Mexican grant — lands patented to third parties.

2. The claim of one whose title under a Mexican land grant is perfect and complete, and who is, therefore, not bound under the act of March 3, 1891, to apply to the court of private land claims for confirmation, is not cut down to the extent that the land has been patented by the United States to third parties, because he appeared and prayed confirmation in a suit brought against him by the United States under the authority of § 8 of that act, to remove the government's doubt as to title or boundaries, on the theory that the language of § 14, giving that effect to such patents "if in any case" it shall appear that the lands or any part thereof, decreed to any claimant under the act, shall have been sold by the United States, applies not only to the proceeding brought by the claimant himself for confirmation, but also to the proceeding on behalf of the government, in which the court is to determine the matter, subject to all lawful rights adverse to the claimant or possessor, and as between such claimant and possessor and any other claimant or possessor, and subject in this

respect to all the applicable statutory provisions.

[No. 28.]

Argued and submitted November 2, 1910.
Decided November 14, 1910.

A PPEAL from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court of Pima County in favor of plaintiff in a suit to quiet title. Affirmed.

See same case below, 11 *Ariz.* 359, 95 *Pac.* 103.

The facts are stated in the opinion.

Mr. S. L. Kingan submitted the cause for appellant:

The judiciary department must follow the law promulgated by the legislative department. If the legislators choose to violate a treaty, the affair is of a political aspect, and not a matter for the court's jurisdiction.

Botiller v. Dominguez, 139 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525; *Head Money Cases (Edye v. Robertson)* 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *Re Ah Lung*, 18 Fed. 28; *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522.

The statute is intended to help the grant claimant to establish his rights and to protect his property. And it gives the government power to compel him to establish his claim and determine its boundaries, so that there can never be any conflict between the grant claimant and the government, or anyone claiming under the government.

United States v. Martinez, 184 U. S. 441, 46 L. ed. 632, 22 Sup. Ct. Rep. 422.

The whole spirit of the statute is to protect, at all hazards, those who homestead the land.

Real de Dolores v. United States, 175 U. S. 75, 44 L. ed. 78, 20 Sup. Ct. Rep. 17.

The purpose of the government in forcing the grant claimants to take some action or lose their grants is to protect the government in its public lands, and prevent it issuing patents on lands covered by grants.

Botiller v. Dominguez, *supra*.

It will occasionally happen that the government, through accident or inadvertence, will patent the same land a second time; but when its attention is called to the fact that the land has been previously patented, it cannot patent the same land a second time without virtually stultifying itself. A patent assumes that a patentor has certain rights to convey, and if those rights have already been conveyed with the knowledge of the grantor, a second patent carries with it a suspicion of a want of good faith.

NOTE.—On conclusiveness of prior decisions on subsequent appeals—see note to *Hastings v. Foxworthy*, 34 L.R.A. 321.

United States v. Conway, 175 U. S. 60, 44 L. ed. 72, 20 Sup. Ct. Rep. 13.

In the case at bar, the government knew it had patented certain lands to the grantors of Richardson, and the boundaries were fixed. Ainsa, administrator, admitted such to be the case. Richardson's rights, therefore, could not be affected by the decree, and there was no occasion for making him a party.

See *United States v. Martinez*, *supra*.

The case of *United States v. Baca*, 184 U. S. 653, 46 L. ed. 733, 22 Sup. Ct. Rep. 541, is in point.

Mr. Joseph W. Lewis argued the cause, and, with Messrs. Selim M. Franklin and Frank H. Hereford, filed a brief for appellee:

This court having heretofore decided on appeal in this case (*Ainsa v. New Mexico & A. R. Co.* 175 U. S. 76-91, 44 L. ed. 78-84, 20 Sup. Ct. Rep. 28) that the district court had jurisdiction of this action, that question is settled and cannot be raised again.

United States v. Camou, 184 U. S. 572-574, 46 L. ed. 694-696, 22 Sup. Ct. Rep. 505; *Illinois v. Illinois C. R. Co.* 184 U. S. 77-99, 46 L. ed. 440-449, 22 Sup. Ct. Rep. 300; *Sibbald v. United States*, 12 Pet. 488-492, 9 L. ed. 1167-1169; *Thompson v. Maxwell Land Grant & R. Co.* 168 U. S. 451-471, 42 L. ed. 539-546, 18 Sup. Ct. Rep. 121; *Snyder v. Pima County*, 6 Ariz. 41, 53 Pac. 6; *Beiscker v. Moore*, 98 C. C. A. 272, 174 Fed. 368; *Washington Bridge Co. v. Stewart*, 3 How. 413, 11 L. ed. 658; *Whyte v. Gibbes*, 20 How. 541, 15 L. ed. 1016.

The San José de Sonoita grant, being a complete and perfect grant prior to the treaty of cession, the grantee thereof, his heirs and assigns, had title in fee, which was not in any way affected by the change of sovereignty.

United States v. Percheman, 7 Pet. 86, 87, 8 L. ed. 617, 618; *Ainsa v. New Mexico & A. R. Co.* *supra*; *Dent v. Emmeger*, 14 Wall. 308-314, 20 L. ed. 838-840; *Trenier v. Stewart*, 101 U. S. 797-810, 25 L. ed. 1021-1024.

And the treaty of cession, commonly called the Gadsden treaty, so provides.

Ely v. United States, 171 U. S. 220-241, 43 L. ed. 142-150, 18 Sup. Ct. Rep. 840.

The lands embraced within the grant being private property, the patents issued to parts thereof under the United States public land laws were utterly void.

Knight v. United Land Asso. 142 U. S. 161-216, 35 L. ed. 974-993, 12 Sup. Ct. Rep. 258; *Polk v. Wendal*, 9 Cranch, 87-102, 3 L. ed. 665-670.

54 L. ed.

The President of the United States has no right to issue patents for land the sale of which is not authorized by law.

Easton v. Salisbury, 21 How. 426-432, 16 L. ed. 181-183.

Under the act of Congress approved July 22, 1854 (10 Stat. at L. 308, chap. 103), and the act of Congress approved July 15, 1870 (16 Stat. at L. 304, chap. 292, U. S. Comp. Stat. 1901, p. 1449), the lands within the limits of the grant were reserved from sale or other disposal by the government.

Ely v. Magee, 34 Land. Dec. 506.

While so reserved, the homestead patents under which Richardson claims title were issued. Patents for lands reserved from sale are void.

Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321-325, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018; *Morton v. Nebraska*, 21 Wall. 660-675, 22 L. ed. 639-645; *Polk v. Wendal*, *supra*; *Minter v. Crommelin*, 18 How. 87, 89, 15 L. ed. 279, 280; *Doolan v. Carr*, 125 U. S. 618-642, 31 L. ed. 844-853, 8 Sup. Ct. Rep. 1228; *Noble v. Union River Logging R. Co.* 147 U. S. 165, 176, 37 L. ed. 123, 127, 13 Sup. Ct. Rep. 271.

Lands within the limits of a claimed Mexican grant in Arizona, being reserved from sale or disposal by the acts of Congress aforesaid, are not "public lands" of the United States, and are not subject to sale under the public land acts.

Cameron v. United States, 148 U. S. 301-311, 37 L. ed. 459-463, 13 Sup. Ct. Rep. 595; *Van Reynegan v. Bolton*, 95 U. S. 33-37, 24 L. ed. 351-352; *Newhall v. Sanger*, 92 U. S. 761-766, 23 L. ed. 769-771.

Under the acts of Congress aforesaid, the reservation became immediately operative upon all lands within the ceded territory covered at the time by any Spanish or Mexican claim which originated prior to the treaty of cession.

Re Baca Float No. 3, 30 Land Dec. 97.

The act of Congress creating the court of private land claims does not deprive the owner of a perfect grant, who is brought into that court as a party defendant at the suit of the government, of lands which previously had been unlawfully and without right patented to others under the public land laws, and such lands are not excluded by the terms of that act from the grant as confirmed by that court.

Ely v. Magee, *supra*; *Richardson v. Ainsa*, 11 Ariz. 359, 95 Pac. 103.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit to quiet title, brought in 1887 by the appellee's intestate in the district court of Arizona. The decision was in

favor of the appellee, and this decision was affirmed by the supreme court of the territory, *whereupon the defendant Richardson appealed to this court.

The appellant represents a title derived from a grant by the Mexican government of land in the portion of Arizona afterwards acquired by the Gadsden Purchase, December 30, 1853. 10 Stat. at L. 1031. At the time of the Gadsden Purchase this title was complete. The appellant claims through mesne conveyances from holders of patents issued by the United States in 1879 and 1880, under the homestead laws.

The first error assigned is that the district court was without jurisdiction. That point already has been decided against the appellant in this very case under the name of *Ainsa v. New Mexico & A. R. Co.* No. 2, 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33, so that it is not open to him to urge it. *United States v. Camou*, 184 U. S. 572, 574, 46 L. ed. 694, 695, 22 Sup. Ct. Rep. 505. But it is proper to say that, in our opinion, the decision did not proceed upon a mistake of fact, and is not inconsistent with the reasoning of the immediately preceding decision between the same parties (175 U. S. 76, 86, 44 L. ed. 78, 82, 20 Sup. Ct. Rep. 28), although No. 2 was begun before, and No. 1 after, the passage of the act of March 3, 1891, chap. 539, 26 Stat. at L. 854, U. S. Comp. Stat. 1901, p. 765, establishing a court of private land claims.

In 1892 the United States brought a suit against the present appellee in the court of private land claims, alleging that his claim was void, and that the United States had granted patents for portions of the land, praying that the title might be adjudicated, and, if valid, the boundaries established, excepting such parts as might have been disposed of by the United States. The appellee answered, setting up title, and praying confirmation. Ultimately, in pursuance of the decision of this court (*Ely v. United States*, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840), a decree was entered in his favor, and a patent issued to him on October 29, 1906, specifying no exceptions other than one of "gold, silver, or quick-silver mines or minerals of the same." 296] *The appellant, however, contends that, by virtue of the above-mentioned statute of March 3, 1891, the effect of the appellee's appearance in the court of private land claims was to forfeit all portions of the land in controversy that had been patented by the United States, and to give the appellee in place of it a claim for not exceeding \$1.25 per acre so patented against the United States. The contrary decision is the other error assigned.

Of course, the patents for homesteads

issued in the name of the United States, on the facts that we have stated, were a mere usurpation and were void. The lands covered by them, whether reserved or not by the acts of July 22, 1854, chap. 103, § 8, 10 Stat. at L. 308; July 15, 1870, chap. 292, 16 Stat. at L. 304, were not public lands, but private property, which the government was bound by the express terms of the Gadsden treaty of December 30, 1853, to respect. The appellant's claim rests solely on an interpretation of §§ 8 and 14 of the above-mentioned act of 1891, that would cut down the performance of the treaty promise by the United States to at least the narrowest limits consistent with good faith. We are of opinion that the different construction adopted by the court below, and also by the Acting Secretary of the Interior in *Ely v. Magee*, 34 Land Dec. 506, 512, is correct. After providing in § 6 for incomplete titles, the act goes on in § 8 to deal with complete ones. Holders of claims under such titles, it says, "shall have the right (but shall not be bound) to apply to said court" for a confirmation of their title. Of course, this means that the title is recognized as good without the proceeding in court. *Ainsa v. New Mexico & A. R. Co.* 175 U. S. 76, 90, 44 L. ed. 78, 84, 20 Sup. Ct. Rep. 28.

The confirmation is granted, "excepting any part of such land that shall have been disposed by the United States," and without prejudice to conflicting private interests. Then, in § 14 it is enacted that "if, in any case, it *shall appear that the [297 lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree," with a provision for a judgment in favor of the claimant, against the United States, for the proved value of such granted lands, not exceeding \$1.25 per acre. If this were all there could be no question that the exception of lands granted by the United States was merely a condition attached to the decree of confirmation, and did not purport to affirm such grants if the claimant did not see fit to go into the court of private land claims.

But in § 8 there is a further provision by which the United States may proceed against the claimant, as it did against the appellee, on the ground that the title or boundaries are open to question, and therefore the court is to determine the matter, "but subject to all lawful rights adverse to such claimant or possessor, as between such claimant and possessor, and any other claimant or possessor, and sub-

ject in this respect to all the provisions of this section applicable thereto." The appellant argues that this provision gives a wider meaning to § 14. He says that the words "if in any case" it shall appear that lands have been sold by the United States apply as well to a proceeding by the United States as to one where the claimant goes forward. He argues that so to apply them is just, in view of the supposedly unknown boundaries of the old Mexican grants and the policy of the United States in offering its public lands to settlers,—that otherwise there is a suspended threat, and possibility of a claimant turning up after many years, and dispossessing those who had been encouraged by the United States to go upon the land. *Botiller v. Dominguez*, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525. But the considerations mentioned in the case cited did not prevent the United States, in the act of March 3, 1891, from leaving 298] *the holders of perfected titles free not to present them to the court, as they were required to do in earlier statutes. The good faith of the United States was pledged to respect the Mexican titles. It recognized in the act of 1891 that holders of such titles need not go into the land claims court to get them confirmed, and we should be slow to suppose that it meant to make a doubt in the Department of Justice as to the validity of a perfect title a ground for cutting down what otherwise it was bound to protect, and did, by the statute, leave intact. But for that unfounded doubt, the appellee would have been secure in his rights, and could have turned the holders of the homestead patents off his land. *United States v. Martinez*, 184 U. S. 441, 445, 46 L. ed. 632, 22 Sup. Ct. Rep. 422. The proceeding by the government was a matter over which he had no control, and ought not to affect his rights. Looking at the words of § 14 more exactly, they do not require the appellant's construction. "If in any case" means in any case before the court that the act established. And when the section goes on, "it shall appear that the lands or any part thereof, decreed to any claimant under the provisions of this act, shall have been sold," it is reasonable to suppose that it has reference to those cases in which a claimant is seeking a decree; that is to say, where the claimant is the plaintiff in the case. It is true that a petition by the United States may end in the same result, but the terms of the sentence and the duty of the government concur in leading us to limit the words as we do. On the other hand, the consideration mentioned sufficiently shows that the claimant did not impair his position by praying for confirmation in his answer. The prayer 54 L. ed.

merely expressed what would have happened without it by the force of law.

Judgment affirmed.

*DURYEA POWER COMPANY, [299
Bankrupt, by Its Trustee, the Berks
County Trust Company, Appt.,

v.

HERBERT M. STERNBERGH.

(See S. C. Reporter's ed. 299-302.)

Appeal — from circuit court of appeals — bankruptcy case.

The revisory order of a Federal circuit court of appeals in the proceedings authorized by the bankrupt act of July 1, 1898 (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432), § 24b, which reversed a decree of the bankruptcy court, confirming the order of the referee, refusing to allow a certain claim to be filed for the purpose of voting at the election of the trustee, and directed that court to allow the claim to be proved, is not reviewable in the Federal Supreme Court, even if the circuit court of appeals treated the proceeding as an appeal.

[For other cases, see Appeal and Error, 804, 805, in Digest Sup. Ct. 1908.]

[No. 29.]

Argued November 2, 1910. Decided November 14, 1910.

APPEAL from the United States Circuit Court of Appeals for the Third Circuit to review a decree which reversed a decree of the District Court for the Eastern District of Pennsylvania, confirming the order of a referee, refusing to allow a claim to be filed for the purpose of voting at the election of trustee, and directed that court to allow the claim to be proved. Dismissed for want of jurisdiction.

See same case below, 88 C. C. A. 482, 161 Fed. 540.

The facts are stated in the opinion.

Mr. Edwin C. Brandenburg argued the cause, and, with Messrs Clarence A. Brandenburg, F. Walter Brandenburg, Andrew A. Leiser, and Thomas K. Leidy, filed a brief for appellant.

Mr. Cyrus G. Derr argued the cause, and, with Mr. John G. Johnson, filed a brief for appellee.

NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to *Bagley v. General Fire Extinguisher Co.* 53 L. ed. U. S. 605.

On appeal and review in bankruptcy cases—see note to *Re Eggert*, 43 C. C. A. 9.

300] *Mr. Justice Holmes delivered the opinion of the court:

This case arose on a controversy as to the right of the appellee, Sternbergh, to vote on the selection of a trustee in bankruptcy. At the first meeting of the creditors, Sternbergh offered for allowance a proof of claim for \$14,438.86, which was objected to on the ground that Sternbergh was indebted to the bankrupt company for unpaid stock. Sternbergh announced that he intended to use this claim for voting purposes. After a hearing, the referee refused to allow the claim for use in the election, and certified the facts, as Sternbergh's vote, if allowed, would have elected a different trustee. The district judge stated the question to be whether the referee was right in rejecting the claimant's offer to vote, and that it did not involve the extent but only the fact of Sternbergh's liability, and he affirmed the action of the referee. Thereupon Sternbergh filed a petition to the circuit court of appeals, seeking a revision of the decree in matter of law under § 24b of the bankruptcy law. That court, remarking that the facts were not in dispute, proceeded to discuss their significance and effect, and reversed the decree, but allowed the selection of trustee to stand, as no allegation was made against him. The bankrupt, through the trustee, appealed to this court, obtaining a certificate from a justice of this court under § 25 b, 2.

The first question to be answered is whether this is a case in which a party is entitled to take an appeal to this court under § 25. And clearly it is not. The right of appeal from a decision of a circuit court of appeals allowing or rejecting a claim is given by 25b only where the decision is final, whether there is a certificate under § 25 b, 2, or not. The circuit court of appeals may render a final decision when an appeal is taken to it under 25a from a judgment allowing or rejecting a claim of \$500 or over. But this case did not and could not **301]** have *come to it in that way, for there was no judgment allowing or rejecting the claim. The referee's order was, "the within claim is disallowed for the present, especially as to voting, without prejudice to the claimant's right to present the claim hereafter." That is the order that was reviewed by the district court, and that was affirmed by it. Therefore Sternbergh's counsel, rightly apprehending that they could not appeal to the circuit court of appeals, brought their petition for revision under § 24b, alleging that the district judge erred in matter of law in confirming the order of the referee, refusing to allow the claim of Sternbergh to be filed for voting upon the election of trustee. This is all that was brought before

the circuit court of appeals, and all that it had authority to decide. Its decision, although directing the district court to allow the petitioner to prove his claim, was not a final decision upon that point, and did not come to it in such a way that it could be. It simply reversed the provisional order of the referee, and made a provisional, though seemingly useless, order the other way.

No appeal to this court lies from a decision in the exercise of supervisory jurisdiction. *Holden v. Stratton*, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45. But it is said that the circuit court of appeals treated this case as an appeal; that it did not follow the findings of the referee and the court below, as it was bound to do on a revisory proceeding; that it filed a statement of the facts found and of its conclusion of law, as required in an appeal by general orders 36, 3, and that a justice of this court allowed an appeal from its decision, which, as we have said, does not lie from an order or decree under § 24b. It is argued that an appeal to the circuit court of appeals may be treated as a petition for revision (*Holden v. Stratton*, 191 U. S. 115, 119, 48 L. ed. 115, 118, 24 Sup. Ct. Rep. 45), and that, conversely, a petition for revision may be turned into an appeal, or, at least, treated as one for the purpose of an appeal to this court, if only to establish that the circuit *court of appeals exceeded [302 its jurisdiction. There are two answers to this contention. In the first place, the converse proposition does not hold. An appeal opens both fact and law, and therefore might be regarded as intended to raise questions of law in any way that might be deemed proper. But a petition for revision open only questions of law, and when the foundation of its jurisdiction is thus narrowed, the action of the court cannot enlarge it so as to deal with the facts. In the next place, in this case the circuit court of appeals made no such attempt. It treated the facts as undisputed, and differed from the court below only in its understanding of their significance and legal import. It filed no finding of facts at or before the time of entering its decree, as required by the general orders, but did so only two months after the decree had been entered, and a month after an appeal had been taken and allowed by a justice of this court, upon a petition of the appellant.

We have considered the suggestion that, if the appeal should be dismissed, a certiorari should be granted, but we are of opinion that no ground is shown for the issue of the writ.

Appeal dismissed.

LING SU FAN, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 302-311.)

Appeal — questions reviewable on writ of error — review of facts.

1. Assignments of error which challenge the sufficiency of the evidence to warrant a conviction cannot be considered by the Federal Supreme Court on a writ of error to the supreme court of the Philippine Islands, to review a judgment affirming such conviction, where it is not contended that there was no evidence of guilt, since only errors of law can be considered upon a writ of error.

[For other cases, see Appeal and Error, 4889-4891, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — prohibiting exportation of Philippine coin — police power.

2. The owner of Philippine silver coin is not deprived of his property therein without due process of law, contrary to the act of July 1, 1902, by the prohibition against the exportation of such coin from the Philippine Islands, under penalty of forfeiture and fine or imprisonment, which is made by Philippine law No. 1411, enacted by the Philippine Commission in the exercise of the power under the act of Congress of March 2, 1903 (32 Stat. at L. 952, chap. 980, U. S. Comp. Stat. Supp. 1909, p. 893), § 6, to adopt such measures as are deemed proper, not inconsistent with the organic act, to maintain the parity between gold and silver pesos, but such statute is within the limits of the police power.

[For other cases, see Constitutional Law, IV, b, 5; IV. c, 2, in Digest Sup. Ct. 1908.]

[No. 20.]

Argued October 27, 1910. Decided November 14, 1910.

IN ERROR to the Supreme Court of the Philippine Islands to review a conviction in the Court of First Instance of the City of Manila of the offense of exporting Philippine silver coins from the Philippine Islands. Affirmed.

See same case below, 10 Philippine, 104.
The facts are stated in the opinion.

Mr. J. M. Valc argued the cause, and, with Messrs. Marion Butler and Lionel D. Hargis, filed a brief for plaintiff in error:

To justify the state in interposing its

authority in behalf of the public, first, it must appear that the interests of the public generally, as distinguished from those of a particular class, require the interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Lawton v. Steele, 152 U. S. 133-143, 38 L. ed. 385-391, 14 Sup. Ct. Rep. 499.

The effect of the inhibition to export pesos from the Philippine Islands is to legislate the difference in exchange out of the pocket of the owner of the pesos, and into that of the money broker.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 235, 41 L. ed. 984, 17 Sup. Ct. Rep. 581.

Assistant Attorney General Fowler argued the cause and filed a brief for defendant in error:

There is nothing in the act prohibiting the exportation of the silver pesos coined by the Philippine government which is inconsistent with any clause contained in the said act of July 1, 1902, and especially with the due-process-of-law clause.

Patterson v. The Eudora, 190 U. S. 169, 174, 176, 47 L. ed. 1002, 1006, 1007, 23 Sup. Ct. Rep. 821; Frisbie v. United States, 157 U. S. 160, 165, 39 L. ed. 657, 658, 15 Sup. Ct. Rep. 586; United States v. Holliday, 3 Wall. 407, 18 L. ed. 182; United States v. 43 Gallons of Whiskey, 93 U. S. 188, 23 L. ed. 846; Buttfeld v. Stranahan, 192 U. S. 470, 493, 48 L. ed. 525, 534, 24 Sup. Ct. Rep. 349.

The case is here on writ of error, and this court will not, therefore, review the evidence.

Behn v. Campbell, 205 U. S. 403, 51 L. ed. 857, 27 Sup. Ct. Rep. 502.

Mr. Justice Lurton delivered the opinion of the court:

The plaintiff in error has been convicted of the offense of "exporting from the Philippine Islands Philippine silver coin," in violation of Philippine law No. 1411, being §§ 1998 and 1999, Compiled Acts of the Philippine Commission, title 3, chapter 194. Sections 1 and 2 of law No. 1411 read as follows:

"Section 1. The exportation from the

NOTE.—On distinction between appeal and writ of error—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; and Pearson v. Yewdall, 54 L. ed.

24 L. ed. U. S. 436; Wilson v. North Carolina, 42 L. ed. U. S. 865.

For a discussion of police power generally—see notes to State v. Marshall, 1 L.R.A. 51; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; State v. Schlemmer, 10 L.R.A. 135; and Barbier v. Connolly, 28 L. ed. U. S. 923.

Philippine Islands of Philippine silver coins, coined by authority of the act of Congress approved March 2d, 1903 [32 Stat. at L. 952, chap. 980, U. S. Comp. Stat. Supp. 1909, p. 893], or the bullion made by melting or otherwise mutilating such coins, is hereby prohibited, and any of the aforementioned silver coins or bullion which is exported, or of which the exportation is attempted subsequent to the passage of this act, and contrary to its provisions, shall be liable to forfeiture, under due process of law, and one third of the sum or value of the bullion so forfeited shall be payable to the person upon whose information, given 308] to the proper authorities, *the seizure of the money or bullion so forfeited is made, and the other two thirds shall be payable to the Philippine government, and accrue to the gold standard fund. Provided, that the prohibition herein contained shall not apply to sums of P. 25 or less, carried by passengers leaving the Philippine Islands.

"Section 2. The exportation or attempt to export Philippine silver coin or bullion made from such coins from the Philippine Islands, contrary to law, is hereby declared to be a criminal offense, punishable, in addition to the forfeiture of the said coins or bullion, as above provided, by a fine not to exceed P. 10,000, or by imprisonment for a period not to exceed one year, or both, in the discretion of the court."

We may pass over the assignments of error which challenge the sufficiency of the evidence to warrant a conviction, inasmuch as it is not contended that there was no evidence. This is a writ of error, and upon such a writ the error to be considered must be confined to error of law.

The substantial question is as to whether a law which prohibits the exportation of Philippine silver coin from the Philippine Islands is a law which deprives the owner of his property in such coins without due process of law, in violation of that prohibition of the organic act of July 1, 1902, which provides that "no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law." 32 Stat. at L. 692, chap. 1369. The authority for the law is found in the act of Congress of July 1, 1902, §§ 76 et seq., 32 Stat. at L. 691, 710, chap. 1369, U. S. Comp. Stat. Supp. 1909, p. 890, which authorized the Philippine government to establish a mint in the city of Manila for coinage purposes and to enact laws for its operation, and for the striking of certain coins. By the later act of Congress of March 2, 1903 (chap. 980, 32 Stat. at L. 952, U. S. Comp. Stat. Supp. 1909, p. 893), it was provided that the gold 309] peso, consisting *of 12.9 grains of

gold, nine tenths fine, should be the unit of value in the islands. The second section of that act provided as follows:

"That in addition to the coinage authorized for use in the Philippine Islands by the act of July first, nineteen hundred and two, entitled, 'An Act Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippine Islands, and for Other Purposes,' the government of the Philippine Islands is authorized to coin to an amount not exceeding seventy-five million pesos, for use in said islands, a silver coin of the denomination of one peso, and of the weight of four hundred and sixteen grains, and the standard of said silver coins shall be such that of one thousand parts, by weight, nine hundred shall be of pure metal and one hundred of alloy, and the alloy shall be of copper."

Section 6 of the same act of March 2, 1903, provided:

"That the coinage authorized by this act shall be subject to the conditions and limitations of the provisions of the act of July first, nineteen hundred and two, entitled, 'An Act Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippine Islands, and for Other Purposes,' except as herein otherwise provided; and the government of the Philippine Islands may adopt such measures as it may deem proper, not inconsistent with said act of July first, nineteen hundred and two, to maintain the value of the silver Philippine peso at the rate of one gold peso."

In a subsequent part of the same section, the issuance of certificates of indebtedness, bearing interest, was authorized as a specific measure for maintaining the parity between the silver and gold peso.

The law of the Philippine Commission, above set out, under which the conviction of the plaintiff in error was secured, must rest upon the provision of § 6, above set out, as a means of maintaining "the value of the silver *peso at the rate of one gold [310 peso." Passing by any consideration of the wisdom of such a law prohibiting the exportation of the Philippine Islands silver pesos as not relevant to the question of power, a substantial reason for such a law is indicated by the fact that the bullion value of such coin in Hong Kong was some 9 per cent greater than its face value. The law was therefore adapted to keep the silver pesos in circulation as a medium of exchange in the islands and at a parity with the gold peso of Philippine mintage.

The power to "coin money and regulate the value thereof, and of foreign coin," is a prerogative of sovereignty and a power exclusively vested in the Congress of the

United States. The power which the government of the Philippine Islands has in respect to a local coinage is derived from the express act of Congress. Along with the power to strike gold and silver pesos for local circulation in the islands was granted the power to provide such measures as that government should "deem proper," not inconsistent with the organic law of July 1, 1902, necessary to maintain the parity between the gold and silver pesos. Although the Philippine act cannot, therefore, be said to overstep the wide legislative discretion in respect of measures to preserve a parity between the gold and silver pesos, yet it is said that if the particular measure resorted to be one which operates to deprive the owner of silver pesos of the difference between their bullion and coin value, he has had his property taken from him without compensation, and, in its wider sense, without that due process of law guaranteed by the fundamental act of July, 1902.

Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. These limitations are due to the fact that public law gives to such coinage a value which does not attach as a mere **311]** consequence *of intrinsic value. Their quality as a legal tender is an attribute of law aside from their bullion value. They bear, therefore, the impress of sovereign power which fixes value and authorizes their use in exchange. As an incident, government may punish defacement and mutilation, and constitute any such act, when fraudulently done, a misdemeanor. Rev. Stat. §§ 5189, 5459, U. S. Comp. Stat. 1901, pp. 3484, 3684.

However unwise a law may be, aimed at the exportation of such coins, in the face of the axioms against obstructing the free flow of commerce, there can be no serious doubt but that the power to coin money includes the power to prevent its outflow from the country of its origin. To justify the exercise of such a power it is only necessary that it shall appear that the means are reasonably adapted to conserve the general public interest, and are not an arbitrary interference with private rights of contract or property. The law here in question is plainly within the limits of the police power, and not an arbitrary or unreasonable interference with private rights. If a local coinage was demanded by the general interest of the Philippine Islands, legislation reasonably adequate to maintain such coinage at home as a medium of exchange is not a violation of private right, forbidden by the organic law. Obviously, if the Phil-

ippine government had power to prohibit the exportation or melting of Philippine silver pesos, it had the power to make the violation of the prohibition a misdemeanor. The proceedings for the enforcement of the law included the ordinary process in criminal cases lawful in the islands, and not forbidden by the act of July, 1902.

Judgment affirmed.

*IN RE METROPOLITAN TRUST **[312]**
COMPANY OF THE CITY OF NEW
YORK.

(See S. C. Reporter's ed. 312-321.)

Judgment — vacating after term.

1. A Federal circuit court which, after denying a motion to remand the cause to the state court, whence it had been removed as presenting a separable controversy, sustains the demurrer of one of the defendants, and decrees the dismissal of the bill as to it, cannot vacate such decree after the term, on the theory that, its final decree dismissing the bill as to the other defendants having been reversed on an appeal to which such defendant was not a party, with directions to remand the cause to the state court, the decision sought to be vacated was a nullity, as rendered without jurisdiction.

[For other cases, see Judgment, XII. b, 2, in Digest Sup. Ct. 1908.]

Mandamus — to inferior court — when proper remedy.

2. Mandamus is the proper remedy where a Federal circuit court has exceeded its power by vacating a judgment after the term.

[For other cases, see Mandamus, II. e, in Digest Sup. Ct. 1908.]

[No. 12, Original.]

Submitted May 16, 1910. Assigned for oral argument May 31, 1910. Argued October 11, 1910. Decided November 14, 1910.

APPPLICATION for a writ of prohibition or mandamus to the Circuit Court of the United States for the Southern District of New York to compel that court to set aside a decree which vacated, after the term,

NOTE.—As to when mandamus is the proper remedy—see notes to United States v. Lamont, 39 L. ed. U. S. 160; McCluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnp. Co. v. State, 3 L.R.A. 265; State v. Whitesides, 3 L.R.A. 777; and Ex parte Hurn, 13 L.R.A. 120.

On mandamus in exercise of superintending control of superior over inferior tribunal—see note to State ex rel. Fourth Nat. Bank v. Johnson, 51 L.R.A. 33.

a prior decree dismissing the bill as to one of the defendants, and to forbid the exercise of any further jurisdiction over such defendant. Mandamus granted.

Statement by Mr. Justice Hughes:

This is an application by the Metropolitan Trust Company of the City of New York, which had been impleaded as a defendant in the suit of Pollitz v. Wabash R. Co. for a writ of prohibition or mandamus, directed to [313] the circuit court of the United States for the southern district of New York, to forbid the exercise of jurisdiction over the petitioner and over a decree dated January 10, 1908, in its favor in said suit, and in the alternative to provide that any order for the vacating of said decree should be set aside. A rule to show cause was issued, to which return has been made, and from the petition and return the following facts appear:

On or about January 15, 1907, James Pollitz brought suit in the supreme court of the state of New York against the Wabash Railroad Company and others to declare illegal and void certain securities of the railroad company, issued in exchange for debenture bonds, pursuant to a plan complained of as injurious to the stockholders, and for a re-exchange, and, in default thereof, for an accounting by the defendants with respect to the new securities which had been issued.

On January 25, 1907, the railroad company caused the case to be removed to the circuit court of the United States for the southern district of New York, on the ground that there was a separable controversy between it, as a citizen of the state of Ohio, and the complainant, a citizen of the state of New York.

The complainant moved to remand the cause, and on February 21, 1907, the motion was denied. Thereupon application was made to this court for a writ of mandamus to compel the remand, and the petition was denied. *Re Pollitz*, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729.

After the removal of the cause, the defendants demurred to the bill of complaint, the trust company demurring separately, and all the demurrers were overruled, save that of the trust company, which was sustained. A decree was entered on January 10, 1908, which, after overruling the other demurrers, provided as follows:

"Ordered, adjudged, and decreed, that the demurrer of the defendant the Metropolitan [314] Trust Company of the City of New York, be, and the same hereby is, sustained, and that the bill of complaint be, and the same hereby is, dismissed as to the defend-

ant the Metropolitan Trust Company of the City of New York, with costs."

The defendants other than the trust company then answered. An earlier suit, to which the trust company was not a party, was pending in the same court, with regard to the same transaction, and the court, denying the motion of the complainant for leave to discontinue the first suit, ordered the suits to be consolidated. After hearing, a final decree was entered on February 23, 1909 [167 Fed. 145], dismissing the bill in each suit upon the merits.

The complainant then appealed to the circuit court of appeals, but no review was sought of the decree of January 10, 1908, dismissing the bill in the second suit as against the trust company; and the trust company was not cited and did not in any way become a party to the appeal.

On February 8, 1910, the circuit court of appeals decided that there was not a separable controversy between the complainant and the railroad company, and that the motion to remand should have been granted. The court accordingly reversed the final decree, with direction to the circuit court to permit the complainant to discontinue the first cause, and to remand the second cause to the supreme court of the state of New York. [100 C. C. A. 1, 176 Fed. 333.]

Thereupon, on February 28, 1910, an order for remand was entered in the circuit court, which contained the following provision as to the trust company:

"And it appearing that the defendant Metropolitan Trust Company duly demurred to the complaint, and that such demurrer was sustained and judgment entered January 10, 1908, dismissing the complaint as to said defendant, which has not been appealed from or reversed,

"Ordered, adjudged and decreed that this judgment remanding said cause to the supreme court of the state of New York [315] shall not apply to said defendant Metropolitan Trust Company."

On March 21, 1910, the complainant moved in the circuit court to vacate the decree entered January 10, 1908, and to remand the cause as to the trust company. The latter appeared specially and objected to the jurisdiction of the court. The court granted the motion to vacate the decree, and denied the motion to remand the cause as to the trust company, without prejudice, upon the ground that the application for such relief should be made to the judge who entered the order to remand as to the other defendants. [180 Fed. 950.]

The trust company then applied to this court for a writ of prohibition or mandamus, as stated.

Messrs. **Tompkins McIlvalne** and **Herbert Parsons** (in behalf of Mr. Henry B. Closson) for petitioner on original submission.

Mr. J. Aspinwall Hodge for respondent.

Mr. Tompkins McIlvalne argued the cause and filed a brief for petitioner:

A circuit court of the United States has no power to vacate or amend its own judgment for errors of law or fact after the term is passed.

Ayres v. Wiswall, 112 U. S. 187, 28 L. ed. 693, 5 Sup. Ct. Rep. 90; *Bronson v. Schul-ten*, 104 U. S. 410, 26 L. ed. 797.

When the decree or judgment of February 23, 1909, dismissing the bill on the merits as to all the defendants except the petitioner, was entered, the petitioner's judgment of January 10, 1908, dismissing the bill as to it, became, even if it were not so before, "final" and appealable; these two judgments together, then, at least, constituted the "final decision" which is made appealable by § 6 of the judiciary act of March 3, 1891.

Mendenhall v. Hall, 134 U. S. 559, 33 L. ed. 1012, 10 Sup. Ct. Rep. 616; *Hohorst v. Hamburg-American Packet Co.* 148 U. S. 262, 37 L. ed. 443, 13 Sup. Ct. Rep. 590; *Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221.

The question whether there is a separable controversy between parties as to whom there is the requisite diversity of citizenship is a justiciable question that it is the province of the circuit court to determine. The circuit court's determination on that point may, on appeal, be held to be error; but, like any other judicial decision on a question of law or fact which the court has power to determine, it is *res judicata* until set aside or reversed by a proper proceeding.

Re Pollitz, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729; *Re Winn*, 213 U. S. 458, 468, 53 L. ed. 873, 877, 29 Sup. Ct. Rep. 515; *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, 220, 53 L. ed. 765, 770, 29 Sup. Ct. Rep. 430; *Skillern v. May*, 6 Cranch, 267, 3 L. ed. 220; *McCormick v. Sullivant*, 10 Wheat. 192, 6 L. ed. 300; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; *Loeser v. Savings Deposit Bank & T. Co.* 89 C. C. A. 642, 163 Fed. 212.

Where on the face of the record it is clear, as a matter of law, that the circuit court is assuming to act wholly without jurisdiction, a writ of mandamus lies.

Re Winn, supra; *Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214; *Virginia v. Rives*, 54 L. ed.

100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524; *Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387, 5 A. & E. Ann. Cas. 692; *Virginia v. Paul*, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536; *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; *Re Metropolitan R. Receivership*, 208 U. S. 90, 52 L. ed. 403, 28 Sup. Ct. Rep. 219; *Re Dunn*, 212 U. S. 374, 53 L. ed. 558, 29 Sup. Ct. Rep. 299.

Mr. J. Aspinwall Hodge argued the cause and filed a brief for respondent:

The conclusion of the circuit court that the cause should be remanded is not reviewable here by appeal or writ of error or by mandamus.

Re Pennsylvania Co. 137 U. S. 451, 454, 34 L. ed. 738, 740, 11 Sup. Ct. Rep. 141; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 581, 40 L. ed. 536, 542, 16 Sup. Ct. Rep. 389.

A motion in the nature of a writ of error *coram vobis* is the exercise of jurisdiction in the court below which does not admit of revision in this tribunal.

Ledgerwood v. Pickett, 1 McLean, 143, Fed. Cas. No. 8175, s. e. 7 Pet. 144, 148, 8 L. ed. 638, 639.

The petitioner is also endeavoring to make the writ of mandamus perform the office of a writ of error. This court has emphatically held that this cannot be done, even if no appeal or writ of error is given by law.

Re Rice, 155 U. S. 396, 403, 39 L. ed. 198, 201, 15 Sup. Ct. Rep. 149; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 379, 37 L. ed. 486, 489, 13 Sup. Ct. Rep. 158; *Ex parte Loring*, 94 U. S. 418, 24 L. ed. 165; *Ex parte Newman*, 14 Wall. 152, 20 L. ed. 877.

An order or decree sustaining the demurrer of one of several defendants is not such a final decision as gives the right of appeal to the complainant.

Hohorst v. Hamburg-American Packet Co. 148 U. S. 262, 37 L. ed. 443, 13 Sup. Ct. Rep. 590; *Re Atlantic City R. Co.* 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208; *Re Pollitz*, 206 U. S. 323, 332, 51 L. ed. 1081, 1084, 27 Sup. Ct. Rep. 729; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15.

The court may vacate a judgment after the term has expired during which it was entered, and its power so to do is not dependent upon the issue of a formal writ, or the institution of an action in equity; but, in a proper case, relief can be obtained by service of a notice of motion.

Ledgerwood v. Pickett, supra; *Ferris v. Douglass*, 20 Wend. 626; *Wetmore v. Kar-rick*, 205 U. S. 141, 151, 51 L. ed. 745, 748, 27 Sup. Ct. Rep. 434.

Whether the order of January 10, 1908, was final or interlocutory, and whether the Metropolitan Trust Company was a necessary or only a proper party, no error was committed by the judge of the circuit court in granting complainant's motion to vacate that order or decree, on the suggestion or motion of complainant, in view of the mandate of the circuit court of appeals, establishing the fact that the diverse citizenship did not exist which was necessary to give jurisdiction to the court to enter the decree.

Olney v. Harvey, 50 Ill. 453, 99 Am. Dec. 530; *United States v. Wallace*, 46 Fed. 569; *Black*, Judgm. § 307; *Baker v. Barclift*, 76 Ala. 417; *Shuford v. Cain*, 1 Abb. (U. S.) 302, Fed. Cas. No. 12,823; *Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; *Woffenden v. Woffenden*, 1 Ariz. 334, 25 Pac. 666; *Hanley v. Donoghue*, 59 Md. 244, 43 Am. Rep. 554; *Randall v. Collins*, 58 Tex. 232; *Harris v. Hardeman*, 14 How. 334, 346, 14 L. ed. 444, 449; *Mills v. Dickson*, 6 S. C. 487; *Dederick v. Richley*, 19 Wend. 108; *Ex parte Crenshaw*, 15 Pet. 119, 10 L. ed. 682; *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797; *Phillips v. Negley*, 117 U. S. 665, 29 L. ed. 1013, 6 Sup. Ct. Rep. 901; *Re College Street*, 11 R. I. 472; *Critchfield v. Porter*, 3 Ohio, 522.

Mr. Justice **Hughes**, after making the foregoing statement, delivered the opinion of the court:

When the complainant moved to remand the cause, the circuit court had jurisdiction to determine whether or not a separable controversy existed which justified the removal from the state court. Its decision was an act within its judicial authority, subject to review upon appeal after final decree. On 319] the application made to *this court in *Re Pollitz*, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729, for a writ of mandamus to compel the remand, the court said (pages 331, 333):

"The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the circuit court, to which the decision was by law committed.

"The application to this court is for the issue of the writ of mandamus, directing the circuit court to reverse its decision, although in its nature a judicial act, and within the scope of its jurisdiction and discretion.

"But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way, or to review its

judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.

"If the ruling of the circuit court was erroneous, as is contended, but which we do not intimate, it may be reviewed after final decree on appeal or error. *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 582," 40 L. ed. 536, 542, 16 Sup. Ct. Rep. 389. See, also, *Ex parte Nebraska*, 209 U. S. 436, 52 L. ed. 876, 28 Sup. Ct. Rep. 581; *Re Winn*, 213 U. S. 458, 468, 53 L. ed. 873, 877, 29 Sup. Ct. Rep. 515; *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430.

Having decided to retain the cause, the circuit court proceeded, as it was entitled to proceed, to try the issues. It heard the demurrers to the bill, and, overruling the others, it sustained that of the Metropolitan Trust Company. No leave was granted to amend the bill, and a decree was entered dismissing it as against the trust company. When, after final decree dismissing the bill as against the other defendants, the complainant appealed to the circuit court of appeals, the decree in favor of the trust company was not brought before the appellate *court for review, and the trust com- [320] pany was not a party to the appeal.

The decision of the circuit court of appeals, in reversing the final decree, and in directing the remand to the state court, was, of course, subject to the necessary limitation that it could apply only to the parties who had been brought before that court. It had no other purport. It is one of "the ordinary rules respecting appeals" that "all the parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal." *Davis v. Mercantile Trust Co.* 152 U. S. 590, at page 593, 38 L. ed. 563, 564, 14 Sup. Ct. Rep. 693, 695. See also *Terry v. Abraham* (*Terry v. Merchants' & P. Bank*) 93 U. S. 38, 23 L. ed. 794; *Wilson v. Kiesel*, 164 U. S. 248, 251, 41 L. ed. 422, 423, 17 Sup. Ct. Rep. 124. If a party has not had this opportunity, he is not bound; as to him an essential element of appellate jurisdiction is lacking. Accordingly, when decree was entered in the court below upon the mandate of the circuit court of appeals, the trust company was expressly excepted from its operation.

It is in this light that the subsequent proceeding in the circuit court must be examined. If that court had jurisdiction to vacate the decree of January 10, 1908, in favor of the trust company, it was by virtue of its own control over the decree, and not by

force of the mandate of the appellate court. Nor could the court exercise the general power which it possesses to modify or set aside its orders or decrees prior to the expiration of the term at which the final decree is entered; for in this case that term had ended before the motion was made. *Cameron v. M'Roberts*, 3 Wheat. 591, 4 L. ed. 467; *Sibbald v. United States*, 12 Pet. 488, 9 L. ed. 1167; *Bronson v. Schulten*, 104 U. S. 410, 415, 26 L. ed. 797, 799; *Ayres v. Wiswall*, 112 U. S. 187, 190, 28 L. ed. 693, 694, 5 Sup. Ct. Rep. 90; *Phillips v. Negley*, 117 U. S. 665, 674, 29 L. ed. 1013, 1015, 6 Sup. Ct. Rep. 901. The motion was not made for the purpose of correcting a clerical error or an inadvertence. After the term had expired, and after the complainant had exercised his right of appeal to procure a [321] review of the errors of which he *desired to complain, it was sought to set aside a decree which stood unreversed, and by which the trust company had been dismissed from the cause.

To reach this result, the circuit court asserted the power to vacate the decree upon the ground that it had been rendered without jurisdiction; and the court held that it must be treated as a nullity. But the decree cannot be so regarded unless the court, upon the motion to remand, was without jurisdiction to determine whether a separable controversy existed, and hence not merely committed error, but exceeded its authority. The decree was not a nullity unless the order refusing to remand was a nullity; and the latter contention was negatived by the decision of this court upon the application for a writ of mandamus in *Re Pollitz*, supra. The reversal by the circuit court of appeals of the final decree as to the other defendants, and its direction to remand, did not make the decision of the court of first instance any the less "a judicial act, and within the scope of its jurisdiction and discretion;" and as that reversal and direction did not affect the trust company, the decree in its favor remained in full force.

The question is not with respect to the mere form of the application which was made to the circuit court for the purpose of setting the decree aside. When the motion was made, the court was without jurisdiction to vacate the decree. As the court, in granting the motion, exceeded its power, mandamus is the appropriate remedy. *Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214; *Re Winn*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515.

The rule is made absolute and the writ of mandamus awarded.

*ROBERT A. HOOE and Arthur Herbert, Appts.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 322-336.)

Claims — against United States — rent in excess of congressional appropriations.

The owners of a building who have received the entire sums which Congress has from year to year appropriated as full compensation for the rent of quarters secured for the Civil Service Commission by the Secretary of the Interior, in the discharge of his duty under the act of Jan. 16, 1883 (22 Stat. at L. 403, 405, chap. 27, U. S. Comp. Stat. 1901, p. 1220), cannot maintain suit against the government under the act of March 3, 1887 (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752), to recover the difference between such sums and the fair rental value of the building, including the basement, which was used without consent, on the theory that the claim is founded either upon a contract, express or implied, or upon the constitutional obligation to make just compensation for private property taken for public use, in view of U. S. Rev. Stat. §§ 3679, 3732, U. S. Comp. Stat. 1901, pp. 2454, 2504, providing respectively that "no department of the government shall expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract for the future payment of money in excess of such appropriations," and that "no contract or purchase on behalf of the United States shall be made unless the same is authorized by law, or is under an appropriation adequate to its fulfillment," and of the acts of Congress of June 22, 1874 (18 Stat. at L. 133, 144, chap. 388), and March 3, 1877 (19 Stat. at L. 363, 370, chap. 106, U. S. Comp. Stat. 1901, p. 2514), prohibiting contracts for the rental of property for government purposes until an appropriation therefor shall have been made in terms by Congress.

[For other cases, see Claims, 105-127; United States, 270-282, in Digest Sup. Ct. 1908.]

[No. 13.]

Argued October 25, 26, 1910. Decided November 28, 1910.

APPEAL from the Court of Claims to review a judgment dismissing the petition in a suit to recover from the United States the rental value of property occupied by the Civil Service Commission in excess of congressional appropriations therefor. Affirmed.

See same case below, 43 Ct. Cl. 245.

The facts are stated in the opinion.

NOTE.—As to what claims constitute valid demands against a state—see notes appended to *Northwestern & P. Hypotheek Bank v. State*, 42 L.R.A. 33, and *Houston v. State*, 42 L.R.A. 39.

Mr. L. T. Michener argued the cause, and, with Messrs. W. W. Dudley and P. G. Michener, filed a brief for appellants:

The actions of the Secretary are not to be regarded as his personal acts, but as the acts of the government. All that he did was by virtue of his position as an officer of the government, and if there be no specific act of Congress directing him in the matter, yet, if that which he did officially, and which the government got the benefit of, resulted in the appropriation of the use of this property by the government, it is to be treated as the act of the latter.

United States v. Lynah, 188 U. S. 465, 466, 47 L. ed. 546, 547, 23 Sup. Ct. Rep. 349.

The United States, by its agents, proceeding under the authority of an act of Congress, took appellants' property for public uses, and it thereby became obligated, by virtue of the Constitution, to make just compensation; and this action lies for the value of the use and occupancy of their property.

United States v. Great Falls Mfg. Co. 112 U. S. 645, 656, 657, 28 L. ed. 846, 850, 5 Sup. Ct. Rep. 306; Great Falls Mfg. Co. v. Atty. Gen. (Great Falls Mfg. Co. v. Garland) 124 U. S. 581, 597, 31 L. ed. 527, 532, 8 Sup. Ct. Rep. 631; Monongahela Nav. Co. v. United States, 148 U. S. 312, 324-326, 37 L. ed. 463, 467, 468, 13 Sup. Ct. Rep. 622; United States v. Lynah, 188 U. S. 445, 460-470, 47 L. ed. 539, 544-548, 23 Sup. Ct. Rep. 349.

An appropriation act fixes the amount to be paid by the government in a certain fiscal year, but it does not strike to earth a constitutional obligation by failing to provide enough money to discharge that obligation.

Shipman v. United States, 18 Ct. Cl. 147, Graham's Case, 1 Ct. Cl. 381; Collins's Case, 15 Ct. Cl. 35; Briggs's Case, 15 Ct. Cl. 48; Parsons's Case, 15 Ct. Cl. 246.

When an act authorizes the officer to do a particular thing without restriction as to cost, and an inadequate appropriation is made, and the same thing done inures to the benefit of the government, or is accepted by the proper public officers, an action will lie for the reasonable value thereof.

Shipman v. United States, 18 Ct. Cl. 146; Freedman's Bank Case, 16 Ct. Cl. 29.

A special act must be taken as intended to constitute an exception to general acts or provisions, and the presumption is that the special act is to be considered as remaining an exception to them.

Rodgers v. United States, 185 U. S. 83, 87-89, 46 L. ed. 816, 818, 819, 22 Sup. Ct. Rep. 582; Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) 109 U. S. 556, 570, 27

L. ed. 1030, 1035, 3 Sup. Ct. Rep. 396; New York C. & H. R. R. Co. v. United States, 21 Ct. Cl. 472; McCollum's Case, 17 Ct. Cl. 92; Shipman v. United States, 18 Ct. Cl. 147; Dougherty v. United States, 18 Ct. Cl. 503; Beaman v. United States, 19 Ct. Cl. 9.

When there is no express contract for the use of property in present occupation by the government, the obligation to make just compensation is fixed by the 5th Amendment, and it attaches *eo instanti*.

Semmes v. United States, 26 Ct. Cl. 119.

Obligation to make compensation is constitutional, and does not depend on a contract made by an officer.

United States v. Great Falls Mfg. Co. 112 U. S. 645, 656, 28 L. ed. 846, 850, 5 Sup. Ct. Rep. 306; Great Falls Mfg. Co. v. Atty. Gen. supra; United States v. Russell, 13 Wall. 623, 627-630, 20 L. ed. 474-476; Bauman v. Ross, 167 U. S. 548, 574, 42 L. ed. 270, 283, 17 Sup. Ct. Rep. 966; Monongahela Nav. Co. v. United States, 148 U. S. 327, 37 L. ed. 468, 13 Sup. Ct. Rep. 622.

An "implied contract" such as the court of claims has endeavored to establish was beyond the power of the Secretary to make in a case of this character.

Clark v. United States, 95 U. S. 539, 541, 542, 24 L. ed. 518, 519; South Boston Iron Co. v. United States, 118 U. S. 37, 42, 30 L. ed. 69, 71, 6 Sup. Ct. Rep. 928.

The obligation of the Constitution does not depend upon any form or character of implication.

Stovall v. United States, 26 Ct. Cl. 237; Dooley v. United States, 182 U. S. 222-224, 45 L. ed. 1074-1078, 21 Sup. Ct. Rep. 762.

Assistant Attorney General John Q. Thompson argued the cause, and with Mr. Charles F. Kincheloe, filed a brief for appellee:

The government is not liable for unauthorized acts of its officers or agents.

Bank of United States v. Owens, 2 Pet. 527, 539, 7 L. ed. 508, 512; Johnson v. United States, 5 Mason, 441, Fed. Cas. No. 7,419; Hunter v. United States, 5 Pet. 173, 187, 8 L. ed. 86, 91; Gibbons v. United States, 8 Wall. 269, 274, 19 L. ed. 453, 454; Filor v. United States, 9 Wall. 45, 48, 19 L. ed. 549, 550; Whiteside v. United States, 93 U. S. 247, 256, 257, 23 L. ed. 882, 884, 885; Hart v. United States, 95 U. S. 316, 318, 24 L. ed. 479, 480; Hawkins v. United States, 96 U. S. 689, 691, 24 L. ed. 607, 608; Langford v. United States, 101 U. S. 341, 25 L. ed. 1010; Moffat v. United States, 112 U. S. 24, 31, 28 L. ed. 623, 625, 5 Sup. Ct. Rep. 10; Camp v. United States, 113 U. S. 648, 653, 28 L.

ed. 1081, 1082, 5 Sup. Ct. Rep. 687; *German Bank v. United States*, 148 U. S. 573, 579, 37 L. ed. 564, 568, 13 Sup. Ct. Rep. 702; *Hume v. United States*, 132 U. S. 406, 414, 33 L. ed. 393, 396, 10 Sup. Ct. Rep. 134; *Hill v. United States*, 149 U. S. 593, 597, 598, 37 L. ed. 862-864, 13 Sup. Ct. Rep. 1011; *Schillinger v. United States*, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; *Bigby v. United States*, 188 U. S. 400, 407, 47 L. ed. 519, 523, 23 Sup. Ct. Rep. 468.

A construction of the law and judgment in favor of the appellants would be most decidedly and dangerously against public policy.

Randall v. Howard, 2 Black, 585, 17 L. ed. 269; *Hannay v. Eve*, 3 Cranch, 242, 2 L. ed. 427; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 643, 32 L. ed. 819, 9 Sup. Ct. Rep. 402; *Gibbs v. Consolidated Gas Co.* 130 U. S. 408, 32 L. ed. 984, 9 Sup. Ct. Rep. 553; *Page*, Contr. § 326.

Mr. Justice **Harlan** delivered the opinion of the court:

The appellants, plaintiffs below, seek to recover from the United States the sum of **327**] \$9,000, the amount which *they allege is due them on account of the occupation and use, by the Civil Service Commission, of certain premises in the city of Washington, District of Columbia.

The finding of fact by the court of claims—using largely the words of the finding—may be summarized as follows:

On the 10th day of July, 1900, the Secretary of the Interior, proceeding under the appropriation act for the legislative, executive, and judicial expenses of the government for the fiscal year ending June 30th, 1901 (31 Stat. at L. 125, chap. 192), made a written agreement with plaintiffs for the leasing and renting to the government for the use of the Civil Service Commission of a certain building on E. and Eighth streets, in Washington, "except the basement thereof," for the period commencing August 1st, 1900, and ending June 30th, 1901, at the rate of \$333.33½ per month, or \$4,000 for the year,—the right being reserved to the government to terminate the lease after thirty days' written notice at the end of any calendar month.

The commission, on August 1st, 1900, took possession and remained in exclusive possession of the building, including its basement, until the bringing of this suit. The amount appropriated by Congress for the rent of offices for the commission for the year ending June 30th, 1901, was \$4,000, one twelfth of which was expended for such rent for July, 1900.

On the 3d of March, 1901, Congress appropriated for the rent of quarters for the commission the sum of \$4,000 for the fiscal year ending June 30th, 1902. 31 Stat. at L. 1000, 100—1, chap. 830, U. S. Comp. Stat. 1901, p. 283. The Secretary of the Interior, shortly after the beginning of that year, proposed to the plaintiffs a renewal of the lease for that year. But the plaintiffs expressed their unwillingness "to rent the said building for another year at the rate of \$4,000 per annum," or to rent the entire building, including the basement, then occupied by the commission, *at **328** a rental less than \$6,000 per annum. Without further action on either side, "the defendants continued in possession of said building and basement during said year, paying," however, to the plaintiffs, \$4,000, the rent specified in the lease for the first year; to wit, \$4,000.

In his estimates submitted for appropriations by Congress for the fiscal year ending June 30th, 1903, the Secretary named \$6,000 "for rent of quarters for the Civil Service Commission." As the general legislative, executive, and judicial appropriation bill for that year did not, as it passed the House of Representatives, include that sum, the plaintiffs' agent, in writing, informed the chief clerk of the Interior Department that unless the Senate fixed the rent at \$6,000, the plaintiffs would ask possession of the property at the earliest convenient time. Of this attitude of the plaintiffs the Senate was informed by plaintiffs' agent. He appeared before the House Committee on Appropriations, and by the Secretary of the Interior transmitted the letter of plaintiffs to the Senate Committee on Appropriations. Congress, however, *refused to increase the appropriation to \$6,000*, and for the fiscal year ending June 30th, 1903, appropriated "for rent of buildings for the Department of the Interior, namely, for . . . Civil Service Commission, four thousand dollars." 32 Stat. at L. 162, chap. 594. No further action was taken by either party in relation to an increase of rent or the demanding of possession, and the United States continued in possession of the property, including the basement, for that fiscal year, paying rent at the rate of \$4,000 per year. Although the Secretary of the Interior estimated an increase of \$2,000 for quarters of the Civil Service Commission for the fiscal year ending June 30th, 1904, Congress appropriated only \$4,500. 32 Stat. at L. 854, chap. 755. In consequence of this increase the Secretary sought to rent from the plaintiffs all the "building *and premises for the use of the Civil **329** Service Commission for the sum of \$4,500, appropriated" but plaintiffs refused to do

that. The Secretary finally, August 18th, 1903, made a lease from claimants for all of said building, "except the basement," for the fiscal year ending June 30th, 1904, at the rate of \$4,500 per year.

For the fiscal year ending June 30th, 1905, Congress, March 18th, 1904, appropriated \$4,500 for the rent of quarters for the commission. 33 Stat. at L. 85, chap. 716. In accordance with that appropriation, the Secretary proposed to the plaintiffs, in writing, to renew the lease of August 18th, 1903, for the fiscal year ending June 30th, 1905, at the rate of \$4,500 per annum. The plaintiffs took no action on this proposal, except to write to the Secretary, requesting that the basement of the building, which had not been included in either of the leases to the government, be included "in the lease at the rate of 30 cents per square foot for its floor space." Neither party took any further steps in reference to the renewal of the lease, or for an increase of rental for the fiscal year ending June 30th, 1905, and the claimants were paid rent for that year at the rate of \$4,500, as provided by the appropriation, and as specified in the lease for the preceding year. A like appropriation of \$4,500 was made for rent of quarters for the commission for the fiscal year 1906, and that body, without any express renewal of the lease for that year, continued in occupation of the entire building up to August 1st, 1905, for which the claimants have been paid at the rate of \$4,500 per year.

The court of claims further found: "Although the claimants never rented to the government for the use of the Civil Service Commission, or for any other purpose, that part of the basement of said building not occupied by heating and ventilating plants and equipments thereof, yet the Civil Service Commission took possession of this portion of said basement, and continuously occupied and used the same from the 1st day of August, 1900, until the bringing of this action, August 1, 1905; and in a letter to the Acting Secretary of the Interior, dated November 28, 1904, relative to the matter of a renewal of the government's lease for the building for that fiscal year, the claimants, among other things, called attention to the fact that the basement of the building was then fully occupied by the Civil Service Commission. The fair rental value of that portion of the basement occupied and used as aforesaid was \$400 per year, and the rental value of the entire building, including the basement, was not less than \$6,000 per year. During the time that the defendants have occupied and used said building and basement belonging to the claimants, *the claimants have receipted for*

rent for the same in full, except for the basement, which has been specially excluded from each of said receipts given by the claimants. With the exception of this exclusion of the basement from said receipts, it does not appear that any other protest was ever made by the claimants that said payments were not in full for the rent legally due to them for said building. The claimants, however, repeatedly insisted that the defendants were not paying enough rent for said building, and on one occasion asked for extra rent for said basement, as heretofore found."

The court below directed the petition to be dismissed and judgment to be entered for the government. That was accordingly done.

The pleadings and facts indicate that the claim of the appellants is divided into two parts; one, arising out of the occupancy and use by the Civil Service Commission of the building above the basement; the other, for the occupancy and use by that body of the basement.

Let us, at the outset, inquire as to the circumstances under which an officer of the United States, whether the head of a [331] department or a subordinate, may or may not, by his acts, impose liability upon the government, in the absence of authority from Congress. The conclusion we have reached upon that inquiry is controlling. Looking at the statutes in force at the time the transactions here in question occurred, we find that by § 3679 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2454), it was provided that "no department of the government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract for the future payment of money in excess of such appropriations;" and by § 3732 (U. S. Comp. Stat. 1901, p. 2504), that "no contract or purchase on behalf of the United States shall be made, unless the same is authorized by law, or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

An act of Congress of June 22d, 1874, provided that "hereafter no contract shall be made for the rent of any building or part of any building in Washington, not now in use by the government, to be used for the purposes of the government, until an appropriation therefor shall have been made in terms by Congress." 18 Stat. at L. 133, 144, chap. 388. Again, by the deficiency appropriation act of March 3d, 1877, it was provided that "hereafter no contract shall

be made for the rent of any building, or part of any building, to be used for the purposes of the government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and that this clause be regarded as notice to all contractors or lessors of any such building or any part of building." 19 Stat. at L. 363, 370, chap. 106, U. S. Comp. Stat. 1901, p. 2514.

The above provisions were all in force when the Civil Service Commission was created. By the act creating that tribunal it was provided that "it shall be the duty **332]** *of the Secretary of the Interior to cause suitable and convenient rooms and accommodations to be assigned or provided, and to be furnished, heated, and lighted, at the city of Washington, for carrying on the work of said commission and said examinations, and to cause the necessary stationery and other articles to be supplied, and the necessary printing to be done for said commission." 22 Stat. at L. 403, 405, chap. 27, U. S. Comp. Stat. 1901, p. 1220.

We have seen that the occupancy by the Civil Service Commission of the plaintiffs' building commenced August 1st, 1900. Now, the general appropriation act for the legislative, executive, and judicial expenses of the government, covering the fiscal year ending June 30th, 1901, opened with the clause providing that "the following sums be, and the same are hereby, appropriated out of any money in the Treasury not otherwise appropriated, in full compensation for the service of the fiscal year ending June 30th, 1901, for the objects hereinafter expressed, namely . . . For rent of buildings for the Department of the Interior, namely, . . . Civil Service Commission, \$4,000." 31 Stat. at L. 86, 125, chap. 192. Each appropriation act for subsequent fiscal years, covering the whole period of the occupancy by the commission of the plaintiffs' building, opened with a similar provision. So that the plaintiffs and all others dealing with officers of the government were distinctly advised as to the amount appropriated by Congress for any specified purpose, and knew, or are to be deemed to have known, that when they received such specified amount for the purpose named, it was intended by Congress to be in full compensation for the service rendered for the government in that fiscal year. The plaintiffs received before the bringing of this suit the appropriation made by Congress specifically for rent of the building for the Civil Service Commission, during the entire period of the commission's occupancy and use of it. **333]** We recall, *in this connection, the fact found by the court below, that the **54 L. ed.**

claimants' receipted bills recited that the amount paid to them was *in full* for the rent, *as fixed by the appropriation acts of Congress*, excepting always, it is true, the rent for the basement of their building. It is also true that the plaintiffs complained that the amount appropriated was inadequate, but they accepted and receipted, for it *as the sum appropriated by Congress for purposes of rent for the commission*, expecting or hoping, no doubt, that Congress would, in due time, remedy the wrong which, as they insisted, had been and was being done to them in respect both of the building and its basement.

But it is said in this connection that the act of 1883 made it the duty of the Secretary of the Interior to cause suitable rooms to be provided for the commission, and as the plaintiffs' building was occupied and used by the commission, for public purposes, with his knowledge and consent, the government is under a liability to pay the claimants the reasonable value of such occupancy and use. This view cannot be accepted, except upon the theory that, during the period in question, it was within the power of the Secretary, by contract, in the matter of rent for a building for the commission, to exceed the sum appropriated by Congress for that purpose. We reject that theory as inconsistent with the acts of Congress, and therefore inadmissible. It is for Congress, proceeding under the Constitution, to say what amount may be drawn from the Treasury in pursuance of an appropriation. The statutes above referred to make it plain that the Secretary was without power to make any express contract for rent in excess of the appropriation made by Congress, particularly where, as here, Congress had taken care to say, in respect of each year's rent, that the appropriation shall be in *full* compensation for the specific purpose named in the appropriation act. It is equally *clear **[334]** that the Secretary could not, by his acts, create a state of things from which, in the absence of legislation on the subject, an implied contract could arise under which the government would be liable, by reason of its *constitutional* duty, to make just compensation for the use of private property taken for public purposes. In such a case the remedy is with Congress, and not with the courts. If an officer, upon his own responsibility, and without the authority of Congress, assumes to bind the government, by express or implied contract, to pay a sum in excess of that limited by Congress for the purposes of such a contract, the contract is a nullity, so far as the government is concerned, and no legal obligation

arises upon its part to meet its provisions. If the circumstances justify such a course, Congress, in its discretion, can intervene and do justice to the owner of private property used by officers of the government in good faith, for public purposes, although without direct legislative authority. The plaintiffs' remedy is in that direction. *

What we have said is equally applicable to the claim of the plaintiffs for the reasonable value of the use of the basement of the building in question. Granting that the plaintiffs have not been paid for its use such sum as they are justly entitled to have received, we are still confronted with the facts heretofore referred to, that Congress has appropriated, each year of the commission's occupancy, a specific sum in full for rent of buildings for the use of that body; that it has in effect prohibited the use of the public money in excess of that sum for rent of buildings for that purpose; and that plaintiffs have already received the entire sums appropriated by Congress for rent. The conclusion necessarily follows that the government cannot, in this case, be made liable to *suit*, either under an express or implied contract, to pay for the use of plaintiffs' property any amount in excess of the sums appropriated by Congress for that purpose.

335] *But it is contended by the plaintiffs that their right to recover does not depend upon contract, expressed or implied, but upon the duty, expressly imposed by the Constitution, to make just compensation for private property taken for public use. In support of this view we are reminded that the Tucker act of March 3d, 1887, 24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752, for the first time, in express words, conferred on the court of claims jurisdiction to hear and determine claims against the government, "founded upon the Constitution of the United States." The claims here in question, it is argued, can be rested exclusively on the Constitution, without reference to any statute of the United States, or to any contract arising under an act of Congress. The argument is ingenious, but it is unsound. It cannot be said that any claim for a specific amount of money against the United States is founded on the Constitution, unless such claim be either expressly or by necessary implication authorized by some valid enactment of Congress. The creation of a Civil Service Commission, providing a building or rooms for its use, and the amount to be paid from time to time by the government as rent for such building and rooms, are all matters within the complete control of Congress. It is the Constitution which

places these matters under the control of Congress. If an officer of the United States assumes, by virtue alone of his office, and *without the authority of Congress*, to take such matters under his control, he will not, in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of the Congress, cannot create a claim against the government, "founded upon the Constitution." It would be a claim having its origin in a violation of the Constitution. The constitutional prohibition against taking private property for public use without just compensation is directed against the government, and not against individual or public officers *proceeding without the au- [336] thority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the government. So that whether we look at the jurisdiction of the court below, in respect either of claims *alleged to be* founded upon the Constitution or to arise from contract, the plaintiffs cannot maintain this *suit* against the government; for they have received the entire sums which Congress appropriated to be paid out of the Treasury on account of rent of buildings or quarters for the Civil Service Commission.

There are other aspects of the case to which the elaborate arguments of counsel have been directed. We deem it unnecessary to notice them in this opinion. Nor do we deem it necessary to follow them in their extended and able discussion of the authorities.

The judgment must be affirmed.

It is so ordered.

CINCINNATI, INDIANAPOLIS, & WESTERN RAILWAY COMPANY, Plff. in Err.,

v.

CITY OF CONNERSVILLE.

(See S. C. Reporter's ed. 336-344.)

Constitutional law — due process of law — imposing special burden on railway company.

The expense of constructing a railway bridge over a highway, made necessary by the action of the municipality in opening such highway through the railway company's embankment, may be cast upon the railway company without denying the due process of law guaranteed by the Federal Constitution, which requires that compensation be made when private property is taken for public use.

[For other cases, see Constitutional Law, 458-466, in Digest Sup. Ct. 1908.]

[No. 19.]

Submitted October 25, 1910. Decided November 28, 1910.

IN ERROR to the Supreme Court of the State of Indiana to review a judgment which affirmed a judgment of the Circuit Court of Henry County, in that state, assessing the damages of a railway company in a street-opening proceeding, without taking into consideration the expense of constructing a bridge over the highway. Affirmed.

See same case below, 170 Ind. 316, 83 N. E. 503.

The facts are stated in the opinion.

Mr. John B. Elam submitted the cause for plaintiff in error. Messrs. James W. Fesler, Harvey J. Elam, and Reuben Conner were on the brief:

The 14th Amendment to the Constitution requires that when property is taken by the power of eminent domain, compensation must be made to the owner.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

When part of an entire property is taken under the power of eminent domain, the owner is entitled to compensation on account of what is taken, and also for injury to what remains.

Chicago & W. M. R. Co. v. Huncheon, 130 Ind. 529, 30 N. E. 636; Chicago & I. C. R. Co. v. Hunter, 128 Ind. 213, 27 N. E. 477; White v. Chicago, St. L. & P. R. Co. 122 Ind. 317, 7 L.R.A. 257, 23 N. E. 782; Rehman v. New Albany Belt & Terminal R. Co. 8 Ind. App. 200, 35 N. E. 292.

The measure of damages is the difference between the value of the entire property before the appropriation, and of what remains immediately after such appropriation.

Sidener v. Essex, 22 Ind. 201; Fifer v. Ritter, 159 Ind. 8, 64 N. E. 463; Louisville, N. A. & C. R. Co. v. Sparks, 12 Ind.

NOTE.—On the necessity of making compensation, and the measure thereof, when laying out street across railway property—see note to New York, C. & St. L. R. Co. v. Rhodes, 24 L.R.A. (N.S.) 1226.

As to what constitutes a taking of private property for public use—see notes to Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co. 18 L.R.A. 166; D. M. Osborne & Co. v. Missouri P. R. Co. 37 L. ed. U. S. 156; Sweet v. Rechel, 40 L. ed. U. S. 188; A. Backus, Jr. & Sons v. Ft. Street Union Depot Co. 42 L. ed. U. S. 853; and High Bridge Lumber Co. v. United States, 16 C. C. A. 468.

On the drainage of private lands as a public purpose for which the power of eminent domain may be exercised—see note to Re Tuthill, 49 L.R.A. 781.

54 L. ed.

App. 410, 40 N. E. 546; Sunnyside Coal & Coke Co. v. Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46; Lake Erie & W. R. Co. v. Lec, 14 Ind. App. 328, 41 N. E. 1058.

When part of an entire property is taken under the power of eminent domain, the owner must be compensated for what is taken and for damages to that which remains; and unless this is done, such owner is deprived of his property without just compensation, without due process of law, and is denied the equal protection of the laws, within the meaning of the 5th and 14th Amendments to the Constitution of the United States.

Re First Street, 58 Mich. 641, 26 N. W. 159; Plymouth v. Pere Marquette R. Co. 139 Mich. 341, 102 N. W. 947; Chicago & A. R. Co. v. Springfield & N. W. R. Co. 67 Ill. 142; St. Louis, J. & C. R. Co. v. Springfield & N. W. R. Co. 96 Ill. 274; Chicago & E. R. Co. v. Jacobs, 110 Ill. 414; Robb v. Maysville & M. S. Turnp. Road Co. 3 Met. (Ky.) 117; Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co. 100 Ill. 21; Chicago, B. & Q. R. Co. v. Chicago, supra; Parks & Boulevards v. Chicago, D. & C. G. T. Junction R. Co. 91 Mich. 291, 51 N. W. 934; Parks & Boulevards v. Michigan C. R. Co. 90 Mich. 385, 51 N. W. 447.

When property of a railroad company is taken for another public use, the same rules as to compensation apply as in the case of an individual owner.

Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co. 100 Ill. 31; Chicago & W. I. R. Co. v. Englewood Connecting R. Co. 115 Ill. 384, 56 Am. Rep. 173, 4 N. E. 246.

When property that has a peculiar value to the owner on account of its being devoted and adapted to a particular use is taken for a public use, the owner should be compensated for such taking by assessing damages at such value.

Ohio Valley R. & Terminal Co. v. Kerth, 130 Ind. 314, 30 N. E. 298; Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co. 100 Ill. 21; Chicago & E. R. Co. v. Jacobs, 110 Ill. 414; Price v. Milwaukee & St. P. R. Co. 27 Wis. 98; King v. Minneapolis Union R. Co. 32 Minn. 224, 20 N. W. 135; Dupuis v. Chicago & N. W. R. Co. 115 Ill. 97, 3 N. E. 720; Chicago & N. W. R. Co. v. Chicago & E. R. Co. 112 Ill. 589; Denver & R. G. R. Co. v. Griffith, 17 Colo. 598, 31 Pac. 171; Cincinnati & S. R. Co. v. Longworth, 30 Ohio St. 108; Shenango & A. R. Co. v. Braham, 79 Pa. 447; 4 Sutherland, Damages, § 1074.

When a street is opened through an existing embankment of earth constituting a part of the property and right of way of a railroad company, and supporting its railroad track, in determining the damages so

caused to the railroad company it is not limited to the value of the land taken or the cost of the embankment, but the damages awarded should include the expense of any structural changes in the property of the company necessarily and proximately resulting from such removal of its embankment and the support of its track.

Baltimore & O. S. W. R. Co. v. State, 159 Ind. 510, 65 N. E. 508; *Cincinnati, H. & D. R. Co. v. Troy*, 68 Ohio St. 510, 67 N. E. 1051; *Grand Rapids v. Grand Rapids & I. R. Co.* 66 Mich. 42, 33 N. W. 15; *Plymouth v. Pere Marquette R. Co.*; *Re First Street*; *Chicago & A. R. Co. v. Springfield & N. W. R. Co.*; *St. Louis, J. & C. R. Co. v. Springfield & N. W. R. Co.*; and *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*,—*supra*; *Colusa County v. Hudson*, 85 Cal. 633, 24 Pac. 791; *Terre Haute & L. R. Co. v. Crawford*, 100 Ind. 550; *Lake Erie & W. R. Co. v. Hancock County*, 63 Ohio St. 23, 57 N. E. 1009; *Morris & E. R. Co. v. Orange*, 63 N. J. L. 252, 43 Atl. 730, 47 Atl. 363.

When a railroad company has a track upon an embankment of earth which is so situated and of such a character that it can and does operate its trains on it with entire safety to the public, and a city opens a new street through such embankment, passing under such track, requiring the removal of the embankment and the substitution of a bridge to carry such track over the street, which, when constructed, will in no way add to the safety or convenience of operating trains, then the construction of such bridge does not involve an expense that the railroad company can be required to incur under the exercise of the police power. And if its damages caused by such street opening do not include the expense of such structure, then its property is taken without just compensation and without due process of law. The trial court should have instructed the jury as requested by the defendant upon this subject.

Cincinnati, H. & D. R. Co. v. Troy, *supra*; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Morris & E. R. Co. v. Orange*, *supra*; *Lake Erie & W. R. Co. v. Shelley*, 163 Ind. 36, 71 N. E. 151; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *Lewis, Em. Dom.* § 6.

Messrs. **Richard N. Elliott** and **Charles F. Jones** submitted the cause for defendant in error. Messrs. **David W. McKee** and **Hyatt L. Frost** were on the brief:

Under the statutes of Indiana it is the

duty of all railroad companies to construct and keep in safe and good condition all highway crossings, and this duty is the same whether the highway was established before or after the railroad was built.

Lake Erie & W. R. Co. v. Shelley, 163 Ind. 36, 71 N. E. 151; *Evansville & T. H. R. Co. v. State*, 149 Ind. 278, 49 N. E. 2; *Chicago, I. & L. R. Co. v. State*, 158 Ind. 191, 63 N. E. 224; *Chicago & S. E. R. Co. v. State*, 159 Ind. 240, 64 N. E. 860; *Baltimore & O. S. W. R. Co. v. State*, 159 Ind. 517, 65 N. E. 508; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 A. & E. Ann. Cas. 1047.

Laws requiring railroad companies to construct, maintain, and keep in safe condition all highway crossings, are passed in the exercise of the police power, and are constitutional, although enacted after the railroad was built.

3 *Elliott, Railroads*, § 1102; *Portland & R. R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784, 2 Atl. 670; *Chicago & N. W. R. Co. v. Chicago*, *supra*; *Illinois C. R. Co. v. Willenborg*, 117 Ill. 203, 57 Am. Rep. 862, 7 N. E. 698; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state, by reasonable regulations, to protect the lives and secure the safety of the people.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437.

Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging, without just compensation, of private property, or of private property affected with a public interest, and is not violative of property rights protected by the Federal Constitution.

Mugler v. Kansas, 123 U. S. 623, 668, 31 L. ed. 205, 212, 8 Sup. Ct. Rep. 273; *Boston & M. R. Co. v. York County*, 79 Me. 386, 10 Atl. 113; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.* 30 Ohio St. 604; *Lake Erie & W. R. Co. v. Shelley*, 163 Ind. 46, 71 N. E. 151; *Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* *supra*; *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341.

The plaintiff in error could have been

compelled by mandate to open up the crossing, the same being a legal duty, and therefore would be entitled to no compensation for so doing.

Chicago, I. & L. R. Co. v. State, 158 Ind. 189, 63 N. E. 224; Chicago & S. E. R. Co. v. State, 159 Ind. 237, 64 N. E. 860; Northern P. R. Co. v. Minnesota and Chicago, B. & Q. R. Co. v. Chicago, *supra*; Vandalia R. Co. v. State, 166 Ind. 219, 117 Am. St. Rep. 370, 76 N. E. 980.

The duty of making the crossing is imposed by statute, but such duty exists independently of the statute.

Chicago & S. E. R. Co. v. State, 159 Ind. 240, 64 N. E. 860; Evansville & T. H. R. Co. v. Crist, 116 Ind. 454, 2 L.R.A. 450, 9 Am. St. Rep. 865, 19 N. E. 310; Evansville & T. H. R. Co. v. State, *supra*; Chicago, I. & L. R. Co. v. State, 158 Ind. 189, 63 N. E. 224; 3 Elliott, Railroads, §§ 1102, 1105.

The legislature may regulate the use of highways by a railroad company by requiring the crossings to be made in a particular manner; and may even impose upon the company the duty of adapting the track and grade to new highways so as to make the crossings safe and convenient. It is the duty of a railroad company to make all public crossings, and such duty cannot be delegated or shifted to another.

Elliott, Roads & Streets, § 778; Southern Indiana R. Co. v. McCarrell, 163 Ind. 469, 71 N. E. 156; Vandalia R. Co. v. State, *supra*.

Municipal corporations of the state of Indiana are given exclusive control over their streets and alleys. Such corporations have no power, by contract, ordinance, or by law, to cede away, limit, or control their legislative or governmental powers, or disable themselves from performing their public duties.

Vandalia R. Co. v. State, 166 Ind. 231, 117 Am. St. Rep. 370, 76 N. E. 980; New York, N. H. & H. R. Co. v. New Rochelle, 29 Misc. 195, 60 N. Y. Supp. 904; Brimmer v. Boston, 102 Mass. 19; Millhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; Oakland v. Carpentier, 13 Cal. 540; Mott v. Pennsylvania R. Co. 30 Pa. 9, 72 Am. Dec. 664; Jackson v. Bowman, 39 Miss. 671; Dingman v. People, 51 Ill. 277; Matthews v. Alexandria, 68 Mo. 115, 30 Am. Rep. 776; Northern P. R. Co. v. Minnesota, *supra*.

The exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution.

54 L. ed.

Northern P. R. Co. v. Minnesota, 208 U. S. 583, 596, 597, 52 L. ed. 630, 636, 28 Sup. Ct. Rep. 341; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367.

Mr. Justice Harlan delivered the opinion of the court:

The common council of Connorsville, Indiana, adopted a resolution declaring that a railway embankment maintained by the Cincinnati, Indianapolis, & Western Railway Company, the plaintiff in error, across Grand avenue, in that city, obstructed passage between the north and south ends of the avenue; also, that such avenue should, as a matter of public necessity, be opened as a public street through said railroad embankment.

*The question of the expediency, ad- [341] visability, and public utility of opening up the avenue through the embankment was thereupon referred to the city commissioners, and to the council's committee on streets, alleys, and bridges, for action. Upon consideration of the matter at a time of which public notice was duly given, and after an examination of the ground sought to be appropriated, the commissioners reported that the opening of the avenue through the railroad embankment would be of public utility. The report stated that the real estate to be appropriated by the opening of the avenue was so much of the railroad embankment as extended the entire width of the avenue, as then used and opened, immediately north and south of such embankment. The tract sought to be appropriated was 66 feet square and was occupied by the embankment. The commissioners found and reported that no real estate would be damaged by the proposed opening other than that sought to be appropriated, and that the real estate abutting on both sides of the avenue would be benefited by the proposed opening of the street. There was a hearing—after due notice to all parties concerned, including the railroad company—of the question of injuries and benefits to the property to be appropriated; and of the benefits and damages to all real estate resulting from the opening of the avenue. The result of the hearing was a report by the city commissioners in favor of the opening, and the value of the real estate sought to be appropriated was estimated at \$150.

The city council adopted the report of the commissioners, and appropriated for the purpose of opening Grand avenue the real estate described in the report as necessary to such opening,—the property here in question being a part of that to be appropriated.

The council also directed that a certified copy of so much of the report as assessed benefits and damages be delivered to the **342]** *treasurer of the city, and copied in full on the records of the council, with the minute of the adoption of the resolution describing the real estate appropriated.

There were various exceptions by the railway company and by the city, followed by a trial before a jury, which found for the railway company and assessed its damages at \$800. A motion by the company for a new trial having been overruled, and a judgment entered for the defendant company, in the state court of original jurisdiction, the case was carried to the supreme court of Indiana (which affirmed the judgment), and it is now here for a re-examination as to certain Federal questions raised by the railway company.

It was not disputed at the trial that the improvement of Grand avenue, as ordered by the city of Connersville, made it necessary to construct a bridge over and across the avenue as reconstructed.

The trial court gave the following, among other, instructions to the jury: "It being the duty of the defendant railroad company to construct and keep in safe and good condition all highway crossings, the defendant in this action would not be entitled to any damages for constructing the necessary crossing nor abutments and bridge for supporting its railroad over and across said street when constructed."

It refused to give this instruction asked by the railway company: "If the appropriation of the defendant's property under the proceedings set forth in this case will necessarily and proximately cause expense to the defendant in constructing a bridge to carry its railroad over the proposed street, in order that its railroad tracks may have support and its railroad may be operated as such, and as an entire line, and such construction of said bridge will be required for no other purpose, then, in determining the defendant's damages, you should consider the expense of constructing such bridge."

343] *The railway company duly excepted to this action of the trial court, but the supreme court of Indiana held that there was no error.

There are twenty assignments of error, accompanied by an extended brief of argument. In addition, a great many authorities are cited by the learned counsel for the railway company. If we should deal with each assignment and argument separately, and enter upon a critical examination of the authorities cited, this opinion would be of undue length. We think the case is within a very narrow compass. This seems to be the view of learned counsel of the plain-

tiff in error, for, after a general reference to various questions raised at the trial, counsel say that "the case, upon final analysis, reduces itself to the question whether the police power [of the state] can be so applied as to require the railroad company to build the bridge without compensation."

If the railway company was not entitled to compensation on account of the construction of this bridge,—whether regard be had to the 5th or the 14th Amendments of the Constitution, or to the general reserved police power of the state,—then it is clear that the jury were not misdirected as to what should be considered by them in estimating the damages which, under the law, the railway company was entitled to recover.

The question as to the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question is, we think, concluded by former decisions of this court; particularly by *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 562, 582, 584, 591, 50 L. ed. 601, 605, 606, 608, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *New Orleans Gaslight Co. v. Drainage Comrs.* 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 571, 38 L. ed. 269, 274, 14 Sup. Ct. Rep. 437; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 254, 41 L. ed. 979, 990, 17 Sup. Ct. Rep. 581; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336. See also *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367. The railway company accepted its franchise from the state, *subject necessarily to **[344]** the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority, within whose limits the company's business was conducted. This court has said that "the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good." *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 297, 43 L. ed. 702, 706, 19 Sup. Ct. Rep. 465, 470.

Without further discussion, and without referring to other matters mentioned by counsel, we adjudge, upon the authority of former cases, that there was no error in

holding that the city could not be compelled to reimburse the railway company for the cost of the bridge in question.

Judgment affirmed.

**345] *NATIONAL BANK OF COMMERCE
OF SEATTLE, Appt.,**

v.

R. E. DOWNIE, Trustee; St. Paul & Tacoma Lumber Company, Barber Asphalt Paving Company, Mukilteo Lumber Company, Gamwell & Wheeler, Bankrupts, and the Seattle National Bank. (No. 31.)

SEATTLE NATIONAL BANK, Appt.,

v.

R. E. DOWNIE, Trustee; St. Paul & Tacoma Lumber Company, Barber Asphalt Paving Company, Mukilteo Lumber Company, Gamwell & Wheeler, Bankrupts, and National Bank of Commerce of Seattle. (No. 32.)

(See S. C. Reporter's ed. 345-357.)

Claims — against United States — assignment — validity as against trustee in bankruptcy.

Assignments as collateral security for a loan of unallowed claims against the United States on account of contracts for furnishing materials to the various departments of the government, being in direct opposition to U. S. Rev. Stat. § 3477, U. S. Comp. Stat. 1901, p. 2320, making absolutely null and void voluntary transfers of claims against the United States before their allowance, can confer no interest in the assignees, as against the trustee in bankruptcy of the assignors.

[For other cases, see Claims, I. e, in Digest Sup. Ct. 1908.]

[Nos. 31 and 32.]

Argued and submitted November 3, 1910.
Decided November 28, 1910.

A PPEALS from the United States Circuit Court of Appeals for the Ninth Circuit to review decrees which affirmed decrees of the District Court for the Western District of Oregon, disallowing, as against a trustee in bankruptcy, the claims of creditors to preferences under assignments by the bankrupts of unallowed claims against the United States. Affirmed.

See same case below, 88 C. C. A. 657, 161 Fed. 839.

The facts are stated in the opinion.

NOTE. — As to the validity of the assignment of claims against the United States—see notes to Lopez v. United States, 2 L.R.A. 571, and Greenville Sav. Bank v. Lawrence, 22 C. C. A. 650.
54 L. ed.

Messrs. George E. de Steiguer, Frederick Bausman, and Daniel Kelleher submitted the cause for appellants:

The statute concerns disputed "claims" only.

Freedman's Sav. & T. Co. v. Shepherd, 127 U. S. 494, 32 L. ed. 163, 8 Sup. Ct. Rep. 1250; 17 Ops. Atty. Gen. 545; 21 Ops. Atty. Gen. 75; 12 Ops. Atty. Gen. 216; Marshall v. Baltimore & O. R. Co. 16 How. 336, 14 L. ed. 962; Ball v. Halsell, 161 U. S. 72, 40 L. ed. 622, 16 Sup. Ct. Rep. 554; Goodman v. Niblack, 102 U. S. 556, 560, 26 L. ed. 229, 231; Price v. Forrest, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 438; Dowell v. Cardwell, 4 Sawy. 217, Fed. Cas. No. 4,039.

The cases which have any application to this case may be grouped in three classes: First, we find cases where the assignee endeavors to assert his claim against the government.

United States v. Gillis, 95 U. S. 407, 24 L. ed. 503; St. Paul & D. R. Co. v. United States, 112 U. S. 733, 28 L. ed. 861, 5 Sup. Ct. Rep. 366.

The second group of cases includes those wherein the consideration of the assignment is that the assignee shall intervene between the assignor and the government. These are all cases in which a contract is made for the prosecution of a disputed claim for damages against the United States, and the person undertaking its prosecution is given a lien upon, or assignment of, a portion of the fund to be collected.

Ball v. Halsell, supra; Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216.

The third group of cases includes those where the controversy is between the original claimant or his successors in interest and the assignee, and where it was not a part of the consideration or contract of assignment that the assignee should intervene in any manner between the claimant and the government.

Goodman v. Niblack, 102 U. S. 556, 26 L. ed. 229; Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870; Freedman's Sav. & T. Co. v. Shepherd and Price v. Forrest, supra.

The question now raised has been considered and decided by the courts of last resort of four of the states,—Massachusetts, Mississippi, New York, and Virginia; and these courts have concurred in holding the statute inapplicable to such a case as that now before the court.

Yorke v. Conde, 147 N. Y. 486, 42 N. E. 193; Re Hone, 153 N. Y. 528, 47 N. E. 798; Jerneagan v. Osborn, 155 Mass. 207, 29 N. E. 520; Thayer v. Pressey, 175 Mass. 233, 56 N. E. 5; Fewell v. American Surety Co. 81 Miss. 782, 92 Am. St. Rep. 625, 28 So. 755;

Hawes v. Wm. R. Trigg Co. 110 Va. 165, 65 S. E. 538.

A bankruptcy court, in administering an estate, should regard and protect equitable liens and rights; even such as might not be enforceable by suit in law or equity.

Re Chase, 59 C. C. A. 631, 124 Fed. 755; Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 466; Ketchum v. St. Louis, 101 U. S. 306-319, 25 L. ed. 999-1003; Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075; Carr v. Hamilton, 129 U. S. 252, 32 L. ed. 669, 9 Sup. Ct. Rep. 295; Fourth Street Nat. Bank v. Yardley, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439.

Mr. J. E. Horan argued the cause, and, with Messrs. H. D. Cooley, W. A. Peters, J. H. Powell, and Harold Preston, filed a brief for appellees:

Assignments of the character appearing in this case are not within any exceptions, but are absolutely void.

United States v. Gillis, 95 U. S. 407, 416, 24 L. ed. 503, 505; Spofford v. Kirk, 97 U. S. 484, 24 L. ed. 1032; Ball v. Halsell, 161 U. S. 72, 40 L. ed. 622, 16 Sup. Ct. Rep. 554; Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216.

The only exceptions to the general rule announced in the foregoing cases that will be found to have been made by this court are the following: First: The statute has been held not to apply to an involuntary transfer by operation of law.

Erwin v. United States, 97 U. S. 393, 397, 24 L. ed. 1065, 1067; Goodman v. Niblack, 102 U. S. 556, 26 L. ed. 229; Butler v. Goreley, 146 U. S. 303, 36 L. ed. 981, 13 Sup. Ct. Rep. 84; Price v. Forrest, 173 U. S. 410, 423, 43 L. ed. 749, 753, 19 Sup. Ct. Rep. 434; St. Paul & D. R. Co. v. United States, 112 U. S. 733, 28 L. ed. 861, 5 Sup. Ct. Rep. 366.

Second: That it does not affect a partnership contract to furnish supplies to the government, or a promise by one partner to pay to another a sum already due him under a partnership agreement out of money to be received from the government for such supplies.

Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870.

Third: That it does not affect the right of a mortgagee of real estate leased to the United States, or the pledgee of the funds thereof, to recover from the mortgagors or pledgees the amount of funds paid to them by the United States.

Freedman's Sav. & T. Co. v. Shepherd, 127 U. S. 494, 32 L. ed. 163, 8 Sup. Ct. Rep. 1250.

Fourth: That the government cannot be

compelled to pay a second time a claim which it has paid to another under a power of attorney from the claimant.

Bailey v. United States, 109 U. S. 432, 27 L. ed. 988, 3 Sup. Ct. Rep. 272.

*Mr. Justice Harlan delivered the [349] opinion of the court:

There is no dispute as to the facts out of which the present controversy has arisen. Substantially the facts are these: On the 16th day of April, 1907, the appellee Downie was appointed receiver of the property of Gamwell & Wheeler, partners, who had previously, on the same day, been adjudged bankrupts. Subsequently he was elected and qualified as permanent trustee, and by order of the court, June 20th, 1907, was authorized to collect all moneys due the bankrupts *from the United States or any of its departments*.

Gamwell & Wheeler, as a firm, held sixteen unallowed claims *against the United States*, aggregating \$33,517.48, the first one being dated December 10th, 1906, and the last February 15th, 1907. The National Bank of Commerce of Seattle was a creditor of that firm in the sum of \$37,149.85. These claims were all assigned by Gamwell & Wheeler to the above bank. The Seattle National Bank was likewise a creditor of the firm and to the extent of \$22,582.19, with interest, and that firm held certain unallowed claims against the United States, sixty-one in number, and amounting to \$38,509.32. The first of the latter claims was dated September 25th, 1906, and the last April 4th, 1907. They were all assigned by Gamwell & Wheeler to the last-named bank.

The parties, by stipulation of July 10th, 1907, agreed: "That each and all of said claims against the United States government, so assigned [to the banks named], were claims for money due from the government of the United States to the said bankrupts upon account of contracts entered into between said bankrupts and the United States for the furnishing of materials by said bankrupts to various departments of said government; that said assignments were each and all voluntarily made in consideration of a loan made by said bank to said bankrupts *at the time [350] of said assignments, and as collateral security for the repayment of said loans, and without notice to the other creditors of said bankrupts. That all of such assignments were made after the entering into of said contracts, and after partial performance thereof by said bankrupts, before the allowance of any such claims or the ascertainment of the amount due thereon, or the issuing of any warrant for the payment thereof.

and that none of said assignments were executed in the presence of any witnesses at all, and that none of them recite any warrant for the payment of the claim assigned, and that none of them were acknowledged by any officer having authority to take acknowledgment of deeds, or any other acknowledging officer at all, and that none of them were certified as being acknowledged by any officer. The said loans, to wit, of said banks exceeded in amount the value of said collaterals so assigned to secure the same, and there is now due to each of said banks on account of said loans an amount much in excess of the value of the said collaterals so assigned to each of said banks respectively."

The claims of the two banks (\$37,149.85 and \$22,582.19, with interest) were allowed by the referee in bankruptcy, and it was adjudged by the court that the banks were entitled, respectively, to receive, on account of the claims assigned to them, whatever amount might be collected on them from the government, and the trustee was ordered to pay over to the banks holding the assignments the collections as they were made thereon.

The district court allowed the respective claims of the banks as general debts, but disallowed them as preferred. This order was affirmed in the circuit court of appeals, that court rejecting the claim of each bank for a lien upon the fund assigned. The case is here under a certificate by Justice Brewer, to the effect that the determination of the question involved in each case 351] was *essential to a uniform construction of the bankruptcy act throughout the United States.

The questions raised by the parties make it necessary to determine the scope and effect of § 3477 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2320) in its application to these cases. That section was brought forward from previous acts of Congress and is as follows: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having

authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

The words of that section are so clear and explicit that there cannot be, we think, any reasonable ground to doubt the purpose of this legislation. Its essential features are not new, as can be seen by an examination of the act of Congress of July 29th, 1846, "in relation to the payment of claims" on the United States, and the act of February 26th, 1853, "to prevent frauds upon the Treasury of the United States." 9 Stat. at L. 41, chap. 66; U. S. Comp. Stat. 1901, p. 2320; 10 Stat. at L. 170, chap. 81, U. S. Comp. Stat. 1901, p. 2320. Turning to § 3477, we find Congress had in mind not only *all* transfers and assignments of *any* claim on the United States, or part of a claim or *any interest therein*, whether *the [352 transfer or assignment be absolute or unconditional, and *whatever was the consideration of the transfer or assignment*, but all powers of attorney, orders, or other authorities for receiving payment of any such claim, or *of any part or share thereof*. All such transfers, assignments, powers of attorney, orders, or authorities are declared to be "absolutely null and void," except there be a compliance with the conditions fully set out in the statute. None of those conditions were complied with in these cases.

In *United States v. Gillis*, 95 U. S. 407, 24 L. ed. 503, it appears that suit was brought in the court of claims, by the assignee of an unallowed claim on the United States, and the question arose whether the assignee could maintain a suit in his name for the proceeds of the claim. The court of claims sustained the assignee's right to sue, but this court, upon careful examination of the act of 1853, re-enacted in § 3477 of the Revised Statutes, reversed the judgment, and directed the petition of the assignee to be dismissed. It was contended in that case that the act of 1853 had reference only to claims asserted before the Treasury Department. But that view was rejected. After observing that the comprehensive provisions of the statute excluded any exceptions to the rule presented, the court said: "We think, therefore, the act of 1853 is of universal application, and covers *all* claims against the United States *in every tribunal in which they may be asserted*. And such, we think, was the understanding of Congress when the Revised Statutes were enacted. In the revision, the act of 1853 was included and re-enacted."

Among the earlier cases on the general subject is *Spofford v. Kirk*, 97 U. S. 484, 488-490, 24 L. ed. 1032, 1034, 1035, frequently referred to in later decisions and always followed.

That was a case of a suit by *Spofford*, in the supreme court of this district. He be-
353] came the holder, by assignment, *of certain acceptances which, upon their face, provided for payment to be made out of any moneys received from the United States on the claim of one *Kirk against the government*. The assignee or holder of the acceptances paid value for them, and acted in entire good faith. The question was whether an assignment of a claim against the United States, made before the claim had been allowed, and before a warrant had been issued for its payment, had any *validity, either in law or in equity*. The court of original jurisdiction dismissed *Spofford's* bill, and the judgment was affirmed here. Mr. Justice Strong, speaking for this court, referred to § 3477 of the Revised Statutes, and, among other things, said: "It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and *incapacitates every claimant upon the government from creating an interest in the claim in any other than himself*." After referring to the fact that the court had not been called upon to decide in the *Gillis* Case, whether the assignment there involved was invalid as between the assignor and the assignee, the opinion proceeds: "But if, after the claim in this case was allowed, and a warrant for its payment was issued in the claimant's name, as it must have been, he had gone to the Treasury for his money, it is clear that *no assignment he might have made, or order he might have given, before the allowance, would have stood in the way of his receiving the whole sum allowed*. The United States must have treated as a nullity any rights to the claim asserted by others. It is hard to see how a transfer of a debt can be of no force as between the transferee and the debtor, and yet effective as between the creditor and his assignee to transmit an ownership of the debt, or create a lien upon it. Yet if
354] *that might be,—and we do not propose now to affirm or deny it, the question remains, whether the act of Congress was not intended to render *all* claims against the government, *inalienable alike in law and in equity, for every purpose, and between all parties*. The intention of Congress must

be discovered in the act itself. . . . We cannot say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of the claim, or any part thereof, shall be absolutely null and void, that they are only partially null and void, that they are valid and effective as between the parties thereto, and only invalid when set up against the government. It follows that, in our opinion, the accepted orders under which the appellant claims gave him no interest in the claim of the drawer against the United States, and no lien upon the fund arising out of the claim. His bill was therefore rightly dismissed."

In *St. Paul & D. R. Co. v. United States*, 112 U. S. 733, 736, 28 L. ed. 861, 862, 5 Sup. Ct. Rep. 366, 367, the court held that a voluntary transfer by mortgage, for the security of a debt, and finally completed and made absolute by a judicial sale, was within the prohibition of § 3477, Mr. Justice Matthews, speaking for the court, saying that, "if the statute does not apply to such cases, it would be difficult to draw a line of exclusion which leaves any place for the operation of the prohibition."

The latest adjudication by this court, construing § 3477 of the Revised Statutes, is that of *Nutt v. Knut*, 200 U. S. 12-14, 20, 50 L. ed. 348, 350-352, 26 Sup. Ct. Rep. 216, 217, 219. That case involved, among other things, the validity of the clause in a written contract relating to compensation to be made to an attorney employed to prosecute a claim against the United States. The contract provided that the payment of such compensation "is hereby made a lien upon said claim, and upon any *draft, mon- [355 ey, or evidence of indebtedness which may be issued thereon. This agreement not to be affected by any services performed by the claimant, or by any other agents or attorneys employed by him." After referring to the words of § 3477, and citing previous cases in which the scope and meaning of that section were considered (which cases are given in the margin†), this court said: "If regard be had to the words as well as to the meaning of the statute, as declared in former cases, it would seem clear that the contract in question was, in some important particulars, null and void upon its face.

†*Spofford v. Kirk*, 97 U. S. 484, 24 L. ed. 1032; *United States v. Gillis*, 95 U. S. 407, 24 L. ed. 503; *Erwin v. United States*, 97 U. S. 392, 24 L. ed. 1065; *Goodman v. Niblack*, 102 U. S. 556, 26 L. ed. 229; *Ball v. Halsell*, 161 U. S. 72, 40 L. ed. 622, 16 Sup. Ct. Rep. 554; *Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 494, 32 L. ed. 218 U. S.

We have in mind that clause making the payment of the attorney's compensation a *lien* upon the claim asserted against the government, and upon any draft, money, or evidence of indebtedness issued thereon. In giving that lien from the outset, before the allowance of the claim, and before any services had been rendered by the attorney, the contract, in effect, gave him an interest or share in the claim itself, and in any evidence of indebtedness issued by the government on account of it. In effect or by its operation it transferred or assigned to the attorney in advance of the allowance of the claim such an interest as would secure the payment of the fee stipulated to be paid. All this was contrary to the statute; for its obvious purpose, in part, was to forbid anyone who was a stranger to the original transaction to come between the claimant and the government, prior to the allowance of a claim, and who, in asserting his own interest or share in the claim, pending its examination, might embarrass the conduct of the business on the part of the [356] officers of the government. *We are of opinion that the state court erred in holding the contract, on its face, to be consistent with the statute."

In this connection, it must be said that this court has held that the statute in question does not embrace the transfer of a claim against the United States, where the transfer has been by operation of law, not merely as the result of a voluntary assignment by the claimant. In *Erwin v. United States*, 97 U. S. 392, 397, 24 L. ed. 1065, 1067, this court, speaking by Mr. Justice Field, after referring to the act of 1853, embodied now in § 3477 of the Revised Statutes, to prevent frauds upon the Treasury, said that it "applies only to cases of voluntary assignment of demands against the government. It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evil at which the statute aimed; nor does the construction given by this court deny to such parties a standing in the court of claims." This construction of the statute was recognized as settled law in *Goodman v. Niblack*, 102 U. S. 556, 560, 26 L. ed. 229, 231; *St. Paul & D. R. Co. v. United States*, 112 U. S. 733, 736, 28 L. ed. 861, 862, 5 Sup. Ct. Rep. 366; *Butler v.*

ed. 163, 8 Sup. Ct. Rep. 1250; *Hobbs v. McLean*, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870; *St. Paul & D. R. Co. v. United States*, 112 U. S. 733, 28 L. ed. 861, 5 Sup. Ct. Rep. 366; *Bailey v. United States*, 109 U. S. 432, 27 L. ed. 988, 3 Sup. Ct. Rep. 272; *Priest v. Forrest*, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 434.

54 L. ed.

Goreley, 146 U. S. 303, 311, 36 L. ed. 981, 985, 13 Sup. Ct. Rep. 84; *Hager v. Swayne*, 149 U. S. 242, 247, 37 L. ed. 719, 721, 13 Sup. Ct. Rep. 841, and *Ball v. Halsell*, 161 U. S. 72, 79, 40 L. ed. 622, 624, 16 Sup. Ct. Rep. 554.

The present cases are not assignments which, by operation of law, created an interest in the assignor's claims against the United States. They are clean-cut cases of a voluntary transfer of claims against the United States, before their allowance, in direct opposition to the statute. If any regard whatever is to be had to the intention of Congress, as manifested by its words,—too clear, we think, to need construction,—we must hold such a transfer to be absolutely null and void, and as not, in itself, passing to the appellants any interest, present or remote, legal or equitable, in the claims transferred. The result is that when *Gamwell & Wheeler* were adjudged bankrupts, they * *were still in law the owners of* [357] *these claims on the United States*, and all interest therein passed under the bankrupt act to their general creditors, to be disposed of as directed by the bankrupt act, just as if there had been no attempt to transfer them to the banks. Any other holding will effect a repeal of the statute by mere judicial construction, in disregard of the plain, unequivocal intent of Congress, as indicated by the statute.

The judgment as to each bank is affirmed.

J. HARVEY LADEW, Louise Berry Wall Ladew, Individually and as Trustee under the Will of Edward R. Ladew, Deceased, et al., Appts.,

v.

TENNESSEE COPPER COMPANY.

(See S. C. Reporter's ed. 357-369.)

Federal courts — proper district for suit — bringing in absent defendants.

The asserted right of citizens of New York and West Virginia, as owners of timber lands in Georgia, near the Tennessee boundary line, to protection against the destruction of their forests by the discharge of deleterious fumes and gases from the works of a New Jersey corporation situated within the territorial jurisdiction of the Federal circuit for the eastern district of Tennessee, is not a claim to real property within the district, within the meaning of the act of March 3, 1875 (18 Stat. at L. 470, chap. 137), § 8, providing for bringing in absent defendants in local actions, so as to confer jurisdiction upon that court over the New

NOTE.—On proper Federal district for suit—see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

Jersey corporation, which refuses to appear voluntarily in the suit as a defendant.
[For other cases, see Courts, 956-959, in Digest Sup. Ct. 1908.]

[No. 495.]

Argued October 19, 1910. Decided November 28, 1910.

APPEAL from the Circuit Court of the United States for the Eastern District of Tennessee to review a decree dismissing the bill as to a nonresident defendant in a suit by nonresidents for protection against injury to their property in Georgia from the discharge of fumes and gases from the works of such nonresident defendant, situated within the district. Affirmed.

See same case below, 179 Fed. 245.

The facts are stated in the opinion.

Mr. Henry B. Closson argued the cause and filed a brief for appellants.

Mr. John H. Frantz argued the cause, and, with Messrs. Howard Cornick and Martin Vogel, filed a brief for appellee.

Mr. Justice Harlan delivered the opinion of the court:

This action in equity was brought by the present appellants, citizens of New York and of West Virginia, against the appellees, the Tennessee Copper Company, a corporation of New Jersey, and the Ducktown Sulphur, Copper, & Iron Company, Limited, a British corporation, each of those corporations having its chief office and place of business in Polk county, Tennessee, within the territorial jurisdiction of the circuit court.

The business of each defendant is the mining, manufacturing, and producing of copper and sulphur ores and products. The plaintiffs are the joint owners in fee and in possession of more than 6,000 acres of land in Fannin, Gilmer, and Pickens counties, Georgia, and have the timber rights in other lands, exceeding 18,000 acres, in the same counties, just beyond the boundary line between Tennessee and Georgia. All these lands are devoted to forestry, have been and are of the greatest value, and contain various kinds of valuable trees. The plaintiffs employ the forests in the production of timber and bark. But for the acts of the defendants, as hereinafter stated, the lands would be sufficient to afford a continuous supply of lumber and bark in large quantities and for an indefinite period in the future. The lands have upon them forests and trees of different growth, which must receive attention and treatment in order to meet the future needs of forestry and bark in-

dustry. Before the commission by the defendants of the acts complained of, the *forest and timber rights and holdings [362 of plaintiffs approached \$100,000 in value, and the damage alleged to be committed by the defendants will exceed \$50,000.

The defendants conduct their business in Tennessee within a short distance of plaintiffs' lands. Recently, before the bringing of this action, the defendants erected, or caused to be constructed, and still own, operate, and control, furnaces, smelters, and ovens, all in close proximity to one another, upon lands owned or leased by them in Polk county, Tennessee. In view of those facts the plaintiffs allege that both in law and equity they are possessed of "a right and claim in, to, and against the lands and tenements of the defendants in the nature of an easement thereupon that the same shall not be used in a manner to injure or destroy the said lands and forests [in Georgia] of your orators, adjacent thereto, as aforesaid. But the defendants, by means of said furnaces, smelters, and ovens maintained by them upon their lands as aforesaid, and in other ways, are, and for some time past have been, generating and causing to be discharged into the atmosphere, vast quantities of smoke, sulphur fumes, and noxious and poisonous vapors and gases and other deleterious substances. Within a short distance from the works and property of the defendants the said smoke, fumes, vapors, and gases and other deleterious substances so generated by each respectively inextricably mingle and are together discharged upon the lands and forests and trees of your orators, and as a result thereof great damage has been done and injury is threatened, as hereinafter appears."

The plaintiffs further allege that said fumes, gases, and vapors have already destroyed a considerable portion of their forests and trees; that unless they receive the relief asked their entire holdings will be destroyed, and their property and interests rendered valueless; that such fumes, gases, and vapors have descended upon *plaintiffs' forests and trees, killing [363 the trees and ruining the timber; that the destruction so created and produced is constantly increasing in extent, and includes forests and trees of every variety and species, and in all stages of growth and development; that the taller trees that serve to protect the smaller growth have been the first to suffer damage and destruction; that the enlargement of the zone of destruction is due to the fact that the death of the trees already brought about permits the smoke, fumes, gases, and vapors that are constantly increasing in quantity to travel farther

before being absorbed; that the forests and timber, destroyed as stated, would have made good lumber, railroad ties, and tan bark, and could have been utilized for purposes of trade and commerce; and that the acts of the defendants, unless restrained by the court, will destroy all the forests, old and young, as well as the timber and bark rights of the plaintiffs.

The bill also alleges that the smoke, fumes, gases, and vapors so generated and discharged on the property of the plaintiffs will destroy all forms of plant and tree life, including vegetables, crops, grasses, and orchards; that by such destruction the soil loses all moisture and compactness, and, being washed away by the rains, the remaining part of plaintiffs' lands will be rendered bare and barren; that the smoke, fumes, gases, and vapors are unwholesome and injurious to the life and health of all coming in contact with them, and render the lands unfit for occupancy; and that the plaintiffs, as well as the Bureau of Forestry of the United States, have frequently demanded that defendants abate the above nuisance, but the latter have refused to obey such demand, leaving plaintiffs no other alternative except to seek an injunction to prevent the above wrongs.

The specific relief asked is a decree that the defendants shall not use their property in Tennessee so as to destroy *or injure the plaintiff's lands and forests in Georgia; that the alleged nuisance maintained by defendants be abated under the direction of the court, through its own officers or otherwise, as shall seem suitable and right; and that the defendants be enjoined "from maintaining, operating, directing, or permitting upon their land or premises [in Tennessee] the operation or maintenance of any oven, roast heap, pit, furnace, or appliance generating or giving forth any of the smoke, gases, fumes, or vapors heretofore complained of, or otherwise generating, producing, or causing any foul or dense or copper or sulphurous smoke, or any noxious, poisonous, unhealthy, or disagreeable, or in any manner injurious, vapor, gas, fume, or odor upon the territory or lands of your orators" [in Georgia].

Such was the case made by the plaintiffs' allegations in their bill.

The summons was served in Polk county, Tennessee, on the general manager of the Tennessee Copper Company, the highest officer of that corporation; on the British corporation, by leaving a copy with its acting general manager in the same county. Each defendant corporation has, as already indicated, its main office, and is conducting its business, in that county.

The copper company, the New Jersey

corporation, appeared for the special and sole purpose of objecting to the jurisdiction of the circuit court. The British corporation appeared for the special purpose only of entering a motion to dismiss the bill for want of jurisdiction as to it, as well as for want of proper parties. The court, speaking by Judge Sanford, who delivered a well-considered opinion in the case, sustained the motion of the Tennessee Copper Company, and dismissed the bill as to it. The motion of the British company was overruled, the court holding that it had jurisdiction over the alien corporation. 179 Fed. 245. There was no appeal by the latter corporation.

*The present appeal was taken only [365 from that part of the decree dismissing the bill as to the New Jersey corporation.

The plaintiffs, we have seen, are citizens of New York and West Virginia, while the Tennessee Copper Company is a corporation of New Jersey. But under the statutes regulating the jurisdiction of the circuit courts of the United States, diversity of citizenship—nothing more appearing—will not give authority to circuit courts of the United States to render a judgment *in personam* where, as here, neither the plaintiffs nor the defendants are inhabitants of the district in which the suit was brought, and where the defendant appears specially and objects to jurisdiction being exercised over it. The defendant corporation, not an inhabitant of the district where suit is brought, cannot be compelled against its will to submit to such jurisdiction for the purposes merely of a personal judgment. 18 Stat. at L. 470, § 1, chap. 137, as amended and corrected in 1887 and 1888; 24 Stat. at L. 552, chap. 373; 25 Stat. at L. 433, chap. 866; U. S. Comp. Stat. 1901, p. 508; *Macon Grocery Co. v. Atlantic Coast Line R. Co.* 215 U. S. 501, 508, 510, ante, 300, 304, 30 Sup. Ct. Rep. 184, and authorities there cited.

The plaintiffs insist, however, that jurisdiction can be sustained by § 8 of the act of March 3d, 1875, determining the jurisdiction of the circuit courts of the United States. 18 Stat. at L. 470, chap. 137. The 1st section of that act, as amended by the above act of 1888, 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508, correcting the enrolment of the act of March 3d, 1887 (24 Stat. at L. 552, chap. 373), provides that a suit founded only on the fact of the diversity of citizenship between the parties shall be brought only in the district of the residence of either the plaintiff or the defendant. But the plaintiffs contend that that section is not to be interpreted apart from the other sections of the same act. Section 8 has relation to the 1st section, and contains provisions

that refer to an exceptional class of cases. **366]** *The two sections relate to the same general subject, and must be regarded as embodying a scheme of jurisdiction. Considered together, they mean that, if jurisdiction is founded only on diversity of citizenship, the circuit court may, without its process being personally served on the defendant, within its jurisdiction, exert the jurisdiction given by the 8th section in the particular cases and for the special purposes therein specified,—its power in such cases being, of course, restricted as in that section prescribed. Such is the argument of the plaintiffs.

The 8th section of the act of 1875 provides: "That when in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or *claim to*, or to remove any encumbrance or lien or cloud upon the title to, real or personal property *within the district where such suit is brought*, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and **367]** adjudication of such suit *in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect *only* the property which shall have been the subject of the suit, and under the jurisdiction of the court therein, within such district. . . ."

Substantially, the contentions of plaintiffs are that the mode in which the defendant uses its real property in Tennessee, within the jurisdiction of the circuit court, creates a nuisance injuriously affecting their property near by in the state of Georgia;

1072

that, according to the settled principles of law, they are entitled to have the defendant corporation restrained from so using its Tennessee property as to injure their property in Georgia; and that the right to such protection against the effects of that nuisance, as maintained by the defendant in Tennessee, should, within the fair meaning of the act of 1875, be deemed a "*claim to . . . real property . . . within the district where such suit is brought*,"—such property, it is alleged, being so used in Tennessee as to create a nuisance, causing injury to the plaintiff's property in Georgia.

Manifestly, unless the plaintiffs can sustain this proposition and bring their case within the 8th section of the act of 1875, there is no ground whatever to maintain the jurisdiction of the circuit court as to the defendant corporation; certainly not, as we have said, for the purposes of a personal judgment against the defendant company, since neither the plaintiffs nor the defendant are inhabitants of the district in which the suit was brought, and the defendant corporation refuses to voluntarily appear and submit to the jurisdiction of the court.

We are of opinion that under no reasonable interpretation of the 8th section can the plaintiffs' case be held to belong to the class of exceptional cases mentioned in *that [**368** section. In no just sense can their cause of action be said to constitute "*a claim to*" real property in the district. They cannot be regarded as having a "*claim to*" the leased land or premises on which the alleged nuisance is maintained. It may be that what the defendant is charged with doing creates a nuisance. It may also be that the defendant company wrongfully uses and has used its property in Tennessee in such way as to seriously injure the property of plaintiffs, near by in Georgia, and that plaintiffs are legally entitled by some mode of proceeding in some court to have the alleged nuisance abated, and their property in Georgia protected in the manner asked by them. But it does not follow that they can invoke the authority of the circuit court of the United States for the protection of their property against the defendant's acts. The jurisdiction of the circuit courts is determined by acts of Congress enacted in pursuance of the Constitution. Apart from the powers that are inherent in a judicial tribunal, after such tribunal has been lawfully created, the circuit courts can exercise no jurisdiction not conferred upon them by legislative enactment. It is quite sufficient now to say, without discussion, that it would be a most violent construction of the 8th section of

the act of 1875 to hold that the right to have abated the nuisance in question arising from the use in Tennessee of defendant's property, because of the injurious effects upon plaintiffs' real property in Georgia, creates, in the meaning of the statute, a "claim to" real property within the district where the suit is brought. There is absolutely no foundation for such a position. We do not mean to say that Congress, in cases of controversies between citizens of different states, might not so enlarge the scope of the statute regulating the jurisdiction of the Federal courts as to enable the circuit court, sitting in Tennessee, to suppress the nuisance in question. 369] Upon that question *we have no occasion at this time to express an opinion. Still less do we say that the plaintiffs have not an efficient remedy in some court, either against the defendant corporation, or against the several individuals who, under its sanction, or by its authority, are maintaining in Tennessee the nuisance complained of. We only mean to say—and cannot properly go further in this case—that the statute in question does not cover this particular case, and that the United States circuit court, sitting in Tennessee,—the New Jersey company refusing to voluntarily appear in the suit as a defendant,—is without jurisdiction to give the plaintiffs, citizens of New York and West Virginia, the particular relief asked against that corporation.

The bill was properly dismissed for want of jurisdiction in the Circuit Court, and the decree below is affirmed.

GEORGE PEABODY WETMORE, Appt.,
v.

TENNESSEE COPPER COMPANY.

(See S. C. Reporter's ed. 369-371.)

Federal courts — proper district for suit — bringing in absent defendants.

A suit by a nonresident owner of lands within the territorial jurisdiction of the Federal circuit court for the eastern district of Tennessee, for protection against injury from a discharge of deleterious fumes and gases from the works of a New Jersey corporation situated within the district, does not present a claim to real property within the district, within the meaning of the act of March 3, 1875 (18 Stat. at L. 470, chap. 137), § 8, providing for bringing in absent defendants in local actions, so as to confer jurisdiction upon that court over the New

Jersey corporation, which refuses to appear voluntarily in the suit as a defendant. [For other cases, see Courts, 956-959, in Digest Sup. Ct. 1908.]

[No. 500.]

Submitted October 11, 1910. Decided November 28, 1910.

APPEAL from the Circuit Court of the United States for the Eastern District of Tennessee to review a decree which dismissed, for want of jurisdiction as to a nonresident corporate defendant, a suit by a nonresident owner of lands within the district, seeking protection against the injury to his property from the discharge of deleterious fumes and gases from the works of such nonresident, situated within the same district. Affirmed.

See same case below, 179 Fed. 245.

The facts are stated in the opinion.

Mr. Charles Seymour submitted the cause for appellant.

Messrs. Howard Cornick, John H. Frantz, and Martin Vogel submitted the cause for appellee.

Mr. Justice Harlan delivered the opinion of the court:

The plaintiff, George Peabody Wetmore, a citizen of Rhode Island, is the owner in fee and in possession of large tracts of land, valuable for timber, farming, and residence purposes, in Polk county, eastern district of Tennessee. The defendants are the same corporations as those mentioned in *Ladew v. Tennessee Copper Co.* just decided. [218 U. S. 357, ante, 1069, 31 Sup. Ct. Rep. 81.]

The plaintiff, after setting out substantially the same facts as those stated in the *Ladew* Case in reference to the conduct by each defendant of its business, and to the injury done to his lands by the mode in which that business is conducted, seeks the same relief as to his lands in Tennessee as that asked by the plaintiffs in the other case as to their lands in Georgia. Each defendant appeared specially,—the defendant the Tennessee Copper Company, for the purpose of objecting to the jurisdiction of the circuit court of the United States, sitting in Tennessee, to give the relief asked by the bill against it, and the British corporation for the purpose of moving to dismiss the bill because of misjoinder of parties, and because of want of jurisdiction in that court to sustain an action against it in Tennessee for the wrong alleged to have been done to the present plaintiffs.

The circuit court dismissed the bill as to the Tennessee Copper Company, but overruled the motion to dismiss the bill as to

NOTE.—On proper Federal district for suit—see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.
54 L. ed.

the British corporation, the court being of the opinion that it had jurisdiction of the latter corporation. From that decree, so far as it related to the Tennessee Copper Company, Wetmore appealed to this court. In conformity with § 5 of the act of Congress of March 3d, 1891, chap. 517, 26 Stat. at L. 827, U. S. Comp. Stat. 1901, p. 549, 371] the question of jurisdiction was certified by the circuit court to this court.

On the authority of *Ladew v. Tennessee Copper Co.*, the decree of the court below must be affirmed.

It is so ordered.

MONTEZUMA CANAL COMPANY, Appt.,
v.
SMITHVILLE CANAL COMPANY et al.

(See S. C. Reporter's ed. 371-386.)

Appeal — from territorial supreme court — statement of facts.

1. The findings of a district court of a territory furnish a sufficient statement of the facts for the purposes of an appeal from the territorial supreme court, where the latter court made no express findings of fact, but entered a general judgment of affirmance, manifestly based upon the correctness of the findings of the trial court. [For other cases, see Appeal, V. o, in Digest Sup. Ct. 1908.]

Judgment — res judicata — parties and privies.

2. Irrigation canal companies and persons claiming under them, made parties to a suit over water rights, whether viewed as appropriators of water, or as mere carriers for others, sufficiently represent the users of the waters of the respective canals to cause such water users to be bound by the judgment.

[For other cases, see Judgment, III. k, in Digest Sup. Ct. 1908.]

Judgment — res judicata — water rights.

3. A decree determining the rights of an irrigation canal company in the waters of a river, as against the owners of other irrigation canals taking water from the river at points above the head of its own canal,

NOTE.—As to review by United States Supreme Court of territorial decisions—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

On conclusiveness of judgments generally—see notes to *Sharon v. Terry*, 1 L.R.A. 572; *Bollong v. Schuyler Nat. Bank*, 3 L.R.A. 142; *Wiese v. San Francisco Musical Fund Soc.* 7 L.R.A. 577; *Morrill v. Morrill*, 11 L.R.A. 155; *Shores v. Hooper*, 11 L.R.A. 308; *Bank of United States v. Beverly*, 11 L. ed. U. S. 76; *Johnson Steel Street R. Co. v. Wharton*, 38 L. ed. U. S. 429; and *Southern P. R. Co. v. United States*, 42 L. ed. U. S. 355.

and against all persons claiming under them, is *res judicata* as to such canal owners and the water users under such canals in a subsequent controversy over the respective rights of the appropriators of the waters of such river.

[For other cases, see Judgment, III. k, in Digest Sup. Ct. 1908.]

Courts — powers — appointment of water commissioner.

4. The bounds of judicial authority are not transcended by the appointment by a court of a water commissioner charged with the duty of distributing the waters of a river among the various irrigation canals according to the adjudged priorities, and imposing upon the parties a *pro rata* liability for his salary.

[Implied or incidental powers of Courts, see Courts, I. c, in Digest Sup. Ct. 1908.]

[No. 1.]

Submitted November 8, 1909. Ordered for oral argument May 16, 1910. Argued October 21 and 24, 1910. Decided November 28, 1910.

A PPEAL from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court of Grand County, in that territory, determining the rights of appropriators of the waters of a river for irrigation purposes. Reversed and remanded for further proceedings.

See same case below, 11 Ariz. 99, 89 Pac. 512.

The facts are stated in the opinion.

Mr. John J. Hawkins for appellant on original submission.

Mr. Walter Bennett for appellees.

Mr. Thomas Armstrong, Jr., argued the cause, and, with Messrs. John J. Hawkins and C. L. Rawlins, filed a brief for appellant:

Courts cannot lightly disregard their previous decrees, nor have they any authority to modify or set them aside after the term at which they were rendered.

National Metal Co. v. Greene Consol. Copper Co. 9 Ariz. 192, 80 Pac. 397.

Nor can it make any difference in the application of this rule that more parties are brought into the second suit. Those who were parties to the first are nevertheless bound by the former decree.

Uhlfelder v. Levy, 9 Cal. 607; *Boulder & W. County Ditch Co. v. Lower Boulder Ditch Co.* 22 Colo. 115, 43 Pac. 540.

There being no allegation or proof of any change of conditions since the former decree, that decree is conclusive and binding now upon the parties.

Los Angeles v. Baldwin, 53 Cal. 469.

Courts are established to settle controversies brought before them, but they are without power to delegate their judicial functions to any. Even receivers and masters in chancery can act only within strict rules. No question of procedure or as to their rights or duties is left open for their determination. If the court undertake to delegate these judicial functions to an executive officer of the court, its decree is to that extent void.

Bradley Fertilizer Co. v. Taylor, 112 N. C. 141, 17 S. E. 69.

Mr. Walter Bennett argued the cause and filed a brief for appellees.

Mr. Justice White delivered the opinion of the court:

The decree of the supreme court of the territory of Arizona (11 *Ariz.* 99, 89 *Pac.* 512), which is appealed from, affirmed a decree of a district court of the territory, determining the rights of appropriators within the county of Graham to the waters of the Gila river.

In the brief of counsel for the appellee it is suggested that the appeal should be dismissed because the matter in dispute does not exceed the sum of \$5,000, and because the appellant has no substantial financial interest in the cause. We think, however, that the record sufficiently shows that the jurisdictional amount is involved, and that the appellant has such interest as entitles it to prosecute the appeal. We shall, therefore, consider the case upon the merits.

The issues below were made up by an amended complaint, in which the Smithville Canal Company and the Central Canal Company and the water users under these canals were plaintiffs, and the Montezuma Canal Company and other canal companies, as also the water users under such canals, were defendants. The general nature of the controversy is indicated by the character of the *decree entered in the district court, just stated. Incorporated in the answer of the Montezuma Canal Company and its water users were averments in the nature of a cross bill against the San José Irrigating Company and the San José Extension Canal Company and various other defendants, setting up a former judgment recovered in the district court of Graham county by the Montezuma Canal Company, as settling between the Montezuma Company and said codefendants rights in the water of the river. The San José Irrigating Company, it is to be remarked, was incorporated in 1892, and in 1904 the San José Extension Canal Company was incorporated, and undertook the management, repair, and operation of a part of the canal

previously under the control of the San José Irrigating Company.

The trial court made findings of fact and stated conclusion of law thereon, but certified no rulings in respect to the admission or rejection of evidence. The supreme court of the territory made no express findings of fact, but entered a general judgment of affirmance, manifestly based upon the correctness of the findings of the trial court. Under such circumstances the findings of the district court furnish a sufficient statement of the facts for the purposes of this appeal. *Stringfellow v. Cain*, 99 U. S. 610, 25 L. ed. 421. The question for decision, therefore, is whether such findings are sufficient to support the decree. *Ibid.*

We are concerned, however, only with the error assigned by the Montezuma Canal Company, as that company alone appealed to the supreme court of the territory, and it is the only party to the record now seeking a reversal of the judgment of affirmance entered by the appellate tribunal.

The contentions urged by the Montezuma company are twofold: First, that due effect was not given to the prior judgment which it pleaded, and which determined its rights in the water of the Gila river as against the *appropriators of waters[374 from that river at points above the head of its canal; and, second, that error was committed in the appointment of a so-called water commissioner, charged with the duty of distributing the water among the different canals, according to the adjudged priorities. There being, then, no controversy in respect to the rights to water decreed in favor of the canals situated below the head of the Montezuma Canal Company, the findings in respect to those canals need not be particularly referred to.

Before stating the contents of the decree which was entered in the trial court, we make a condensed statement of the facts embodied in the findings upon which the decree was based, in order to a comprehension of the controversy arising for determination.

There are 23,728 acres of land in the county of Graham, territory of Arizona, which are irrigated by water diverted from the Gila river by means of twenty-five ditches or canals. These canals extend from a point in section 29, township 6 south, range 28 east, at first in a southwestwardly and then in a northwestwardly direction, to a point 41 miles distant at the northeast corner of the southeast quarter of section 35, township 4 south, range 23 east. Commencing with the head of this irrigation system the canals in question, in their order as respects the flow of the waters of the river and the number of acres irrigated by each

canal, are as follows: Brown, 100 acres; Sanchez, 400 acres; Mejia, 320 acres; Fourness, 260 acres; San José, 3,000 acres; Michelena, 450 acres; Montezuma, 3,750 acres; Union, 2,900 acres; Sunflower, 400 acres; Graham, 962 acres; Central, 2,675 acres; Oregon, 1,100 acres; Smithville, 1,760 acres; Bryce, 515 acres; Dodge, 450 acres; Nevada, 800 acres; Curtis, 800 acres; Kempton, 850 acres; Reid, 100 acres; Ft. Thomas, 960 acres; Thompson, 240 acres; Military, 400 acres; Saline, 46 acres; Zeckendorf, 50 acres. The Montezuma canal [375] *was first constructed. The six canals situated above the head of that canal were constructed as follows: The San José and the Michelena in 1874, the Mejia in 1877, the Sanchez in 1883, the Fourness in 1891, and the Brown in 1896. The first canal below the Montezuma is called the Union, and was constructed in 1879. Among other things it was found that the Union canal "carries water for 100 acres that were reclaimed in 1874, and irrigated by water that was then diverted from the river and carried to the land by the Montezuma canal. . . ."

Embodied in the "conclusions of law" made by the court is a statement that William Ellsworth and other named individuals "were the persons or successors in interest to the persons who, in 1875, appropriated water for and applied it to the first 300 acres of land" in certain named sections, "and who are diverting and carrying water thereto through the San José canal. . . ."

One half of a miner's inch per acre was found to be necessary for the irrigation of the lands served by the various canals. It was further found that a surface flow of 7,500 miner's inches in the Gila river at the head of the irrigation system furnished more water than is needed to irrigate the entire acreage shown by the evidence to have been in cultivation in the year 1904; and it was also found that "there is a greater flow than this amount during the larger part of the year, so that the amount of water available for irrigation purposes is more than one half of a miner's inch per acre for a greater length of time each year than the time during which the supply is less than one-half inch per acre."

Substantially all of the canals referred to are now controlled by incorporated canal companies, respecting whom the trial court found as follows:

"The different incorporated canal companies, who are parties plaintiff and defendant herein, are duly and regularly incorporated under the laws of this territory, and [376] *own and control the several canals, as alleged in the pleadings herein, which

canals were originally operated by unincorporated partnerships or societies, and the present corporations, parties hereto, are the successors to the unincorporated owners of the several canals, and are in every instance carrying the water for the use of the landowners or the successors in interest of the landowners who were the original appropriators of the water carried therein for irrigation purposes. None of the parties hereto have been engaged or are now engaged in carrying water for hire, and none of the incorporated companies, parties hereto, have appropriated any water in their corporate capacity. None of the several parties hereto who are landowners, appropriators of water, or who are receiving water for irrigation from the different incorporated companies or through the several canals owned by the parties hereto, have ever maintained their right to their several priorities as against the co-owners of land or couers of water in their respective canals, but the individual landowners and appropriators of water that is furnished under the management of each of the several ditches or canals, herein referred to have surrendered to their couers in that canal their priority, and the water that is taken from the river for the use of the land under the several canals has been, by the consent of the different landowners under each canal, delivered to the different tracts of land in accordance with the extent of the interest in the ditch or canal of each landowner, regardless of the acreage cultivated by the said landowner, and regardless of the date when the said acreage was placed under cultivation."

Findings 11 and 12 are as follows:

"11. On the 17th day of February, 1897, a decree was entered in this court in action No. 505, wherein the Montezuma Canal Company was plaintiff, the San José Irrigating Company, a corporation, Chiricahua Cattle Company, a corporation, Pedro Michelena and others, were *defendants, [377] wherein it was judged and decreed that the plaintiff had the right and was entitled to have flow into the Montezuma canal continuously from the Gila river at all times during the dry season of the year when water is low and scarce in said river, 1,000 miner's inches of water, and was entitled to have flow from the said river into said canal 2,000 miner's inches of water at times of wet seasons of the year, when water is high and plentiful therein, as against each and all of the defendants in said action, and in which it was ordered, adjudged, and decreed that said defendants above named, and all persons claiming under them and each of them, be perpetually restrained and enjoined from diverting or taking water

from the said river above the head of the plaintiff's said canal, or in any manner obstructing the flow of water in the said river, so as to prevent the said water from flowing in the bed of said river down the same, and therefrom into plaintiff's canal to the full extent of a thousand inches during each and every dry season of the year when water is low and scarce, and also from in any manner preventing the said 2,000 miner's inches of water from flowing down the channel or bed of said river, and from flowing therefrom into the plaintiff's said canal during the wet seasons of the year when water is plentiful in said river.

"12. On the 18th day of September, 1900, a complaint was filed in the district court of the second judicial district, in and for Graham County, territory of Arizona, in action No. 797, in which the San José Irrigating Company was plaintiff and E. L. Tidwell et al. were defendants, and on March 31, 1901, a stipulation was filed in the said cause No. 797, by and between the San José Irrigating Company and its stockholders, on the one hand, and Frank Dysart, Pedro Michelena, and Frank McLean, using water on lands owned by them, through the Michelena ditch, on the other hand, in which it was stipulated and agreed that the [378] grantors and predecessors "in interest of both parties made their original appropriation of the water of the Gila river at the same date or time, and that neither should, as against the other, claim or attempt to prove any prior or superior right to any of the water of the said Gila river by reason of having been prior in date, or time of making the original appropriation of the water of said Gila river; and on the 29th of June, 1901, a decree was entered in the said district court in the said action No. 797, in which it was found and decreed by the court that the first right to diversion, use, and enjoyment of the water in the Gila river, after the prior appropriation of 1,000 miner's inches theretofore decreed to the Montezuma Canal Company, was in the plaintiff, the San José Irrigating Company, its shareholders and stockholders, to the extent of a perpetual flow of 1,500 miner's inches, and in the defendants Frank Dysart, Alexander McLean, and Pedro Michelena, using water through the Michelena ditch, to the extent of a perpetual flow of 500 miner's inches of water in the Gila river.

"That neither the plaintiff nor defendants, users of water under the Michelena ditch, have priority of right over the other to the use of the water of the said Gila river, but they shall have equal right thereto, and shall prorate the flow of water in the Gila river in the above proportions in

case of scarcity of water therein, or in case of a failure of a full flow of water in said river from any cause sufficient to supply each with the quantity herein decreed to be the quantity to which each is entitled in point of time."

We excerpt in full in the margin† the decree which was *entered by the trial [379] court, omitting the tabular statement as to the amounts of water to which the water users under the several canals were entitled when the surface flow at the head of the irrigating system was 300, 400, 500, *750, [380] 1,000, 1,500, 2,000, 2,500, 3,000, 3,500, 4,000, 4,500, 5,000, 5,500, 6,000, 6,500, 7,000, and 7,500 inches, respectively.

The question arises whether due effect was given to *the decree entered in the [381] action No. 505 on February 17, 1897, in favor of the Montezuma Canal Company, referred to in finding No. 11; in other words, Is the decree as entered warranted by the facts as found?

*We premise that the Montezuma [382]

†Be it remembered, that on the 28th day of April, 1905, the same being a regular judicial day of the April term of the said district court, this cause came on regularly for trial before the court without a jury, a jury having been expressly waived by the parties in open court. The parties appeared in person and by their respective attorneys, and the court having heard the testimony of the witnesses and the arguments of counsel, and having examined the documentary evidence, the records and papers introduced by both parties, the evidence was closed and the cause was submitted to the court for consideration and decision, and after due deliberation thereon and examination of the briefs filed by the attorneys of the respective parties, the court delivered its findings and decision in writing (filed herein) and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged and decreed that the several parties to this suit are entitled to receive and are hereby authorized to divert and convey from the Gila river water sufficient, each for his or their lands, from time to time, in the amounts and in the order of priority as shown in the tabular statement hereto attached and filed herewith, and marked, "Tabular statement of amounts of water to which the water users under the several canals are entitled at different stages of water in the river, showing the accretions to the surface flow at the head of the irrigation system, and giving the approximate amounts thereof at the head of the different canals."

And the several parties hereto are each hereby forever enjoined from in any wise obstructing or interfering with the rights of any of the other parties to this suit, and for the purpose of carrying into effect this

Canal Company and the defendant, individuals and canal companies in action No. 505, whether viewed as appropriators of water or as mere carriers for others, sufficiently represented the users of the waters of the respective canals to cause such water users to be bound by the judgment. *Thorpe v. Tenem Ditch Co.* 1 Wash. 566, 20 Pac. 588; *Arroyo Ditch & Water Co. v. Baldwin*, 155 Cal. 280, 100 Pac. 874.

The portions of the tabular statement annexed to the decree with which we are now concerned relate to the distribution of water adjudged as between the Montezuma canal and the canals above the head of the Montezuma. Although, as against the appropriators of water served by the San José canal and the Michelena ditch, the Montezuma company, by the terms of the 383]decree in action "No. 505 "had the right and was entitled to have flow into the Montezuma canal continuously from the Gila river, at all times during the dry season of the year, when water is low and scarce in said river, 1,000 miner's inches of water," these provisions were disregarded in the distribution of water ordered in this case.

decree Albert T. Colton is hereby appointed a commissioner of this court, to hold said office and exercise the powers and duties thereof, hereinafter prescribed, until a further order of this court.

The said commissioner shall have the power, at all times, when it shall be proper and necessary, in the discharge of his duties, to enter upon any and all of those certain canals and ditches known as the Brown, Sanchez, Mejia, Fourness, San José, Michelena, Montezuma, Union, Sunflower, Graham, Central, Oregon, Smithville, Bryce, Dodge, Nevada, Curtis, Kempton, Zeekendorf-Clavenger, Reid, Fort Thomas, Zeekendorf-Collins, Thompson, Military, Saline, and upon each and every part thereof, and upon all the dams, gates, flumes, and other structures and appliances, for the obstruction, diversion, or conveyance of water from said Gila river for the irrigation of lands under any or all of said canals or ditches, and have supervision and direction of the placing of, changing, closing, or opening of, the same for the purpose of the discharge of his duties, and to direct the placing of proper gates, dams, or other means for the control of the water of said river at the heads of the canals or other points on the banks of said canals, as he may direct, at the expense of the parties hereto interested therein, and to make such rules and regulations as he may deem proper and expedient, to be observed by the parties hereto, for the distribution and use of said water.

And it is further ordered that said commissioner shall in person, with the assistance of such help as he may need, superintend and control the distribution and use of water by the parties hereto, and by the proper practice direct the diversion of such

This plainly appears when it is considered that by the decree the following allowances were made to the San José and Michelena canals, when, if the rights conferred upon the Montezuma canal by the decree pleaded as *res judicata* had been respected, no allowances whatever at the stated stages of water could have been recognized as existing in the San José and Michelena canals; viz., 120 inches when the surface flow at the head of the irrigation system is 400 inches, 320 inches when the surface flow is 750 inches, 480 inches when the surface flow is 1,000 inches, and 600 inches when the flow is 1,500 inches, with an allowance also to the Mejia canal in the latter event of 30 inches.

While the findings do not establish the reasons which led to these allowances contrary to the decree which was pleaded as *res judicata*, there is room for conjecture that the deductions from the Montezuma and the allowances to the San José and Michelena canals, contrary to the decree, were made for the following reasons: (a) As it was found that in 1875 Ellsworth and others had appropriated water for the irri-

water from said river, and its conveyance to the place of use by whatsoever means he may deem best to secure the greatest economy therein. In the service of said water he shall direct the distribution thereof in accordance with the rights of the parties as to the extent of land irrigated and order of priority of time of appropriation as in this decree established. In the distribution and use of such water the commissioner shall take as a basis of the supply necessary for the cultivation of said lands one half of a miner's inch constant flow for each acre of land, or at that ratio, reckoning 40 miner's inches as the equivalent to a flow of 1 cubic foot per second; provided, however, that no land shall be served with an amount of water in excess of that beneficially used thereon. In measuring the water so supplied, the measure shall be taken for the water supplied to the several canals at the point of diversion from the river.

The commissioner shall report, from time to time, to the court, as to his action in the premises, and shall, whenever he needs the same, apply to the court for further directions as to his powers and duties to make this decree effective.

Any of the parties to this suit may apply to this court for any proper modification of this order or in the supervision and direction of the commissioner.

The compensation of said commissioner shall be one hundred and fifty dollars and twenty cents (\$150.20) per month, and shall be paid by the parties hereto in the proportion set out in the following table, to wit:

A table designating the amounts to be paid by the water users under the several canals and ditches, as their *pro rata* pro-

gation of 300 acres of land, and were diverting the same through the San José canal, and the date of this appropriation was prior to some of the appropriations served through the Montezuma canal, it was considered that this priority should be regarded in the distribution, even if to do so would conflict with the prior judgment in favor of the Montezuma canal; and (b) because the share which was given to the Michelena canal out of the allowances made contrary to the prior judgment in favor of the Montezuma canal were presumably 384] *so given to the Michelena canal, in order to comply with the terms of the judgment in action No. 797, referred to in finding 12, which established an equality of rights in the water between the San José and the Michelena canals. But if these be the theories upon which the court considered it was justified in disregarding the prior judgment, its action was erroneous. This was so, because the rights of the appropriations to the water carried through the Montezuma canal, as against appropriators of water diverted by the San José canal, were adjudicated as late as 1897 by the

decree which was pleaded as *res judicata*, and as no facts were stated by the court which served to take the appropriations of water made by Ellsworth and others in 1875 out of the operation of the judgment of 1897, we can perceive no reason why the fact that appropriations were made in 1875 by Ellsworth et al. justified a disregard of the rights which the judgment of 1897 established in favor of the Montezuma canal.

The remaining contention urged is based upon the action of the trial court, affirmed by the supreme court of the territory, in the appointment of a water commissioner to make distribution of the waters of the Gila river pursuant to the apportionment adjudicated by the decree, and imposing upon the Montezuma company a liability to pay its *pro rata* share of the salary of the commissioner as fixed by the decree. The supreme court of the territory was of the opinion "that it is essential that an officer of the court be continuously on the river to regulate the amount to be diverted under the decree by each canal, in accordance with the ever-varying volume of water in the

portion of the salary of the commissioner, based upon the acreage irrigated under each canal:

Canal.	Acres.	Amount.
Brown	100	\$.65
Sanchez	400	2.55
Mejia	320	2.00
Fourness	260	1.65
San José	3000	19.00
Michelena	450	2.85
Montezuma	3750	23.75
Union	2900	18.35
Sunflower	400	2.55
Graham	962	6.10
Central	2675	16.95
Oregon	1100	6.95
Smithville	1760	11.15
Bryce	515	3.25
Dodge	450	2.85
Nevada	800	5.05
Curtis	800	5.05
Kempton	850	5.40
Reid	100	.65
Ft. Thomas	960	6.10
Thompson	240	1.50
Military	400	2.50
Saline	36	.20
Zeekendorf	500	3.15

Total acres 23,728

Total amount\$150.20

And the said parties shall pay said proportionate sum into the office of the clerk of this court for the use of the said commissioners on the first day of each and every month.

And it is further ordered and decreed that the gates of the water users in arrears of payments to said commissioner in accordance with the foregoing provisions may be kept closed by said water commis-

sioner until said arrears are paid and satisfied.

It is further ordered and decreed that in the case of each incorporated company, party hereto, that is operating a canal or ditch, the *pro rata* portion of the said commissioner's compensation falling due from the acreage of the water users of such canal shall be a charge against the canal company, and shall be paid by proper officer of such company to the clerk of this court on the first day of each month, for the account of said commissioner, and the said officer of the said canal company is hereby authorized to close the gates of water users, under the canal operated by said canal company, who may at any time be in arrears for more than sixty days in the payment of the *pro rata* share of said commissioner's compensation due from the acreage owned or controlled by said water users, and the said officer is hereby ordered and required to close the gates of the said canal at any time the said canal company may be in arrears of payment, for more than sixty days, to the clerk of this court, of the *pro rata* part of the compensation due from the acreage irrigated under the said canal, and to keep such gate closed and the flow of water through said canal arrested until said arrearage is paid in full, and the commissioner is hereby authorized to superintend such closing of the gate and arrest of flow, and to see that the same is done in accordance with provisions of this decree. The parties herein each pay their own cost, and the court cost common to all parties necessarily incurred herein is adjudged against all the parties hereto in the same proportion as the salary of the commissioner has been apportioned herein.

river, according to the tabulated statement;" that the appointment of the commissioner was a proper choice of a method to carry the decree into effect; and that the appointment was authorized as well by a section of the Revised Statutes of the territory, providing that "the court shall cause its judgment and decree to be carried 385] *into execution," as by the power which the court possessed by virtue of its "general jurisdiction to provide all necessary means to carry out its judgment and decree."

It would indeed seem that the decree was modeled upon legislative remedies provided for similar situations in other jurisdictions, as the decree and the remedies which it affords bear a peculiar resemblance to legislative provisions enacted in some of the states where irrigation is practised, to control and regulate the use of water for irrigating purposes. See part 4, Weil's Water Rights in the Western States, pp. 590 et seq. The reason for the creation of statutory provisions of this and kindred character undoubtedly is, as said in *Farm Invest. Co. v. Carpenter*, 9 Wyo. 110, 50 L.R.A. 747, 87 Am. St. Rep. 918, 61 Pac. 253, "to be found in the inability of the ordinary procedure and processes of the law to meet the necessities pertaining to the segregation by various individuals or companies of water from the same stream by separate ditches or canals, and at different points along its course, under rights by appropriation to so divert and use the water."

But because it was within the legislative power to provide administrative machinery to supervise the common use of water in a flowing stream by those having a lawful right to appropriate the water of that stream for beneficial use, it does not result that the decree entered by the court below was in excess of its authority. On the contrary in view of the absence of legislative action on the subject, and of the necessity which manifestly existed for supervising the use of the stream by those having the right to take the water in accordance with the decree which, undoubtedly to that extent, the court was authorized to render, we think the action taken by the court did not transcend the bounds of judicial authority, and therefore is not justly amenable to the attack made upon it. It follows from what we have said that error was committed by the court below in 386] refusing to give due effect *to the judgment in action No. 505, which was pleaded as *res judicata* by the Montezuma Canal Company.

The judgment of the Supreme Court of

the Territory of Arizona is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

MARIA ROURA and Juana Roura, Plffs. in Err.,
v.
GOVERNMENT OF THE PHILIPPINE ISLANDS.

(See S. C. Reporter's ed. 386-400.)

Appeal — scope of review — new theory.

The right to registration of a land title in the Philippine Islands on the ground of established possession when a composition deed from the Spanish authorities was issued will not be considered by the Federal Supreme Court, when reviewing a judgment of the supreme court of the Philippine Islands, which affirmed a judgment of the trial court, refusing registration on the opposition of the insular government, where the case, as made by the pleadings, is rested solely upon the right to register resulting from the composition deed, without the slightest averment of possession prior to the time such deed was issued, except as it may be considered that such possession was alleged as a necessary result of the averments as to the deed, and no evidence whatever was offered concerning the possession prior to, or at the time of, the composition deed, irrespective of the administration proceedings leading up to the issue of such deed, and following upon its annulment, the validity of the deed, as depending upon the competency of the administrative officers to avoid it and to annul the composition proceedings, being the one issue which, as understood by the court below and by the parties, arose upon the opposition of the government.

[For other cases, see Appeal and Error, 4561-4586, in Digest Sup. Ct. 1908.]

[No. 35.]

Argued November 3, 1910. Decided November 28, 1910.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a judgment of the Court of Land Registration, refusing, on the opposition of the insular government, the registration of a land title. Affirmed.

See same case below, 8 Philippine, 214.

The facts are stated in the opinion.

Mr. Frederic R. Conderdt argued the cause, and, with Mr. Howard Thayer Kingsbury, filed a brief for plaintiffs in error.

Assistant Attorney General Fowler argued the cause and filed a brief for defendant in error.

Mr. Justice White delivered the opinion of the court:

Maria and Juana Roura petitioned the court of land registration to register their alleged title as undivided equal owners of a piece of real estate situated in the pueblo of San Miguel de Mayumo, province of Bulacan. See, for the general functions of the court of land registration, *Cariño v. Insular Government*, 212 U. S. 449, 53 L. ed. 594, 29 Sup. Ct. Rep. 334; *Reavis v. Fianza*, 215 U. S. 16, 54 L. ed. 72, 30 Sup. Ct. Rep. 1. This writ of error is prosecuted to a judgment of the supreme court, affirming the trial court in refusing, on the opposition of the insular government, the prayer for registration.

The right to prosecute the writ is challenged on the ground that the amount involved is not sufficient to confer jurisdiction, and because there are no questions arising adequate alone to give jurisdiction. Without going into detail, we say, in view of the affidavits filed in this court concerning the value of the property, after allowing for the elements of speculation possibly entering into the amount fixed in the affidavits, we think, in the absence of affidavits in rebuttal, a sufficient showing has been made to give jurisdiction. We therefore overrule the motion to dismiss, and proceed to the merits.

To reduce the case to the issues essential to be decided requires a statement of the source and history of the title whose registry was asked. We therefore at once state the salient and indisputable facts on that subject. On the 24th of March, 1885, by act before a notary public, José Mercado, declaring that he owned and possessed two parcels of irrigated land situated in Sibul, pueblo of San Miguel de Mayumo, sold the same for cash to Juan Roura. A few weeks after, on May the 3d, 1885, the acting petty governor of 388] the pueblo of San Miguel *de Mayumo issued a certificate, stating that José Mercado had declared to him that he possessed and owned three parcels of irrigated land in the pueblo, two of which are rice lands and the other serves as a building lot and garden, where he has his house erected; that he had possessed the land peaceably and uninterruptedly for more than thirty years, and asking that a certificate be issued as to the truth of these declarations. It was recited in the certificate that the "commune of leading citizens" was convoked and that they unanimously declared that the statements of Mercado were in effect true. The certificate was signed by the petty governor and the individual citizens who had been convoked to pass upon its statements. The purpose of obtaining the certificate does not appear, but it is inferable that it was intended to be

used in a proceeding to be instituted by Mercado to obtain a recognition from the proper administrative authorities of his alleged title to the land. We say this because, four months after, it appears among the files of a proceeding in which, on September 10, 1885, the general directorate of civil administration, under the authority vested in it by the regulations authorizing it to adjust and compose outstanding claims of title to the royal and unreclaimed lands, directed a deed to be issued to Mercado covering two tracts of land in the pueblo of San Miguel de Mayumo upon the payment of two and a fraction pesos. The sum thus to be paid, it was declared, represented 10 per cent of the assessment of the land, and was exacted "for the expense of surveying the measurement to be made by a deputy surveyor of unreclaimed lands and the fees for the title deed, according to the provisions of the decree of the general government of these islands of September 12, 1882, approved by royal order of July 25, 1884." On October 19, following, the director general of civil administration executed, on behalf of the directorate, a deed to Mercado of two *pieces[389 of real estate situate in the pueblo of San Miguel de Mayumo, the description of the second of which pieces in a general sense conformed as to its exterior boundaries to the description of one of the pieces which had been previously sold by Mercado to Roura, and also of one of the pieces described in the certificate of the petty governor. In making this deed, the director general declared that it was executed conformably to the decree of the general directorate of September 7, 1885, by which decree the ownership of the land had been "awarded gratuitously to Mercado." Shortly prior to the making of the deed by the director general to Mercado, that is, on September 25, and shortly following, on November 9, deeds authorized by the general directorate, to unreclaimed land in the pueblo of San Miguel, were made, the one in favor of Regino Pengson, and the other in favor of the parish priest of San Miguel. While the description of the land embraced by these two deeds, or the surveys contemporaneously made concerning the same, are not in the record, it is established that the land which they embraced was surveyed by the official surveyor who surveyed the Mercado land, and that it was not supposed by the directorate that there was any conflict between the three claims.

Shortly after the making of the Mercado deed it would seem that a complaint was made to the directorate of civil administration by Pengson, based upon an alleged conflict between the descriptions of the land embraced in the composition sale made to

him and that described in the composition deed to Mercado. The precise character and extent of this conflict is not disclosed, but it is inferable from the documentary evidence that it related to the situation of a medicinal mineral spring, which was apparently claimed by both, Pengson under his composition and by Mercado under his. The matter was heard by the directorate of 390] civil administration, and *the result of the investigation of that body was by it reported to the governor general, with its recommendation for his action.

The governor general, conformably to the recommendations made to him, issued an order annulling the composition proceedings, and the deeds issued thereunder to Pengson, Mercado, and the parish curate. It was expressly directed that all the proceedings in the several compositions be annulled, reserving the right of the parties to apply for a new composition. It was further directed, however, that before such new composition be allowed, a competent surveyor be appointed, who should mark out the boundaries of the medicinal mineral spring, with the appurtenant land necessary to enable the public to enjoy its benefits, and that such spring and the land so marked out should be held as public property, reserving to private owners the right to demand compensation for any private land taken in the execution of the order. In addition, the order commanded the local authorities to demand from Pengson, Mercado, and the parish priest a return of the deeds issued to them, which the order canceled; that the order be transmitted to the proper provincial and local authorities to be executed and put of record, in conformity to law. The order was published in the official gazette at Manila, and was undoubtedly communicated through the proper administrative channels to all the administrative officers who were concerned with its execution, including local officers of the pueblo of San Miguel. The grounds upon which the directorate recommended and the governor general annulled the composition proceedings, as above stated, were thus enumerated in the official files:

"Account having been given by this central office to his excellency, the governor general, of the proceeding instituted by Don José Fores on behalf of Don Regino Pengson, relative to a claim of lands granted by composition in the barrio of Sibul, pueblo of 391] San Miguel de *Mayumo, it being found that not only the land granted to the aforesaid Pengson, but also those granted to José Mercado and to the parish priest of San Miguel, do not agree in their location or boundaries with those set forth in the title deeds issued by this general directorate

under date of November 9, October 19, and September 25 of last year, respectively, and that these differences originate in errors committed by the expert appraiser of lands, Don José Moreno, when he practised the acts relative to said lands in the capacity of acting deputy of unreclaimed lands. And it being found that the Sibul spring has never been known as private property, nor is it included in land which may have this character, but rather that those medicinal waters have been utilized, without any hindrance or obstacle, not only by the residents of the pueblo, but by the public in general, as is evidenced amongst other things by a certificate of the municipal authorities of San Miguel de Mayumo, and is confirmed by the unanimous and universal voice of the public, and it being found that the general inspection of unreclaimed lands and this general directorate have been taken unawares by the aforesaid expert to issue, as they did issue, by virtue of the surveys made by him, titles of ownership by composition of the lands bordering upon the Sibul springs, by reason of which it might be believed that the spring is found included within some of them, and that the public and free zone which all springs have and need for their enjoyment had disappeared, and considering that the three proceedings referred to embrace a vice of nullity from their beginning, because the data which appear in the notes of survey and measurement of the lands and the plans which accompany them are not correct, and consequently the title deeds issued do not describe the lands such as they really are, and considering that the party responsible for this discrepancy is the expert, Don José Moreno, who, when called to explain *the errors committed by him, has not done so satisfactorily, errors all the more inexcusable in that there are involved parcels relatively small and contiguous, and surveyed and measured with an insignificant lapse of time between one and the other, giving rise to the suspicion that said errors have not been caused solely by neglect nor lack of zeal, but voluntarily, and with knowledge of the mistakes which are contained."

We state in a summary way the further official action concerning the medicinal spring referred to in the order. The governor general directed the proper provincial and local authorities to establish at the spring a sanitarium for the use of the public. But this not being carried out, it was suggested that the spring be placed under the control of private persons for the purpose of creating a sanitarium for the public benefit, and a moderate subvention from the treasury. This project also fell through, on the suggestion that private capital might

not be willing to venture an outlay for the erection of the sanitarium, because of the fear of outstanding claims to ownership of the spring, and the dread that it might ultimately not be held to be public property. Subsequently the provincial and local authorities were directed by the governor general to investigate and report concerning the existence of alleged claims to private ownership of the spring, and, as incident thereto, to expressly report concerning its possession and use during the past. This order brought out an official statement as to the previous composition deeds, their annulment, etc., as we have stated them, coupled with a renewed declaration that investigation disclosed that the spring had never been possessed by any private person, but had always been enjoyed by the public and used as public property. Finally, in September, 1895, from Madrid, a royal decree was issued, the necessary effect of which was to sanction the previous action of the local [393] authorities. This order *directed that the spring, with adequate appurtenant property, be sold at public auction.

Long prior to this, in fulfillment of the order of the governor general of March 5, 1886, in that year, and on the 23d of that month, demand was made of the curate of San Miguel for the return of the deed made to him in consequence of the composition proceedings, and he declared that he had mislaid the deed and could not find it. On the same day of the same month and year a demand was made both on Mercado and Pengson for their deeds. Pengson declared that, having filed his in the proceedings to vacate which had taken place before the directorate, he did not have the deed in his possession. Mercado declared that he had sold the land, and had delivered the deed to the purchaser. Not having disclosed who the purchaser was, further orders to call on him for disclosure were made, but he was absent and could not be reached. Afterwards, in October, 1890, Mercado having died, his widow, in answer to an official demand upon her, declared that the property covered by the composition had been conveyed by her husband during his life to Roura, to whom the deed had been delivered, and that Roura being dead, the deed would probably be found in the possession of his heir and daughter, Maria Roura, and she, upon demand being made upon her, declared that during the lifetime of her father she had heard the title deed mentioned, "but at the present time I am ignorant of its whereabouts." Although the precise date does not appear, it is certain that Roura died testate, and that, by an amicable adjustment and extrajudicial partition of his estate, his two daughters, Ju-

ana and Maria Roura, petitioners before the court of registration, become entitled to one undivided half each of his rights in and to the land conveyed by Mercado, if any such there were.

With this prelude, we are brought to the initiation of *the proceedings in [394] the court of land registration, now before us.

The petition was filed on September 19, 1904. It is alleged that the two plaintiffs were the equal undivided owners of a tract of land, which was described, the description evidently relating to one of the tracts of land which had been described in the deed from Mercado to Roura, and in the certificate issued to Mercado by the petty governor. It was besides alleged that the title of the petitioners was derived by them as heirs of their father, and that he had derived his title from the conveyance made to him by Mercado. It was averred that "said property described is not occupied by anyone," and, aside from any inference of possession to be drawn from the alleged ownership, there was no averment whatever of possession. Various documents were annexed to the petition, among which it is only necessary to mention the certificate issued to Mercado in 1885 by the petty governor and the deed made by Mercado to Roura.

The insular government appeared and opposed the prayer for registration, on the ground that the petitioners had no title to the property, and that it was a part of the public domain. When the case was called for hearing, the husband of Mrs. Modesta Pengson appeared in her behalf to resist the registration applied for, on the ground that she held title to the property, and time was given to formulate an opposition, but this was not availed of, and no further action was taken on behalf of Mrs. Pengson. At the trial the petitioners offered various documents to establish their heirship of their father, which need not be referred to. Declaring that the property to which the petition related was that secondly described in the deed from Mercado to Roura (containing the spring), the petitioners offered that deed and the plan or sketch of the property, which was made in 1885, at the time of the composition proceedings. In addition they offered an *official file containing one [395] of the administrative reports which we have stated; that is, the one saying that it would be unwise to seek to procure private capital for the purpose of establishing a sanitarium until the question of whether there was a private claim to the property was clearly settled. The government offered files of the administrative proceedings, showing in great detail the facts which we have previously stated; that is, the order for composition

in favor of Mercado by the directorate, the deed to him, the controversy originated by Pengson, the decree of the governor general vacating the compositions, and annulling all that had been done under them, and, indeed, establishing all the facts as to notice, the investigation and report as to possession, and the ultimate making of the royal decree. The evidence being closed, counsel for the petitioner thus stated to the court the proposition upon which he relied to secure the allowance of the registration of the title as prayed:

"The court offers to hear the oral argument of Sr. Ferrer. Sr. Ferrer stated that he sought the court of land registration to obtain title deed to the parcel of land which is the subject of the proceeding. The right which his principals invoked was derived from the right of the original owner, Don José Mercado, who acquired the same by virtue of the grant made by the council of civil administration for a stipulated sum, in exchange for the parcel of land. The deceased, Juan Roura, father of the petitioners, acquired possession of this land by virtue of a deed of sale executed by Don José Mercado in his favor, and from him the petitioners inherited the same. After some time had elapsed, the general government annulled that title by grant without returning the money consideration for the land, and without previously hearing the defenses which the aggrieved owner might set up, when, as a matter of fact, this matter ought to have been heard before the competent court. This is not legal; it is an embezzlement, since it cannot be conceived that after the possession of this real estate had been lawfully granted, and the cost thereof had been paid to the satisfaction of both parties, as is witnessed by the documents in evidence, all the transaction should be afterward retroactively annulled.

"These points having been explained, he requested the registration of the property in the name of his clients."

The court denied the prayer for the registration of the title. Summarily stated, it was of opinion, (a) that the subject of making the composition as to the unreclaimed land and awarding a deed was within the administrative authority of the officials, as was also the right to revoke and cancel the deed within a limited time for error found to exist or fraud discovered to have been practised in obtaining the deed; (b) that it was unnecessary to inquire whether irregularities existed in the proceedings by which the deed was canceled, or whether an abuse of administrative discretion had happened in those proceedings, because the Spanish law created express and exclusive remedies for the correction of such

errors, and required that those remedies should be resorted to within a time designated, and did not therefore allow such complaints to become the subject-matter of ordinary judicial controversies; (c) that as the deed which was relied upon as the basis for registration was the mere result of a composition proceeding, and was, in its essence, not a contract upon a moneyed consideration, but a mere gratuitous award, without the payment of a price, the question of error committed in the annulment proceedings came within one or the other of the systems of administrative recourse provided by the Spanish law, which, not having been availed of, operated to deprive of the right to complain judicially of the cancellation; (d) that there was no room for holding that the right to registry obtained because of a prescriptive title, acquired under the composition deed to Mercado by virtue of article 1957 of the Civil Code, providing that "ownership and other property rights in real property are prescribed by possession for ten years . . . with good faith and a proper title," because, first, from the date of the annulment of the title good faith had in any event ceased to exist, and, second, because of the absence of the essential element of possession; since "it has not been proved that there had been exercised, either before or after the declaration of nullity of the title, any possessory act on the part of the petitioners or of their predecessor. All effort of counsel for the petitioners consisted, after the opposition of the insular government was known, in proving that the former administration did not act within its powers in declaring the nullity of the title deed offered." The case having been carried to the supreme court, that court affirmed the judgment upon grounds substantially identical with those which controlled the action of the trial court.

Although we have concluded, from a consideration of the opinion of the court below, aided by the painstaking and full reference to the Spanish law contained in the brief on behalf of the insular government, that the court below was clearly right in its opinion as to the legal principles held to be decisive, we do not stop to state and review those considerations, because we think the argument at bar renders it unnecessary. We say this, because the argument for the plaintiffs in error in substance but proceeds upon the theory that, although the Spanish law was correctly expounded by the court below, nevertheless that law was inapposite because of conditions which it insisted existed prior to and at the time the composition deed was issued and when the administrative order of annulment of that

title was made. The proposition is thus stated in the argument:

"The position of the plaintiffs may be very briefly summarized as follows: In 1885 398] José Mercado was already *by virtue of his thirty years' possession, the absolute owner of the land in question. The composition deed of October 19, 1885, did not create his title, but was merely evidence of it. The decree of March 5, 1886, was wholly ineffectual to divest his ownership, and at most only affected the record evidence of such ownership. It is immaterial that no affirmative proceedings were taken by Mercado or his successors in interest to question the validity and effect of the decree of annulment. They were justified in relying on their undisturbed possession and awaiting adverse action, when it would be open to them to raise all such questions. This ownership, founded on possession, was in itself a property right, protected by the treaty of Paris and the organic act, entitled to registration as a title in fee simple. The insular government is now asking this court to carry into effect even beyond its very terms a decree of a Spanish governor general, made thirteen years before the cession, which is void on its face, as in violation of the fundamental laws of the former government, and, by virtue of such void decree, to deny plaintiffs' ownership of lands which have been in their possession for fifty years,—a possession which the Spanish government never undertook to disturb."

And the theory of established possession upon which the contention rests is reiterated in many forms of expression throughout the entire argument. But when the statement of the case which we have made is considered, it becomes apparent that this contention misconceives the case as presented, since it proceeds upon an assumption unwarranted by the pleadings and unsustained by any proof whatever. As we have seen, the case as made by the pleadings was rested solely upon the right to register resulting from the composition deed, without the slightest averment of possession prior to the time that deed was issued, except as it may be considered that such possession was alleged as a necessary result of the averments as to 399] *the deed. It is further evident that the validity of the deed to Mercado was the one issue which arose on the opposition of the insular government. That this was understood by both parties clearly results from the fact that not a particle of proof was offered concerning the possession prior to or at the time of the composition deed, irrespective of the administrative proceedings leading up to the issue of that deed and 54 L. ed.

following on its annulment. This, moreover, is additionally demonstrated by the express declaration of counsel for petitioners concerning the matter for decision, made after the evidence was in and the case was ripe for consideration. That the trial court had not the remotest thought that such issue was before it is plainly manifest from its statement that all the effort of the counsel of petitioners was directed to assailing the competency of the administrative officers to avoid the Mercado deed and annul the composition proceedings, and that no evidence whatever had been offered to prove possession of the property in controversy by Mercado or any of those holding under him, from the date of the deed up to and including the time of the submission of the cause. That this conception of the issue also prevailed when the case was taken to the supreme court of the islands we think is plainly apparent from the assignment of errors, referred to by the supreme court in its opinion. We think it also conclusively results from the opinion of the supreme court, when considered as a whole, that that court also thought the issue presented to it was thus limited. True it is that a concluding passage in the opinion of the supreme court is referred to as indicating that the court thought that the question of the acquisition by Mercado of the title to the property by pre-emption prior to the composition deed was involved. But we do not think the passage in the opinion, when taken in connection with its context, has the meaning attributed to it. If it had, it would be the merest *obiter*, *since the plead- [400] ings did not raise that issue, and there was not the slightest proof concerning it. While it is not necessary, we deem it well to say that, in reviewing the action of the court below, we are, of course, confined to the record and the case therein made, and may not, as the result of mistaken suggestions as to the issues and proof, disregard our duty by deciding, not the case as made, but an imaginary one, wherein issues not made and not presented below would have to be supplied, and whereby conjecture and surmise must be indulged to replace the total absence of all proof on a particular subject. So far as the unwarranted assumption concerning the subject of possession relates to acts done after the deed to Mercado, it is also disposed of by what we have said, and is besides completely answered by the express finding of both courts concerning the absence of all proof of possession during that period.

Affirmed.

DELIA MOFFITT and Delia Moffitt, Executrix, and James K. Moffitt and Herbert C. Moffitt, Executors of the Will of James Moffitt, Deceased, Pliffs. in Err.,

v.

M. J. KELLY, Treasurer of the County of Alameda, State of California.

(See S. C. Reporter's ed. 400-406.)

Constitutional law — impairing contract obligations — inheritance tax.

1. The enactment of a state statute subjecting to an inheritance tax the rights of a surviving wife in the community property does not violate the contract clause of the Federal Constitution, even if such rights, as they existed when the marriage was celebrated, are contractual, so that they may not be essentially changed or modified by subsequent legislation without impairing contract obligations.

[For other cases, see Constitutional Law, 1374, 1375, in Digest Sup. Ct. 1908.]

Error to state court—scope of review — statutory construction.

2. Whether or not the rights of a surviving wife in the community property as they existed when the marriage was celebrated were correctly subjected to a state inheritance tax law subsequently enacted cannot be reviewed by the Federal Supreme Court when determining, on writ of error to a state court, the validity of such statute under the contract clause of the Federal Constitution.

[For other cases, see Appeal and Error, 2124-2151, in Digest Sup. Ct. 1908.]

Error to state court—scope of review — question of local law.

3. The nature and character of the rights of the surviving wife in the community property are peculiarly local questions, not open to review by the Federal Supreme Court when determining, on a writ of error to a state court, whether the imposition of an inheritance tax under the state laws denies to the wife the equal protection of the laws.

[For other cases, see Appeal, 2070-2123, in Digest Sup. Ct. 1908.]

[No. 37.]

Argued November 4, 1910. Decided November 28, 1910.

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Supreme

Court for the County of Alameda, in that state, subjecting the rights of a surviving wife in the community property to an inheritance tax. Affirmed.

See same case below, 153 Cal. 359, 20 L.R.A. (N.S.) 207, 95 Pac. 653, 1025.

Statement by Mr. Justice White:

James Moffitt was married in California in the year 1863, and there resided with his wife until his death, on October 25, 1906. He left a large amount of property, all of which formed part of the community which existed between himself and his wife. By a will, duly admitted to probate, Moffitt disposed of all his estate to his wife and children in the same proportions as if he had died intestate.

The probate court held that "the interest of the widow in the community property of herself and her deceased husband" was subject to be taxed under a law of California of 1905, which taxed all property passing by will or in case of intestacy from any person who may die seised or possessed of the same. A tax of \$26,684.57 was thereupon assessed as against Mrs. Moffitt's one-half interest in the estate, and an order was entered directing payment of the tax by the executors. An appeal was taken to the supreme court of California. The single 402] *question presented by the appeal, as stated in the opinion of the supreme court, was "whether the surviving wife's share of the community property is subject to this inheritance tax." The question was answered in the affirmative. In an opinion denying an application for a rehearing, the court also adversely disposed of the contention that the enforcement of the tax would violate the contract clause or the equal protection and due process clauses of the Constitution of the United States. 153 Cal. 359, 20 L.R.A. (N.S.) 207, 95 Pac. 653, 1025. The case was then brought to this court.

Mr. Warren Olney argued the cause and filed a brief for plaintiffs in error.

Mr. Robert A. Waring argued the cause, and, with Messrs. U. S. Webb and Snook & Church, filed a brief for defendant in error:

NOTE.—As to taxes on succession and collateral inheritances—see notes to *Re Howe*, 2 L.R.A. 825; *Wallace v. Myers*, 4 L.R.A. 171; *Com. v. Ferguson*, 10 L.R.A. 240; *Re Romaine*, 12 L.R.A. 401; and *Magoun v. Illinois Trust & Sav. Bank*, 42 L. ed. U. S. 1037.

On the power to impose succession tax retrospectively—see note to *Levy's Succession*, 8 L.R.A. (N.S.) 1180.

On liability of community property to succession tax—see note to *Re Moffitt*, 20 L.R.A. (N.S.) 207.

As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L.R.A. 405; *Fletcher v. Peek*, 3 L. ed. U. S. 162; *McCanna v. Citizens' Trust & Surety Co.* 24 C. C. A. 20; and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Doekery*, 63 L.R.A. 571.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

While the plaintiffs in error rely on both the contract clause and the equal protection clause of the Constitution, the latter contention is in substance but an incident, and the former is the fundamental proposition counted on to procure a reversal. We come, however, separately to consider the two contentions.

1. *The alleged violation of the contract clause.*—Considered merely subjectively, the contention is that the rights vested in the wife as a partner in the community existing by virtue of the constitution and laws of the state of California governing at the time of the marriage were contractual rights of such a character that they could not be essentially changed or modified by subsequent legislation without impairing the obligations of the contract, and thereby violating the Constitution of the United States. 403] *But even although this theoretical proposition be fully conceded, for the sake of the argument, it is apparent that it is here a mere abstraction, and is therefore irrelevant to the case to be decided. We say this because there is no assertion of the giving effect to any law enacted subsequent to the contracting of the marriage which purports to essentially modify the rights of the wife in and to the community, as those rights existed at the time the marriage was celebrated. This is so because the state law the enforcement of which it is asserted will impair the obligation of the contract is merely a law imposing a tax. It is evident, therefore, when the contention is concretely considered, it involves but a single proposition; that is, that the state of California could not, without violating the Constitution of the United States, impose a tax on the share of the wife in the community property on the occasion of the cessation by the death of the husband of his dominion and control over the common property, and the consequent complete vesting in enjoyment of such share in the wife. But, in every conceivable aspect, this proposition must rest upon one or both of two theories: either that the nature and character of the right or interest were such that the state could not tax it without violating the Constitution of the United States, or that, if it could be generically taxed without violating that instrument, for some particular reason the otherwise valid state power of taxation could not be exerted without violating the Constitution of the United States. The first conception is at once disposed of by saying that it is elementary that the Constitution of the United States does not, generally speaking, con-

trol the power of the states to select and classify subjects of taxation, and hence, even although the wife's right in the community property was a vested right which could not be impaired by subsequent legislation, it was nevertheless within the power of the state, without violating the Constitution of the *United States, in selecting objects [404 of taxation, to select the vesting in complete possession and enjoyment by wives of their shares in community property, consequent upon the death of their husbands, and the resulting cessation of their power to control the same and enjoy the fruits thereof. And this also disposes of the second conception, since, if the state had the power, so far as the Constitution of the United States was concerned, to select the vesting of such right to possession and enjoyment as a subject of taxation, clearly the mere fact that the wife had a pre-existing right to the property created no exemption from taxation if the selection for taxation would be otherwise legal. It follows, therefore, that the mere statement of the contention demonstrates the mistaken conception upon which, in the nature of things, it rests.

It is said, however, that the reasoning just stated, while it may be abstractly sound, is here inapplicable, because the thing complained of in this case is that the state of California has imposed an inheritance tax upon the share of the wife in the community, and thereby taxed her as an heir of her husband, when, if the laws existing at the time of the celebration of the marriage be properly construed, and be held to be contractual, she took her share of the property on her husband's death, not as an heir to property of which he was the owner, but by virtue of a right of ownership vested in her prior to the death of the husband, although the right to possess and enjoy such property was deferred, and arose only on his death. But, for the purpose of enforcing the Constitution of the United States, we are not concerned with the mere designation affixed to the tax which the court below upheld, or whether the thing or subject taxed may or may not have been mistakenly brought within the state taxing law. We say so because, in determining whether the imposition of the tax complained of violated the Constitution of the *United States, we are solely confined [405 to considering whether the state had the lawful power, without violating the Constitution of the United States, to levy a tax upon the subject or thing taxed. This being true, as it clearly results from what we have said that the vesting of the wife's right of possession and enjoyment, arising upon the death of her husband, was subject to be taxed by the state, so far as the Constitu-

tion of the United States was concerned, it follows that whether the tax imposed was designated or levied as an inheritance tax or any other is a matter with which we have no concern. To make this, if possible, clearer by an illustration, we say that our view just expressed as to the operation and effect of the Constitution of the United States upon the tax in question would not be in the slightest degree changed, although it were to be hypothetically conceded that, on an analysis of the Constitution and laws of California concerning the community between husband and wife, in force at the time of the marriage of the Moffitts, we should conclude that the nature and character of the rights of the wife in the community property, if correctly interpreted, were such that, on the death of the husband, the share coming to the wife would not be liable to taxation under a taxing law like the one under consideration. This would be the case, because, as there was state power to tax, so far as the Constitution of the United States was concerned, the question whether or not the wife's interest under the circumstances was correctly subjected to the tax was a purely state question, not involving any violation of the Constitution of the United States, and which therefore we have no right to review. The controlling effect of the reasoning which we have just stated was pointed out, and the mistaken conception upon which the contentions of the plaintiffs in error rest was indicated, in *Castillo v. McConico*, 168 U. S. 674, 683, 42 L. ed. 622, 625, 18 Sup. Ct. Rep. 229.

2. The contention pressed in argument as 406] to the equal *protection of the law clause substantially denies the right of the state to impose any tax on the share of the wife in the community property, resulting from the termination of the community by the death of the husband, or in substance assumes that we have the right to review the action of the state court in deciding that the tax law which it enforced was applicable. We say this because the entire argument proceeds upon the contention that, as the share of the wife in the community property was a vested interest during the life of the husband, it could not, on the death of the husband, be taxed differently from any other property,—*viz.*, according to value,—without violating the Constitution of California, and creating an inequality repugnant to the Constitution of the United States. But this merely rests upon the mistaken conception previously disposed of, since the nature and character of the right of the wife in the community for the purpose of taxation was peculiarly a local question, which we have no power to review.

Affirmed.

WESTERN UNION TELEGRAPH COMPANY,
Plff. in Err.,
v.

COMMERCIAL MILLING COMPANY.

(See S. C. Reporter's ed. 406-421.)

Commerce — state regulation — common law or statute.

1. A regulation of interstate commerce which would be valid if rested upon the common law of the state is no less valid because made by a state statute.

Commerce — state regulation — telegraph companies.

2. Interstate commerce is not unconstitutionally regulated by a state statute under which, as construed by the state courts, a telegraph company cannot limit its liability for its negligent failure to deliver a telegram addressed to a person in another state.

[For other cases, see Commerce, 368-375, in Digest Sup. Ct. 1908.]

Constitutional law — privileges and immunities — due process of law — freedom to contract.

3. Privileges and immunities of citizens of the United States are not abridged, nor is due process of law denied, contrary to U. S. Const., 14th Amend., by a state statute under which, as construed by the state courts, a telegraph company cannot limit its liability for its negligent failure to deliver a telegram addressed to a person in another state.

[For other cases, see Constitutional Law. IV. a, 3, and IV. b, 7, in Digest Sup. Ct. 1908.]

NOTE.—On state regulation of interstate or foreign commerce—see notes to *Norfolk & W. R. Co. v. Com.* 13 L.R.A. 107; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 13; and *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158.

On state regulation of interstate telegraph and telephone companies—see note to *Postal Teleg. Cable Co. v. Baltimore*, 24 L.R.A. 161.

On police regulation of electric companies—see note to *State ex rel. Laclede Gaslight Co. v. Murphy*, 31 L.R.A. 798.

On validity of limitation of liability of telegraph company for unrepeatd messages—see note to *Western U. Teleg. Co. v. Milton*, 11 L.R.A.(N.S.) 560.

As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621, and *State v. Loomis*, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

Constitutional law — equal protection of the laws — telegraph companies.

4. The equal protection of the laws is not denied telegraph companies and the persons with whom it does business by a state statute under which, as construed by the state courts, a telegraph company cannot limit its liability for its negligent failure to deliver a telegram addressed to a person in another state, although express companies and other common carriers may, by contract, limit their liability in this respect.

[For other cases, see Constitutional Law, IV. a, 3, in Digest Sup. Ct. 1908.]

[No. 15.]

Argued October 26, 1910. Decided November 28, 1910.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which, by a divided court, affirmed a judgment of the Circuit Court for Wayne County, in that state, awarding damages for the failure to deliver an interstate telegram. Affirmed.

See same case below, 151 Mich. 425, 115 N. W. 698.

Statement by Mr. Justice McKenna:

This is an action for damages for failure to deliver a telegram given to the telegraph company at Detroit, Michigan, to be delivered at Kansas City, Missouri.

On the 15th of August, 1904, the milling company was offered 10,000 bushels of wheat, of a certain kind, at \$1.01 a bushel, for immediate acceptance. The telegram in controversy was sent to accept the offer. It was promptly transmitted by the company to its relay station at Chicago within a minute or two after it was filed at Detroit. What became of it afterwards is not shown; 408] it was not delivered. On the face of the telegram were the following words: "Send the following message, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to." One of the conditions referred to was this: "It is agreed . . . that the said company shall not be liable . . . for nondelivery of any unrepeat- 409] ed messages beyond the amount received for the same." Fifty times the amount received for the message was fixed as the damages for nondelivery in case of its repetition, and there was a provision for insurance upon the payment of a premium.

The case was tried to a jury, and the milling company gave evidence of the above facts and of its damages. The telegraph company offered no evidence. The telegraph company asked certain instructions, which to understand, the statute of the state in regard to telegrams must be given. It is 54 L. ed.

entitled, "An Act to Prescribe the Duties of Telegraph Companies Incorporated, Whether within or without This State, Relative to the Transmission of Messages, and to Provide for the Recovery of Damages for Negligence in the Nonperformance of Such Duties." [Act 195, Pub. Acts 1893.] Section 1 of the act provides as follows:

"Sec. 1. The people of the state of Michigan enact that it shall be the duty of all telegraph companies incorporated either within or without this state, doing business within this state, to receive despatches from and for other telegraph companies' lines, and from and for any individual, and on payment of the usual charges for individuals for transmitting despatches, as established by the rules and regulations of such telegraph company, to transmit the same with impartiality and in good faith. Such telegraph companies shall be liable for any mistakes, errors, or delays in the transmission or delivery, or for the nondelivery of any repeated or nonrepeated message, in damages to the amount which such person or persons may sustain by reason of the mistakes, errors, or delays in the transmission *or delivery, due to the negli- [409] gence of said company; or for the nondelivery of any such despatch, due to the negligence of such telegraph company or its agents, to be recovered with the costs of suit by the person or persons sustaining such damage."

As to the statute, the telegraph company requested the court to instruct the jury (1) that it did not prohibit a contract like the one made by the parties; (2) the milling company must recover on the contract or not at all; (3) the message was interstate commerce and the statute cannot be held to apply to it. If the statute be held to be prohibitory, it is void as an attempted regulation of interstate commerce, in violation of the interstate commerce clause of the Constitution of the United States.

The court refused the instructions, and expressed in its charge to the jury a view antagonistic to the propositions of law expressed in them. A verdict was rendered for the milling company in the sum of \$960. The telegraph company moved for a new trial, repeating the propositions expressed in the instructions, and added the further ground that the statute, when construed as prohibiting contracts between persons *sui juris*, is in violation of the 14th Amendment to the Constitution of the United States. Judgment was entered on the verdict, which was affirmed by the supreme court of the state by a divided court.

Mr. C. D. Joslyn argued the cause, and, with Messrs. George H. Fearons and Henry D. Estabrook, filed a brief for plaintiff in error:

The Michigan statute, as construed, is in violation of the commerce clause of the Federal Constitution.

Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; *Western U. Teleg. Co. v. Chiles*, 214 U. S. 274, 53 L. ed. 994, 29 Sup. Ct. Rep. 613; *Walling v. Michigan*, 116 U. S. 455, 29 L. ed. 694, 6 Sup. Ct. Rep. 454; *Welton v. Missouri*, 91 U. S. 275-282, 23 L. ed. 347-350; *Mobile County v. Kimball*, 102 U. S. 691-697, 26 L. ed. 238-240; *Brown v. Houston*, 114 U. S. 622-631, 29 L. ed. 257-260, 5 Sup. Ct. Rep. 1091; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 577, 30 L. ed. 251, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

The statute abridges privileges and immunities of citizens of the United States, and deprives plaintiff in error and the persons with whom it does business of their liberty and property without due process of law.

Lochner v. New York, 198 U. S. 45, 56, 49 L. ed. 937, 941, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133.

The statute denies to plaintiff in error and the persons with whom it does business the equal protection of the laws.

It is the law of Michigan that express companies may by contract limit their liability.

Smith v. American Exp. Co. 108 Mich. 578, 66 N. W. 479.

It is also the law of Michigan that other common carriers may by contract limit their liability.

Michigan C. R. Co. v. Hale, 6 Mich. 243.

Mr. Rush Taggart also argued the cause for plaintiff in error.

Mr. Ralph B. Wilkinson argued the cause and filed a brief for defendant in error:

The Michigan statute is not invalid under the commerce clause.

Pennsylvania R. Co. v. Hughes, 191 U. S. 491, 48 L. ed. 273, 24 Sup. Ct. Rep. 132; *Jones, Teleg. & Teleph. Cos.* § 432; *Wharton, Confl. L.* 3d ed. § 471f; *Joyce, Electric Law*, 2d ed. § 123; *Hart v. Chicago & N. W. R. Co.* 69 Iowa, 485, 29 N. W. 597; *Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44.

The right of contract is not absolute, but may be subject to restraints demanded by the safety and welfare of the state.

Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

Intercourse between the states by the telegraph is interstate commerce. *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 464, 26 L. ed. 1067, 1068; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 356, 30 L. ed. 1187, 1188, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126. So considering, one division of the supreme court of Michigan was of the opinion that the statute of the state in regard to telegraph messages, if not limited to those which were delivered within the state, would be unconstitutional. In arriving at that conclusion it was considered whether the common law of the state prohibited the stipulation against liability for negligence, and it was asked, if it did not, "can a statute of a state deny to one engaged in interstate commerce the right which he theretofore possessed of making a contract limiting his liability?" *The [414 first question was answered in the negative, on the authority of the *Western U. Teleg. Co. v. Carew*, 15 Mich. 525, and subsequent cases. The second question was also answered in the negative, as we have seen. It was, in effect, said that if the first question could be answered in the affirmative, the case would be determined by the local law, and there would be no power of revision in this court, citing *Delmas v. Merchants' Mut. Ins. Co.* 14 Wall. 661, 20 L. ed. 757, and *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132. This presents the seeming paradox that a prohibition against a limitation of liability, if prescribed by the common law, would be valid, and that a like prohibition prescribed by a statute would not be. It is not clear whether it is meant to be said that in the first instance there would be, and in the second instance there would not be, a proper limitation of the liberty of contract and a valid interference with interstate commerce.

The other division of the court, on the other hand, expressed the view that "the legislature intended its action to be co-extensive with its authority to act, and that the statute should be given the broadest possible application," and held to cover state and interstate messages, and "to forbid a limitation of liability" for negligence, and "to make void the stipulation contained in the contract." The power of the legislature to pass it was asserted, and that it did not burden interstate commerce. "The contract," it was said, "was made in the state, is single, involves in its performance service of defendant within and without this state for a single charge." The service was not performed, and for the breach of the com-

mon-law and contract duty the milling company has brought suit, it was said, and that the telegraph company seeks to avoid liability by the stipulation on the back of the message. To this defense it was answered:

"By the law of the state, the stipulation is of no force or effect. The court so declared. It is contended here *that in so doing the court was in error. It will be well to have in mind the effect of the statute as it was applied by the trial court. Undoubtedly, it was the application of a local law to the contract. But the local law does not attempt to state, measure, or define any duty of defendant, or to establish, define, or fix the consequences of its miscarriage. The liability of defendant is established without reference to the statute. It is when it asks to be discharged therefrom, by giving effect to the stipulation, that the local law becomes, if at all, effective. These considerations answer those objections which are based upon the notion that the local law has been given extra-territorial effect, and they require, also, that this case and *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126, shall be distinguished."

Western U. Teleg. Co. v. Pendleton leaves nothing to be said upon the principles relating to interstate telegraphic messages and the limitations upon the states of power to regulate them. A statute of Indiana was adjudged invalid which prescribed that despatches should be transmitted in the order of their delivery, whether intended for delivery within or without the state, "under penalty, in case of failure to transmit, or if postponed out of such order, of \$100, to be recovered by the person whose despatch is neglected or postponed." The statute was construed by the supreme court of the state to apply to despatches not delivered in the state, even against the practice of the companies, authorized by the laws of another state. The message was delivered to the telegraph company in Indiana, addressed to the care of a person in Ottumwa, Iowa, who lived over a mile from the telegraph station, and not within the delivery district. These facts were set up in the answer, and that, in accordance with the custom and usage of the office, and in order to facilitate the delivery of the message, a copy of the telegram was 416] *promptly placed in the postoffice, properly addressed, and delivered the following morning. And it was averred that this was in accordance with the laws of Iowa. A demurrer was sustained to the answer, and judgment entered for the plaintiff for the sum of \$100. It 54 L. ed.

was affirmed by the supreme court; it was reversed by this court on the ground that the statute was a regulation of interstate commerce. Of the correctness of that conclusion there cannot be any controversy, but there is a manifest difference between the statute of Indiana and the statute of Michigan and their purposes and effects. The former imposed affirmative duties, and regulated the performance of the business of the telegraph company. It besides ignored the requirements or regulations of another state, made its laws paramount to the laws of another state, gave an action for damages against the permission of such laws for acts done within its jurisdiction. Such a statute was plainly a regulation of interstate commerce, and exhibited in a conspicuous degree the evils of such interference by a state, and the necessity of one uniform plan of regulation. The statute of Michigan has no such objectionable qualities. It imposes no additional duty. It gives sanction only to an inherent duty. It declares that in the performance of a service public in its nature, that it is a policy of the state that there shall be no contract against negligence. The prohibition of the statute, therefore, entails no burden. It permits no release from that duty in the public service which men in their intercourse must observe,—the duty of observing the degree of care and vigilance which the circumstances justly demand, to avoid injury to another.

We have seen that one division of the supreme court of the state was of the view that if the prohibition rested on the common law, its validity could not be questioned. We cannot concede such effect to the common law and deny it to a statute. Both are rules of conduct proceeding *from [417 the supreme power of the state. That one is unwritten and the other written can make no difference in their validity or effect. The common law did not become a part of the laws of the states of its own vigor. It has been adopted by constitutional provision, by statute or decision, and, we may say in passing, is not the same in all particulars in all the states. But, however adopted, it expresses the policy of the state for the time being only, and is subject to change by the power that adopted it. How, then, can it have an efficacy that the statute changing it does not possess?

It is to the laws, whether part of the common law or found in the statutes of the state, that we look for the validity and extent of a contract between persons. They constitute its obligation. How far this principle is limited by the commerce clause of the Constitution of the United States

may be illustrated by several cases cognate to the one at bar.

In *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289, a statute was considered which prohibited any railway company from limiting its liability as a common carrier. Solan sued the company to recover \$10,000 damages received by him in Iowa from the derailing, by the company's negligence, of a car in which he was traveling under a written contract by which the company agreed to carry him, with cattle, from Rock Valley to Chicago. It was stipulated in the contract that the company should, in no event, be liable to the owner or person in charge of such stock for any injury to his person in any amount exceeding \$500. The company alleged that the stipulation was part of the consideration for the transportation, that it related exclusively to interstate commerce, that it was valid at common law, and that the statute of Iowa was void and unconstitutional, "as being an attempt to regulate and limit contracts relating to interstate commerce." The contentions were rejected. The court said:

418] *"Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of a state, are subject to its law. . . . The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

It was further said:

"The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa,—which is the only matter presented for decision in this case,—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers to use the utmost care and dili-

gence in the transportation of passengers and goods."

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132, may be cited as pertinent. It determined the validity of the common law of Pennsylvania, which prohibited the common carrier from limiting his liability for his own negligence, though the property was shipped from New York to a town in Pennsylvania, under a bill of lading which contained a clause limiting the carrier's liability to a stipulated *value in consideration of [419 the rate paid, the shipper having been offered a bill of lading without such limitation on payment of a higher rate. The court quoted at length from the *Solan* Case, and concluded as follows:

"We can see no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the state courts. The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding."

There is a difference between that case and this,—indeed some contrast. In that case a contract was made in New York which limited the liability of the carrier, the limitation being in accordance with the laws of that state; it was disregarded in Pennsylvania, where the act of negligence occurred, and the law of the latter enforced. In this case the contract limiting liability was made in Michigan, the negligent act occurred in another state, and yet the limitation, it is insisted, is void. In other words, in that case the law of the state was disregarded; in this case it is sought to be enforced. These, however, are but incidental contrasts, in no way affecting the basic principle of the cases, which was that the laws passed upon were exercises of the police power of the states in aid of interstate commerce, and, although incidentally affecting it, did not burden it.

Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934, is a strong example of the same distinctions. A statute of Georgia which required telegraph companies having wires wholly or partly within the state to receive despatches, transmit and deliver them with due diligence, under the penalty of \$100, was sustained as a valid exercise of the power of the state in relation to messages by telegraph *from points outside of and directed [420 to some point within the state. It will be observed that this case in some particulars

exhibits a contrast to *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126, and yet they are entirely reconcilable, having a common principle. In the latter case the law passed on clearly transcended the power of the state, because it directly regulated interstate commerce, as we have already shown. In the *James Case* the power of the state was exercised in aid of commerce. In the latter case prior cases were reviewed, and the principle determining the validity of the respective statutes was declared to be whether they could be "fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states." It was said that a statute of that kind, as it would not "unfavorably affect or embarrass" the telegraph company in the course of its employment, should be held valid "until Congress speaks upon the subject." And it was observed that "it is the duty of a telegraph company which receives a message for transmission, directed to an individual at one of its stations, to deliver that message to the person to whom it is addressed with reasonable diligence and in good faith. That is a part of its contract, implied by taking the message and receiving payment therefor." And there can be liability to the sender of the message as well as to him who is to receive it. The telegraph company in the case at bar surely owed the obligation to the milling company to not only transmit the message, but to deliver it. For the failure of the latter it sought to limit its responsibility,—to make the measure of its default not the full and natural consequence of the breach of its obligation, but the mere price of the service, relieving itself, to some extent, even from the performance of its duty; a duty, we may say, if performed or omitted, may have consequence beyond the damage in the particular instance. This the statute of the state, ex-421] pressing the policy of the state, *declares shall not be. For the reasons stated we think that this may be done, and that it is not an illegal interference with interstate commerce.

Another contention is made. It is urged that the statute as construed violates the 14th Amendment of the Constitution of the United States, in that it abridges the privileges and immunities between citizens of the United States, and deprives the telegraph company and the persons with whom it does business of their liberty and property without due process of law. The basis of this contention is the liberty of the telegraph company to make contracts. It is rather late in the day to make that contention. 54 L. ed.

The regulation of public-service corporations is too well established, both as to power and the extent of the power, to call for any discussion. It is true such power is not unlimited, nor is the police power of the state, but the cases we have cited demonstrate that the statute of Michigan is not in excess of such powers.

Lastly it is said that the statute deprives the telegraph company and the persons with whom it does business of the equal protection of the laws. This is sought to be sustained on the ground that express companies and other common carriers may by contract limit their liability. The argument to sustain the contention is in effect that which we have considered. If an unjust discrimination is intended to be asserted, *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281, is an answer.

Judgment affirmed.

Mr. Justice Holmes dissents.

*MOORE PRINTING TYPEWRITER [422
Plaintiff, a Body Corporate, Russell
W. Montague, and George P. Montague,
Appts.,

v.

NATIONAL SAVINGS & TRUST COMP-
ANY and American Planograph Company,
Bodies Corporate, Ernest M. Pease, Henry
J. Gensler, et al.

(See S. C. Reporter's ed. 422-431.)

Pleadings — judgment on — necessity for defendants to file original or cross bill.

1. The trustee in a voting trust agreement, charged with the duty of holding and voting the corporate stock deposited with it, and with collecting and paying over the dividends to the holders of the trust certificates, which files a bill seeking, in accordance with the trust agreement, to be permitted to resign, and to be discharged from all liability upon transferring the stock to the new trustee chosen by the holders of the trust certificates, is entitled to judgment on the pleadings which grants the relief sought unless those defendants not consenting, but asserting in their answers claims to the stock antagonistic to their codefendants, the holders of the trust certificates, shall comply with the terms on which the court will permit the filing of an original bill or cross bill.

[For other cases, see Pleading, 81-85, 821-829, in Digest Sup. Ct. 1908.]

Pleading — cross bill — leave of court — security.

2. Permission to file a cross bill which seeks to suspend the operation of a decree for the discharge of the trustee in a voting trust agreement, and the transfer of

the stock to the new trustee, is properly refused defendants who assert claims to the stock antagonistic to the holders of the trust certificates, unless they apply for an injunction and give security,—especially where there are some shares of stock held by the trustee to which such defendants assert no claim.

[For other cases, see Pleading, 830-833, in Digest Sup. Ct. 1908.]

[No. 21.]

Argued October 27, 28, 1910. Decided November 28, 1910.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District for the discharge of the trustee in a voting trust agreement, and the transfer of the stock to the new trustee. Affirmed.

See same case below, 31 App. D. C. 452. The facts are stated in the opinion.

Mr. Charles A. Keigwin argued the cause, and, with Mr. George P. Montague, filed a brief for appellants.

Mr. J. J. Darlington argued the cause and filed a brief for appellee the National Savings & Trust Company.

Mr. John J. Crawford argued the cause and filed a brief for appellees holders of trustee's certificates.

Mr. J. K. M. Norton filed a brief for appellees Richard C. Thompson and J. Keith M. Norton.

Mr. Justice McKenna delivered the opinion of the court:

This is a bill in equity, brought by the [423] National Savings & Trust Company against the appellants and certain others, to obtain a decree to permit it to resign a trust created by the deposit with it of 35,005 shares of the stock of the American Planograph Company. The stock was deposited under an agreement signed by George R. Cornwall, Marion Bryan, Charles T. Moore, and others, all of whom were made parties to the bill. The agreement contained the following provision:

"And it is hereby mutually agreed by and between all the parties hereto that on the receipt of the respective certificates of the said 35,005 shares of stock by the said trustee from the parties of the first part, the said trustee shall cause to be delivered to each of the parties of the first part who contribute toward said 35,005 shares an assignable trust certificate, which shall recite the number of shares so deposited by him, and state that the holder thereof is entitled to an equitable interest in

the said 35,005 deposited shares equivalent to the number of shares so conveyed to and deposited with said trustee by each of said depositors respectively, and that the holder of said trust certificate or certificates has no right to vote on any such shares, but shall be entitled to receive his *pro rata* share of any dividends paid on the deposited stock, and that on and after March 31, 1911, each holder of such trust certificate will, on surrender thereof to the said trustee, be entitled to a certificate of an equal number of shares of stock of the American Planograph Company, and the trustee shall forthwith cause to be transferred on the books of the American Planograph Company the stock so held in trust, and deliver the certificates thereof to each of the holders of the said trust certificates."

The agreement transferred the legal title to the trust company, and authorized it to vote the stock in the meeting of the planograph company, "for such measures and such persons as the owners of a majority in amount of said trust certificates shall direct." Also to collect dividends and [424] pay them to the stockholders of the trust certificates. The agreement also contained the following provision: "It is further agreed that in case the said trustee shall decline to accept or serve, or upon the resignation of said trustee during the term for which it is or may be appointed or elected, then the holders of a majority in amount of the trust certificates shall elect a trustee to fill the vacancy or vacancies." It was further provided that the agreement should continue in force until April 26, 1911, but that the trust might be dissolved before that time by a vote of three fourths of the depositors.

It is alleged in the bill that the National Savings & Trust Company notified the depositors of its desire to resign its position as trustee, and that the depositors, by an instrument in writing, duly nominated and appointed the New York Trust Company of the city of New York and state of New York to be trustee in its place instead. And further, that the 22d of May, 1906, it received a written notice from the appellants, purporting to be issued by themselves and others, that the shares have been transferred to it "by breach of trust on the part of the holders of certain of the shares," who were trustees of the appellants, and that suit had been commenced by the beneficiaries of the trust in the state of West Virginia against the planograph company to determine, among other things, the ownership of such shares.

It is also alleged that two suits had been brought and were pending against the Savings & Trust Company and others in the

supreme court of the district, respectively numbered 26,731 and 26,847, in which restraining orders were issued and were enforced, restraining it and the other defendants, until the court's further order, from removing or attempt to remove from the District of Columbia, and from selling, encumbering, or in any manner disposing of any of the shares of the stock of the planograph company in its possession or 425] custody. And that by *reason thereof, and of the written notice served upon it by the Moore company, it is "advised that it may not transfer the said shares of stock in its possession to the said New York Trust Company as its successor in the said trust, without the risk of liability and loss, except through the aid of this court, and that it is entitled in its said capacity as a trustee to apply to this court for its instructions and its protection in the premises."

The prayer of the bill was that the Savings & Trust Company "may be permitted to resign and retire from its said trust, and to surrender the shares of stock now held by it to a new trustee; and that the complainant may be instructed by the courts as to the manner and form of transfer by it to its successor in the said trust."

Costs were also prayed and general relief. Copies of the various instruments referred to were attached to the bill.

The answer of the Moore company neither admitted nor denied the averments of the bill, except that it admitted giving notice to the Savings & Trust Company as alleged by it and the pendency of the suit in West Virginia, as alleged. Also, that the shares of stock stand in the name of the Savings & Trust Company on the books of the planograph company.

The answer alleges new matter to the following effect: In January, 1900, Moore, Bryan, and Cornwall, three of the appellants, entered into a conspiracy for the purpose of wrecking the Moore company and a company called in the answer the Liomatrix, the stock of which is owned by the Moore company, and acquiring for themselves the assets of the Moore company, including certain inventions of Moore. To this end they procured the organization of the planograph company, the purposes of which were of the same general character with those of the Moore company.

426] *Afterwards, by the use of the new incorporation and by a course of fraudulent representations and conduct, which included the piracy of the most valuable machine of the Moore company, the officers of the latter company were induced to believe that the planograph company possessed some inventions of great value, and that the Moore company would be benefited by a
54 L. ed.

consolidation of the two companies. Such consolidation was effected in 1901, upon terms and in a manner which gave complete control of the consolidated companies to the confederates, and that they have used such control for their own profit, and have by various fraudulent means possessed themselves of a very large part of the 35,005 shares of that company's stock, deposited with the Savings & Trust Company. A detail of the transactions by which this was effected is not necessary to recite.

The answer concludes as follows:

"This defendant admits, on the allegations set forth in the bill of complaint, that the plaintiff is entitled to resign and be relieved of its trust, but it alleges, on information and belief, that the New York Trust Company has not consented to accept said trust; and, further, that no other responsible trust company will be likely to accept the same if it has full knowledge of the facts, and in view of all the facts and circumstances hereinabove set forth, including the restraining orders granted by this court in equity suits Nos. 26,731 and 26,847, referred to in the bill of complaint, which orders still remain in force, and prohibit the removal or transfer of the said 35,005 shares of planograph stock, defendant submits that the plaintiff can be granted relief and the rights of all parties protected only by the appointment of a receiver for the said 35,005 shares of planograph stock affected by said trust, who shall hold said stock subject to the orders of this court until the rights of the various claimants thereto have been settled and determined."

*Certain exhibits were attached to [427 the answer, by which it is alleged its allegations are sustained.

The individual appellants, by a joint answer, adopted that of the Moore company.

All of the other defendants in the suit and appellees here answered, and gave consent to an order permitting the Savings & Trust Company to resign its trust and surrender the shares of stock held by it to the New York Trust Company. Two of those so consenting are the complainants in the suits Nos. 26,731 and 26,847, referred to above.

The cause was set down for hearing on bill and answers, and on the 13th of December, 1907, it coming on to be heard, a decree was entered, authorizing and directing the Savings & Trust Company to deliver to the New York Trust Company all of the certificates of stock in the American Planograph Company which it held by virtue of the agreement alleged in its bill, "and to make such indorsement upon such certificates as may be required to enable

its said successor to take complete title to such certificates." And it was ordered that upon compliance with the decree it should be discharged from all liability to the defendants in the suit in respect of such certificates and its action as trustee under such agreement.

The decree concluded as follows:

"Provided, however, that this decree and order shall be void if, on or before the 23d of December, 1907, the defendants the Moore Printing Typewriter Company, Russell W. Montague, and George P. Montague, or one or more of said last-named defendants, by way of a cross bill in this case or by original bill in this court, as they may be advised, shall apply for and obtain a restraining order or injunction with undertaking and security as required by equity rule 42 of this court, prohibiting such transfer of said certificates."

The decree was made by consent of all [428] parties except "by the Moore company and the individual appellants.

On December 13 the Moore company offered a cross bill, which repeated the charges of fraud contained in its answer, and made other charges of misconduct. It prayed that the Savings & Trust Company be required to hold the stock subject to such order or orders as should thereafter be made, and that it be a trustee of such stock for the purpose of the cause, and that, in the event that it be permitted to resign, the person substituted for it be deemed a trustee of the stock, and hold it subject to the orders of the court. The other relief prayed is not necessary to mention.

Leave to file the cross bill was granted. Nothing else was done under it, but the appellants took an appeal from the decree to the court of appeals, by which court the decree was affirmed.

The contentions of the parties turn upon the question whether or not the bill is one of interpleader. Appellants contend that it is one in the nature of interpleader, being in some respects identical with it, but involving "another principle of equity, namely, a trust; and it has therefore a greater scope, and is free from many of the technical restrictions of strict interpleader, particularly as applied to bailors and bailees, principal and agent," etc.

The court of appeals considered the bill as one of strict interpleader, and rejected the contention of appellants (they were appellants also in the court of appeals), because the claim "asserted was not derived from the contractual relation existing between plaintiff [Savings & Trust Company]

and the depositors of the stock." In other words, that the claim of appellants and the claim of the depositors were not derived from a common source.

The court of appeals quoted from *Richardson v. Belt*, 13 App. D. C. 200, as follows:

"An essential foundation of the [429] equity of interpleader is that the party seeking the relief must not be under an independent or special liability to one of the claimants. *Adams*, Eq. 204; 3 Pom. Eq. Jur. § 1327. Where there is an independent liability of the party seeking the relief to one of the several defendants, arising out of the relations subsisting between them, or upon a special contract creating, for example, the relation of bailor and bailee, landlord and tenant, or creditor and debtor, there can be no interpleader, unless it be made to appear that others have acquired a claim of title or interest derived under the said liability." [31 App. D. C. 458.]

But it is not necessary to consider the essentials of a bill of interpleader or one in the nature of interpleader. It is very certain that the bill in the pending case was not intended to be either. The prayer of the bill is for permission to resign the trust created by the agreement between the Savings & Trust Company and the depositors of the stock,—a right which the agreement expressly gives it. But appellants say:

"In the present case, either the complainant, the trust company, had a right to compel the adverse claimants to come into court and litigate their claims, or it had not. If it had not, the bill should have been dismissed. If, on the other hand, it had such right, as it clearly had, then the stock in controversy should have been awarded to the parties who established their ownership to it; that is, to the appellants; who, it is submitted, fully established their claims, while the defendant-appellees practically made default, which, in a case of this nature, amounts to a confession that they had no right or title as against appellants to the thing in controversy."

The assumptions of these statements are not justified. The complainant did not bring the appellants into court to interplead their claim to the stock with the depositors of it. The complainant sought only by its bill to terminate "its relation to the [430] depositors of the stock, and transfer the trust it had undertaken to someone else. There were good reasons for doing so. It had taken the custody of and assumed duties in re-

gard to property the title to which had come into dispute. Every act that was done in discharge of those duties would be under the shadow of illegality and the possibility of litigation. And, besides, something had been done under the trust, the propriety of which might be questioned by the new claimants to the property. Whether justifiably was submitted to the court, and likewise the responsibility of the new trustee. It must be remembered that after the Savings & Trust Company received notice of the new claimants of the stock, it had to proceed, if it proceeded at all, in the possibility of such claim being declared the legal one. It sought, therefore, to relieve itself of the trust and receive a complete discharge from past and future responsibility. The appellants sought to make it a trustee for them during, it may be, a protracted litigation. It was something more, as we have seen, than a mere holder of the stock. It had active duties to perform. We see no error, therefore, in the action of the court on the bill and answers.

But it is said that the trial court erred in refusing to receive the cross bill except upon the terms prescribed in the decree, which were, as we have seen, that they apply for an injunction and give a bond, as provided by equity rule 42 of the court. In the motion for permission to file the cross bill, orders were asked that would have suspended the operation of the decree and the transfer of the stock certificates. And it will further be observed that the stock was not to be transferred by the decree to those whose title appellants were seeking to divest, but to a responsible trust company, and that there were shares of stock held by the trust company in which others had an interest which, it is not contended, is subject to a trust in favor of appellants. 431] The purpose of the cross bill was therefore to prevent the use of property under a claim of title to it which would take time to determine, and it was not inequitable in the court to require security of the appellants,—the security which was required of other litigants who sought the same kind of relief.

Appellants, however, contend that the requirement was inequitable, because the amount of the bond would have been large and beyond their ability to give. But we may not assume that the court's action would have been in excess of what the circumstance would have justified. The appellants did not invoke further action, but took an appeal, even before the expiration of the time which they had been given to comply with the provision of the decree.

Decree affirmed.

ARKANSAS SOUTHERN RAILWAY COMPANY and F. L. Shaw, Sheriff and Tax Collector, Pliffs. in Err.,

v.

LOUISIANA & ARKANSAS RAILWAY COMPANY.

(See S. C. Reporter's ed. 431-438.)

Error to state court — decision of Federal question — impairing contract obligations.

1. A decree of a state court adverse to the contention that, if the state Constitution confers on one railway company an exemption from a special tax granted in aid of another railway company, it impairs contract obligations, is reviewable in the Federal Supreme Court, although the state court rested its decision in part upon the ground that the latter railway company had not acquired all of its contract rights before the adoption of the Constitution.

[For other cases, see Appeal and Error, 1376-1392, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — construction of state Constitution.

2. The construction given by a state court to the immunity of railway companies from taxation, granted by the state Constitution, as extending to a special tax in aid of another railway company, is conclusive on the Federal Supreme Court in determining, on

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On error to state courts in cases presenting questions of impairment of contract obligations—see note to *Osborne v. Clark*, 51 L. ed. U. S. 619.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L.R.A. 571.

As to what laws are void as impairing obligation of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L.R.A. 405; *Fletcher v. Peek*, 3 L. ed. U. S. 162; *McCanna v. Citizens' Trust & Surety Co.* 24 C. C. A. 20; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

On corporate taxation as affected by the contract clause in the Federal Constitution—see note to *Adams v. Yazoo & M. Valley R. Co.* 60 L.R.A. 33.

writ of error to the state court, whether such constitutional provision impairs contract obligations.

[For other cases, see Appeal and Error, 2124-2157, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — taxation.

3. The obligation of a valid municipal grant of a special tax of 5 mills in aid of a specified railway company, effective against all the taxable property in the parish, is not unconstitutionally impaired by the subsequent adoption of a new state Constitution under which any property in the parish passing into the possession of any railroad thereafter constructed becomes exempt from the tax.

[For other cases, see Constitutional Law, 1351-1378, in Digest Sup. Ct. 1908.]

[No. 38.]

Argued November 4, 1910. Decided November 28, 1910.

IN ERROR to the Supreme Court of Louisiana to review a decree which, reversing a decree of the District Court in and for the Parish of Winn, in that state, enjoined the collection from one railway company of a tax granted in aid of another railway company. Affirmed.

See same case below, 121 La. 997, 46 So. 994.

The facts are stated in the opinion.

Mr. A. A. Gunby argued the cause, and, with Mr. Allan Sholars, filed a brief for plaintiffs in error.

Mr. Henry Moore, Jr., argued the cause, and, with Messrs. H. H. White, Henry Moore, and Samuel Herrick, filed a brief for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is a writ of error to reverse a decision of the supreme court of Louisiana granting an injunction to the plaintiff, the Louisiana & Arkansas Railway Company, the defendant in error, against the collection 436] from it of *a special tax in favor of the Arkansas Southern Railway Company, the plaintiff in error. 121 La. 997, 46 So. 994. The agreed facts are these: By art. 230 of the state Constitution of 1898, any railroad thereafter constructed before January 1, 1904, was to be exempt from taxation for ten years from completion, upon certain conditions. The plaintiff built its road through the parish of Winn and gained the right to the exemption. The defendant, plaintiff in error, claims its rights under a vote of the same parish on February 1, 1898, granting a tax of 5 mills to a predecessor to whose rights the defendant has succeeded. This vote was valid, and effective

against all taxable property in the parish. *James v. Arkansas Southern R. Co.* 110 La. 145, 34 So. 337. Act 35, § 6, 1886. Const. 1879, art 242. By its terms the grant was for ten years from the completion of the road, the police jury adding a condition that the railroad should be completed into Winnfield within three years from the date of the vote. Afterwards the police jury extended the time to May 1, 1901, on or before which date, and before the acquisition of its right of way and ground by the plaintiff, the road was finished. It was accepted by the police jury and taxes have been levied and paid in accordance with the vote, beginning with the year 1901. The defendant was proceeding to levy on the property of the plaintiff in the parish, and says that if the Constitution of 1898 is construed to confer an exemption from this tax upon the plaintiff, it impairs the obligation of contracts, contrary to art. 1, § 10, of the Constitution of the United States.

The plaintiff says that there is no constitutional question before this court because the supreme court of Louisiana put its decision partly upon the ground that the defendant had not acquired all of its contract rights before the adoption of the Constitution of 1898. Of course, this court must satisfy itself upon that point, and and therefore has jurisdiction. *Sullivan v. Texas*, 207 U. S. 416, 423, 52 L. ed. 274, 277, 28 Sup. Ct. Rep. 215. *On the [437 other hand, the defendant asks us to review the construction given to the state Constitution as extending the immunity granted by the above-mentioned art. 230 to special taxes like this. Upon that point, equally, of course, we follow the state court. *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, 508, 46 L. ed. 298, 302, 22 Sup. Ct. Rep. 95; *Missouri v. Dockery*, 191 U. S. 165, 171, 48 L. ed. 133, 134, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53. Leaving these preliminaries behind, we come to the point of the case.

We shall not consider whether the vote is to be regarded as having been simply an offer at the time of its passage, in consideration of acts to be done thereafter, and as having become a contract only when the road was finished, that is to say, after the Constitution of 1898 went into effect. See *Wadsworth v. Eau Claire County*, 102 U. S. 534, 538, 539, 26 L. ed. 221, 223, 224. We shall assume, without deciding, that it became binding at once, by statutory authority, after the analogy of a covenant (see *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379, 386, 48 L. ed. 229, 231, 24 Sup. Ct. Rep. 107), although liable to be defeated by the nonperformance of the condition attached. We assume also that the condition was

satisfied and the right to the tax earned, and that when earned it had the same validity and force as if it had been gained before the Constitution was adopted. It appears further from what we have stated that when the right to the tax accrued, the land now in the hands of the plaintiff's road was liable to taxation. But these facts and assumptions are not enough to make out the defendant's case.

No doubt a state might limit its control over the power of a municipal body to tax by authorizing it to make contracts on the faith of its existing powers (*Wolff v. New Orleans*, 103 U. S. 358, 26 L. ed. 395; *Louisiana ex rel. Hubert v. New Orleans*, 215 U. S. 170, 54 L. ed. 144, 30 Sup. Ct. Rep. 40), although, unless it did limit itself with a certain distinctness of implication, a subordinate body would contract subject, not paramount, to the power of the state (*Manigault v. Springs*, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127; 438] *Knoxville Water *Co. v. Knoxville*, 189 U. S. 434, 438, 47 L. ed. 887, 891, 23 Sup. Ct. Rep. 531). But there is no such limitation by the state, and no contract by the parish that implies it. An authority given by the state to promise and levy a tax in future years on the taxable property in the parish does not purport to limit the power of the state to say what property shall be taxable when the time comes,—at least, by general regulations not aimed at aiding an evasion of the promise it has allowed. A vote by a parish to pay 5 mills on all the taxable property within its boundaries refers on its face to a determination by the sovereign as to what that property shall be. See *Arkansas Southern R. Co. v. Wilson*, 118 La. 395, 401, 42 So. 976. The notion that the statute and the vote, separately or together, precluded the state from erecting a jail that should be free from such claims, is untenable on its face. The same reasoning allows the state to go farther, as it has done. We agree with the Supreme Court that it did not transgress the Constitution of the United States.

Decree affirmed.

JOHN B. FISHER, James M. Fisher, William G. Fisher, et al., Plffs. in Err.,
v.

MAYOR AND COUNCIL OF THE CITY
OF NEW ORLEANS.

(See S. C. Reporter's ed. 438-442.)

Error to state court — decision of Federal question — impairing contract obligations.

The contention that an attempt in the State Constitution to limit taxation impairs
54 L. ed.

the obligation of contracts with a municipal school board does not present a case for a writ of error from the Federal Supreme Court to review a decree of a state court which refused mandamus to compel the levy of a tax to pay claims and judgments based upon such contracts, which rests mainly on the grounds that the relators were guilty of laches, and that the statute relied upon as authorizing such contracts did not empower the school board to make contracts in such wise as to bind the municipality to levy the tax, neither the Constitution nor any subsequent legislation having been invoked or enforced by the court. [For other cases, see *Appeal and Error*, 1376-1392, in *Digest Sup. Ct.* 1908.]

[No. 43.]

Argued November 9, 10, 1910. Decided November 28, 1910.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which affirmed a judgment of the Civil District Court of the Parish of Orleans, denying mandamus to compel the levy of a special tax to pay claims and judgments based on contracts made with the New Orleans school board. Dismissed for want of jurisdiction.

See same case below, 121 La. 762, 46 So. 798.

The facts are stated in the opinion.

Mr. Charles Loque argued the cause and filed a brief for plaintiffs in error.

Mr. St. Clair Adams argued the cause, and, with Mr. I. D. Moore, filed a brief for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is a petition for mandamus to direct the levy of a special tax of 1½ mills to pay claims and judgments against the New Orleans school board, based on contracts made by the board with teachers and others during the years 1874, 1875, and 1876, under the Louisiana act 36 of 1873. The ground of the petition is that, under the act, the contracts were authorized and were payable out of a special tax, unlimited in amount; that an attempt to limit taxation in arti-

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

ele 232 of the state Constitution of 1898 is void as to them, because it impairs their obligation, contrary to article 1, § 10, of the Constitution of the United States (*Louisiana ex rel. Hubert v. New Orleans*, 215 U. S. 170, 175-178, ante, 144, 147, 148, 30 Sup. Ct. Rep. 40); and that a sufficient amount has not been levied for the years mentioned. The supreme court denied the mandamus (121 La. 762, 46 So. 798), and this writ of error was brought.

The plaintiffs in error are met at the outset by a denial of the jurisdiction of this court. The main grounds upon which the supreme court of the state decided the case were that the relators had been guilty of laches, and that the act of 1873 did not authorize contracts to be made by the school board in such wise as to bind the city to levy the tax. The court did not purport to rely upon the Constitution of 1898, or any subsequent legislation, for the result. It did not purport to enforce any 440] later *law; it simply denied the existence of the right alleged. Therefore, on the face of the decision, there is no warrant for coming here. But it is said that this court is not limited to the mere language of the opinion, but will consider the substance and effect of the judgment (*McCullough v. Virginia*, 172 U. S. 102, 116, 117, 43 L. ed. 382, 387, 388, 19 Sup. Ct. Rep. 134; *Louisiana ex rel. Hubert v. New Orleans*, 215 U. S. 170, 175, ante, 144, 147, 30 Sup. Ct. Rep. 40), and that this court will decide for itself, with due respect for the state decision, whether a contract had been made and what it was (*Sullivan v. Texas*, 207 U. S. 416, 423, 52 L. ed. 274, 277, 28 Sup. Ct. Rep. 215). Both of these statements are true, of course, and are relevant when the judgment really gives effect to a later act of the state that would impair the obligation of the contract if the contract were as alleged. But the mere allegation of a later constitution or statute impairing the obligation of the contract gives no jurisdiction to this court to see that the contract is enforced according to its tenor, irrespective of the supposed interference of the later law. The jurisdiction extends to doing away with such an interference, but not to remedying an erroneous construction of contracts, or to seeing that they are carried out according to the interpretation of this court, apart from it. *Bacon v. Texas*, 163 U. S. 207, 218, 219, 41 L. ed. 132, 136, 137, 16 Sup. Ct. Rep. 1023; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 350, 351, 352, 46 L. ed. 936, 943, 944, 22 Sup. Ct. Rep. 691; *Weber v. Rogan*, 188 U. S. 10, 14, 47 L. ed. 363, 365, 23 Sup. Ct. Rep. 263; *Central Land Co. v. Laidley*, 159 U. S. 103, 110, 111, 40 L. ed.

91, 94, 16 Sup. Ct. Rep. 80. Therefore the present writ of error must be dismissed unless there is more in the case than the opinion has disclosed.

We discover nothing. If it was true that there was no contract binding the city to levy an extra tax, or that the parties demanding it had lost any rights they might have had by laches, there was no occasion to invoke or enforce any law later than the act of 1873. Obviously, however much we consider the substance of the judgment, it discloses no question of rights under the Constitution any more than does the opinion of the state court. Unless *the rea- [441 sons put forward for the decision were but a cover for an unavowed enforcement of the Constitution of 1898, which, of course, there is no ground to suggest, the jurisdiction of this court fails. As a work of supererogation, we will indicate in a summary way some of the reasons for denying the power of the board of school directors to bind the city to levy the tax upon the facts, simply to show how remote from matter of Federal jurisdiction the decision was.

By § 2 of the act of 1873, the board of directors are to adopt an estimate of debt and expenditures for the current year, and thereafter, in October of each year, to adopt and communicate to the city council an estimate for the year beginning on the next January 1. By § 4 "the council, after receiving the estimate . . . shall proceed to make provision for the support of public schools. . . . For the purpose of such support it shall levy a tax of not less than $\frac{1}{4}$ of 1 per cent," etc. Then, by § 10, "the board of directors of the public schools shall not be empowered to make contracts or debts for the year 1873, or any subsequent year, greater than the amount of the revenue provided for according to this act, or other school laws existing, it being the intent hereof that parties contracting with said board shall take heed that due revenues shall have been provided to satisfy the claims, otherwise they shall lose and forfeit the same." It will be observed that the city council is not required by § 4 to make provision for the amount of the estimate received by it, but for the support of the public schools; and that the minimum limit set to its action implies that beyond that point it has power of control. The subsequent provisions of § 10 hardly are reconcilable with any other view.

In this state of the law, the city council levied the minimum tax of $\frac{1}{4}$ of 1 per cent, and no more, for the years 1874, 1875, and 1876. But the levy was less *than the [442 estimates of the school board, and the contention was that the city council was bound to levy for the full amount of the latter, and

that the plaintiffs in error are entitled to demand a levy for the difference between the two now. The contrary decision was natural enough on the face of the act of 1873, and is corroborated by the consideration of other statutes before and after 1873, to which we think it unnecessary to refer. It also is said that a part of the tax levied was not collected. But that was not a ground stated in the petition, and is not a matter with which we have any concern. We do not go into this matter of laches beyond noting that this petition was not filed until 1907. Whether the long delay was sufficiently explained or not was for the state court to decide.

Writ of error dismissed.

W. S. HARLAN, S. E. Huggins, and C. C. Hilton, Appts.,
v.

THOMAS H. MCGOURIN, Marshal, Appellee. (No.-378.)

ROBERT GALLAGHER et al., Appts.,
v.

THOMAS H. MCGOURIN, Marshal, Appellee. (No. 379.)

(See S. C. Reporter's ed. 442-452.)

Habeas corpus — substitute for writ of error.

1. A writ of habeas corpus cannot be made the basis of a review of a judgment of a court of competent jurisdiction where proceedings were had under a constitutional statute giving the court authority to examine into the charges and to convict or acquit the accused, when the proceedings show no attempt to exert the jurisdiction of the court in excess of its authority.

[For other cases, see Habeas Corpus, 108-118, in Digest Sup. Ct. 1908.]

Habeas corpus — scope of review — evidence.

2. Upon habeas corpus to inquire into a detention under a conviction in a Federal circuit court, affirmed by the proper circuit court of appeals, the bill of exceptions cannot be examined with a view to determining whether there was any testimony to support the accusation.

[For other cases, see Habeas Corpus, 173-176, in Digest Sup. Ct. 1908.]

NOTE.—On habeas corpus in the Federal courts—see notes to *Re Reinitz*, 4 L.R.A. 236; *State ex rel. Cochran v. Winters*, 10 L.R.A. 616; *Re Huse*, 25 C. C. A. 4; and *Tinsley v. Anderson*, 43 L. ed. U. S. 91.

As to questions reviewable by habeas corpus—see notes to *State v. Jackson*, 1 L.R.A. 573; *Bion's Appeal*, 11 L.R.A. 694; *Glass v. The Betsey*, 1 L. ed. U. S. 489; *United States v. Hamilton*, 1 L. ed. U. S. 490; *Re Carlil*, 27 L. ed. U. S. 288; *Oteiza y Cortes v. Jacobus*, 34 L. ed. U. S. 464; and *Pearce v. Texas*, 39 L. ed. U. S. 164.

54 L. ed.

Federal courts — terms.

3. The regular terms of the Federal circuit court for the northern district of Florida, begun respectively, under U. S. Rev. Stat. § 658, U. S. Comp. Stat. 1901, p. 531, at Tallahassee on the first Monday of February, and at Pensacola on the first Monday in March, continue for one year unless finally adjourned in the meantime, notwithstanding the temporary absence of the judge from one term while holding court at the other, since, under § 612, circuit courts may be held at the same time in different districts of the same circuit, and, under § 672, if neither of the circuit judges be present to open and adjourn any regular or special session, either of them may, by written order, directed alternatively to the marshal and the clerk, adjourn the court from time to time, as the case may require, to any time before the next regular term.

[For other cases, see Courts, 307-314, in Digest Sup. Ct. 1908.]

Federal courts — term — adjournment.

4. The Pensacola term of the Federal circuit court for the northern district of Florida was not adjourned for the term while the presiding judge was absent, holding court at Tallahassee, or was out of the state, where there was an attempt, at least, to keep the court open pending the absence of the judge by adjournments from day to day, entered by the clerk upon the minutes, pursuant to a court rule.

[For other cases, see Courts, 307-314, in Digest Sup. Ct. 1908.]

Habeas corpus — scope of review — impaneling grand jury.

5. The objection that the order for the impaneling of the grand jury was made by a judge of a Federal circuit court, who, although within his circuit, was not within the district where the court was located when the trial was had, cannot be raised by habeas corpus.

[For other cases, see Habeas Corpus, 164-169, in Digest Sup. Ct. 1908.]

Habeas corpus — scope of review — indictment.

6. An objection that the indictment was not properly presented by the grand jury, based on testimony that, after the presentation of the original indictment, the grand jury were informed by the district attorney that the indictment needed amendment in some particulars, that this amendment was read over in the presence of the grand jury, and was incorporated into an indictment, which was regularly returned to court, where it was produced with the consent of all the grand jurors, if ever available, cannot be first raised on habeas corpus after conviction.

[For other cases, see Habeas Corpus, 160-163, in Digest Sup. Ct. 1908.]

Habeas corpus — questions reviewable — sentence.

7. The objection that the original sentence, before modification on motion of the government's counsel, exceeded the authority of the court, in that it required service at hard labor, is not available on habeas

corpus, since, at most, only that part of the sentence in excess of the law is void.

[For other cases, see Habeas Corpus, 177-179d, in Digest Sup. Ct. 1908.]

[Nos. 378, 379.]

Argued October 11, 12, 1910. Decided November 28, 1910.

APPEALS from the Circuit Court of the United States for the Northern District of Florida to review a decree refusing relief by habeas corpus to persons convicted of violating the Federal statutes against peonage. Affirmed.

See same case below, 180 Fed. 119.

The facts are stated in the opinion.

Mr. William W. Flournoy argued the causes and filed a brief for appellants:

Fiction of law shall never prevail against the truth of the fact to defeat the ends of justice.

R. v. Atkinson, cited in 16 Am. Dec. 280.

The *dicta* at least of the opinions, if not the opinion, have decided that the bill of exceptions, when made a part of the record, in accordance with the statutes, over the solemn certificate of the trial judge, can be referred to on habeas corpus equally with the pleadings, known as the record proper, in order to establish whether or not there is any evidence to support the accusation.

Clyatt v. United States, 197 U. S. 222, 49 L. ed. 731, 25 Sup. Ct. Rep. 429; Hyde v. Shine, 199 U. S. 86, 50 L. ed. 98, 25 Sup. Ct. Rep. 760; Re Nielsen, 131 U. S. 179, 33 L. ed. 119, 9 Sup. Ct. Rep. 672; Mayes v. State, 3 Heisk. 430.

In *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122, the trial court had directed the district attorney to strike out of the indictment the words "The Comptroller of the Currency and," and Bain was tried, convicted and sentenced. Upon application for writ of habeas corpus, this court, in analyzing the question, said there was no indictment; there was nothing to try; the trial on such an indictment after it was so changed, was not voidable, but void, and that the power of the court to proceed further with the prisoner was as much arrested as if the indictment had been dismissed.

It is equally as violative of the constitutional rights of the appellants to hold that they could be tried upon this indictment without proof of the voting of the grand jury, and without proof of its filing in open court by the grand jury, as it is to hold that a person can be tried twice for the same offense, or that a person can be tried in a jurisdiction foreign to that in which the offense is committed.

Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; *Re Nielsen*, 131 U. S. 176, 183, 33 L. ed. 118, 120, 9 Sup. Ct. Rep. 672; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 216.

Minutes are not conclusive against facts which show proceedings are void.

11 Cyc. Law & Proc. p. 1301.

An order for adjournment cannot be antedated.

11 Cyc. Law & Proc. p. 29; *Stovall v. Emerson*, 20 Mo. App. 322.

The power to adjourn cannot be delegated to the clerk.

State ex rel. Barber v. McBain, 102 Wis. 431, 78 N. W. 603.

The order fixing the term of court must appear of record.

11 Cyc. Law & Proc. p. 729.

In jurisdictions divided into judicial districts in which the term of the court for each county in a district begins on a specific day, the duration of the term is ended by the arrival of the day fixed for the beginning of a term in another county, unless there are statutes authorizing a session of the same court to be held in different counties at the same time. 21 Enc. Pl. & Pr. pp. 631-635.

When there are no facts, no proof, when all the elements of the crime are not proved or proof offered from which a jury would be warranted in finding such fact, then habeas corpus is the proper remedy.

Church, Habeas Corpus, 546; *Hyde v. Shine*, 199 U. S. 86, 50 L. ed. 98, 25 Sup. Ct. Rep. 760; *Clyatt v. United States*, 197 U. S. 222, 49 L. ed. 731, 25 Sup. Ct. Rep. 429; *Staples v. Fairchild*, 3 N. Y. 46; *People ex rel. Tweed v. Liscomb*, supra.

Total defect of proof as to one essential fact will defeat jurisdiction, though if the evidence is conflicting, the judgment is final. In the former, jurisdiction did not attach, while in the latter, it is mere error of judgment.

Staples v. Fairchild, supra.

If habeas corpus lies, then this court, under the act of Congress and precedents, will examine both law and facts, and will not be limited to questions of law only.

May, United States Sup. Ct. Pr. 432; *Re Neagle*, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; *Johnson v. Sayre*, 158 U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773.

If to show jurisdiction the evidence may be examined, why not examine the evidence to show lack of jurisdiction?

Pittsburgh, C. & St. L. R. Co. v. Ramsey, 22 Wall. 322, 22 L. ed. 823.

If the indictment charges no offense, then relief may be had by habeas corpus. Even the plea of guilty would not waive the right if no offense were charged.

United States ex rel. *Hover v. Roman*, 33 Fed. 117.

Or if the indictment should have been quashed on motion or demurrer, the appellant should be discharged by habeas corpus.

Re *Terrell*, 51 Fed. 213.

The statute does not authorize sentence to or at hard labor, and punishment in excess of that allowed by statute renders the sentence utterly void.

Ex parte *Duncan*, 42 Tex. Crim. Rep. 661, 62 S. W. 761; *People ex rel. Tweed v. Liscomb*, supra; *Haines v. Haines*, 35 Mich. 138; *Gardes v. United States*, 30 C. C. A. 596, 58 U. S. App. 219, 87 Fed. 183; Ex parte *Reynolds*, 87 Ala. 138, 6 So. 335; 12 Cyc. Law & Proc. p. 781; Ex parte *Karstendiek*, 93 U. S. 396, 23 L. ed. 889; *Harman v. United States*, 50 Fed. 921; Re *Johnson*, 46 Fed. 477; Ex parte *Geary*, 2 Biss. 485, Fed. Cas. No. 5,293; *Lane v. Com.* 161 Mass. 120, 36 N. E. 755; *Christian v. Com.* 5 Met. 531; *United States v. Pidgeon*, 153 U. S. 62, 38 L. ed. 636, 14 Sup. Ct. Rep. 746.

Assistant Attorney General **Harr** argued the causes and filed briefs for appellee:

The appellants were tried and convicted at a lawful term of the circuit court of the United States for the northern district of Florida.

Florida v. Charlotte Harbor Phosphate Co. 17 C. C. A. 472, 30 U. S. App. 535, 70 Fed. 885; *East Tennessee Iron & Coal Co. v. Wiggin*, 15 C. C. A. 510, 37 U. S. App. 129, 68 Fed. 446; *United States v. Fennell*, 185 U. S. 236, 242, 46 L. ed. 890, 892, 22 Sup. Ct. Rep. 633; *United States v. Pitman*, 147 U. S. 669, 671, 37 L. ed. 324, 325, 13 Sup. Ct. Rep. 425; *Hume v. Bowie*, 148 U. S. 245, 37 L. ed. 438, 13 Sup. Ct. Rep. 582; *McDowell v. United States*, 159 U. S. 596, 600, 40 L. ed. 271, 273, 16 Sup. Ct. Rep. 111; *Bronson v. Schulten*, 104 U. S. 410, 415, 26 L. ed. 797, 799; *Harrison v. German-American F. Ins. Co.* 90 Fed. 762; *Schofield v. Horse Springs Cattle Co.* 65 Fed. 433.

Objections to the organization of the grand jury are never jurisdictional, and for that reason cannot be raised on habeas corpus. They must be taken advantage of by plea in abatement or motion to quash, failing in which the right thereafter to object is held to be waived.

Kaizo v. Henry, 211 U. S. 146, 149, 53 L. ed. 125, 126, 29 Sup. Ct. Rep. 41; *Rodriguez v. United States*, 198 U. S. 156, 165, 49 L. ed. 994, 997, 25 Sup. Ct. Rep. 617; Re *Wood*, 140 U. S. 278, 285, 35 L. ed. 505, 508, 11 Sup. Ct. Rep. 738; Re *Wilson*, 140 U. S. 575, 585, 35 L. ed. 513, 517, 11 Sup. Ct. Rep. 870; *United States v.* 54 L. ed.

Gale, 109 U. S. 65, 69, 27 L. ed. 857, 858, 3 Sup. Ct. Rep. 1; 6 Enc. U. S. Sup. Ct. Rep. p. 576; Re *Eekart*, 166 U. S. 481, 483, 41 L. ed. 1085, 1086, 17 Sup. Ct. Rep. 638; *Carter v. Texas*, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 Sup. Ct. Rep. 687.

Appellants could not, on habeas corpus, contradict the record as to the regularity of their indictment, trial, and conviction.

Re *Mayfield*, 141 U. S. 107, 116, 35 L. ed. 635, 638, 11 Sup. Ct. Rep. 939; Re *Wilson*, 140 U. S. 575, 583, 35 L. ed. 513, 516, 11 Sup. Ct. Rep. 870; Ex parte *Watkins*, 3 Pet. 193, 202-203, 7 L. ed. 650, 653.

The circuit court properly struck out that portion of the sentences requiring them to be served "at hard labor."

Re *Bonner*, 151 U. S. 259, 261, 38 L. ed. 152, 153, 14 Sup. Ct. Rep. 323.

Habeas corpus cannot be availed of as a writ of error.

Toy Toy v. Hopkins, 212 U. S. 542, 548, 53 L. ed. 644, 646, 29 Sup. Ct. Rep. 416.

The trial court, in the cases at bar, had jurisdiction by law of the offenses and of the parties. Its judgments, therefore, are not nullities.

Ex parte *Watkins*, supra; Ex parte *Bigelow*, 113 U. S. 328, 331, 28 L. ed. 1005, 1006, 5 Sup. Ct. Rep. 542; Re *Wilson*, supra.

Nor can it be shown that any of the substantial rights of the defendants have been prejudiced.

Agnew v. United States, 165 U. S. 36, 44, 41 L. ed. 624, 627, 17 Sup. Ct. Rep. 235.

The bill of exceptions in the main causes constitutes no part of the record, and is not open to review on habeas corpus.

Re *Haskell*, 52 Fed. 797; Re *Stupp*, 12 Blatchf. 506, Fed. Cas. No. 13,563; *Church, Habeas Corpus*, 2d ed. § 73.

Mr. Justice **Day** delivered the opinion of the court:

These appeals are from judgments rendered in the circuit court of the United States for the northern district of Florida, discharging a writ of habeas corpus, and remanding the prisoners to the custody of the United States marshal.

The petitioners in the original habeas corpus proceedings, appellants here, were convicted in the United States circuit court for the northern district of Florida of conspiring to hold, arrest, and return one Rudolph Lanning to a condition of peonage, in violation of § 5440 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3676). The offense of returning to a condition of peonage is defined by § 5526 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 3715. Petitioners were sentenced

to imprisonment for different terms and to pay pecuniary fines.

The record discloses that the original cases in which appellants were convicted and sentenced were taken to the circuit court of appeals for the fifth circuit upon writs of error, and the judgments of conviction affirmed. Afterwards petitions for writs of certiorari to bring the cases to this court from the circuit court of appeals were denied in this court (214 U. S. 519, 53 L. ed. 1065, 29 Sup. Ct. Rep. 700). Thereafter, the prisoners, being in the custody of the United States Marshal under the sentences imposed, filed their petitions for writs of habeas corpus, and, the cases being heard in the circuit court of the United States, a judgment was entered dismissing the writs. 180 Fed. 119. The cases were then brought here by appeal.

From this statement it will appear that the appellants were convicted in a court of competent jurisdiction of the alleged offense charged in the indictment; that a trial was had before a court and jury, which was reviewed by proper proceedings in error in the circuit court of appeals for the fifth circuit, and that this court declined to grant a writ of certiorari to review the judgment of the latter court.

The cases have been earnestly and elaborately argued here by counsel for appellants, upon the theory that, in a proceeding of this character, the court may inquire into the facts put in evidence at the trial, at least, so far as is necessary to determine whether there was any inculpatory testimony, and for that purpose may examine the bill of exceptions, which it appended to the petition, and which was originally taken for the purpose of bringing the voluminous testimony in the cases into the record in order that a review might be had by the appellate court.

[445] *It is contended that an examination of the bill of exceptions will disclose that the alleged conspiracy was not formed in the northern district of Florida, as laid in the indictment; that there is a total lack of evidence to connect the petitioners with any such conspiracy; that the petitioners (notably the petitioner Harlan) are not shown by any competent testimony to have been concerned in any overt act for the carrying out of the alleged conspiracy; that it is not shown that there is any condition of peonage in which Lanninger had been detained, and to which he could be returned, in violation of § 5526 of the Revised Statutes of the United States. In other words, in this feature of the case this court is asked to review the testimony adduced at the trial, with a view to determining the lack of evidence in the record to support the verdict and

judgment, although such matters were properly reviewable, and were in fact reviewed, in the error proceedings already referred to.

It is the settled doctrine of this court, often affirmed, that the writ of habeas corpus cannot be used for the purpose of proceedings in error, and that the jurisdiction under that writ is confined to an examination of the record, with a view to determining whether the person restrained of his liberty is detained without authority of law. *Gonzales v. Cunningham*, 164 U. S. 612, 621, 41 L. ed. 572, 575, 17 Sup. Ct. Rep. 182; *Re Schneider*, 148 U. S. 162, 37 L. ed. 406, 13 Sup. Ct. Rep. 572; *Whitney v. Dick*, 202 U. S. 132, 136, 50 L. ed. 963, 964, 26 Sup. Ct. Rep. 584; *Toy Toy v. Hopkins*, 212 U. S. 542, 548, 53 L. ed. 644, 646, 29 Sup. Ct. Rep. 416; *Re Wilson*, 140 U. S. 575, 582, 35 L. ed. 513, 516, 11 Sup. Ct. Rep. 870.

But it is contended that two recent cases in this court are authority for the proposition that, in a collateral attack by a habeas corpus proceeding, while the weight of testimony cannot be examined into, the record may be investigated with a view of determining whether there is *any* testimony to support the accusation; and where there is an entire lack of evidence, the court may order a discharge, and language to this effect is referred to in the *opinion in *Hyde* [446 v. *Shine*, 199 U. S. 84, 50 L. ed. 97, 25 Sup. Ct. Rep. 764, wherein the learned justice, delivering the opinion of the court, said: "In the Federal courts, however, it is well settled that upon habeas corpus the court will not weigh the evidence, although, if there is an entire lack of evidence to support the accusation, the court may order his discharge."

That case was a proceeding in habeas corpus to attack the validity of an order made under § 1014 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 716), for the removal of the petitioner from the state of California to the District of Columbia for trial upon an indictment found in the District. In that case it was contended that, inasmuch as § 1014 requires proceedings for the removal of persons from one district to another to be agreeable to the usual mode of process against defendants in such state, and as in the state of California, where the prisoner was arrested, the supreme court had held that the question of probable cause of the prisoner's guilt might be considered upon the writ of habeas corpus, it necessarily followed that such should be the course of procedure in the Federal courts. In answer to this contention, the language above quoted was used. In so stating, the learned judge, speaking for the court, was but affirming the rule well established under § 1014, that there

must be some testimony before the commissioner to support the accusation in order to lay the basis for an order of removal, otherwise the accused could be discharged upon habeas corpus, although the court would not weigh the evidence where the record shows that some evidence was taken. This was the construction of § 1014 in *Greene v. Henkel*, 183 U. S. 249, 261, 46 L. ed. 177, 189, 22 Sup. Ct. Rep. 218. In *Greene v. Henkel*, Mr. Justice Peckham, speaking for the court, said: "There must be some competent evidence to show that an offense has been committed over which the court in the other district had jurisdiction, and that the defendant is the individual named in the charge, and that there is probable cause for believing him [447] guilty of the *offense charged." In the case of *Hyde v. Shine* the justice was but declaring the rule already recognized and enforced under § 1014 of the Revised Statutes.

So, in the other case relied upon, *Tinsley v. Treat*, 205 U. S. 20, 51 L. ed. 689, 27 Sup. Ct. Rep. 430, it was held, under the circumstances shown, that a prisoner would be released upon habeas corpus where the proceedings were under § 1014 of the Revised Statutes. It was held that while an indictment constitutes prima facie evidence of the offense, when the defendant offered to show that no offense had been committed triable in the district to which removal was sought, the exclusion of such evidence was not mere error, but a denial of a right secured under the Federal Constitution to be tried in the state and district where the alleged offense was committed, and therefore reviewable under habeas corpus proceedings. Neither *Hyde v. Shine* nor *Tinsley v. Treat* is authority for the proposition that a writ of habeas corpus can be made the basis of a review of the judgment of a court of competent jurisdiction, where proceedings were had under a constitutional statute giving the court authority to examine into the charges, and to convict or acquit the accused, when the proceedings show no attempt to exert the jurisdiction of the court in excess of its authority.

The learned counsel for appellants rely upon a number of cases which are said to warrant the court in habeas corpus proceedings in examining the bill of exceptions with a view to determining such matters as are herein presented. But an examination of these cases will show that where collateral attacks have been sustained through the medium of a writ of habeas corpus, the grounds were such as attacked the validity of the judgments, and the objections sustained were such as rendered the judgment not merely erroneous, but void. In *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872, the court undertook to impose a second pun-

ishment where it had already exhausted its power in *imposing one of the alternative penalties allowed by law. In *Re Snow*, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556, the record disclosed that it was sought to impose a second punishment for the same offense. In *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122, it was held that the court was without power to order an amendment of the indictment without a submission of the case to the grand jury, and that subsequent proceedings upon an indictment thus changed were without jurisdiction. In *Re Nielsen*, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672, it was held that the court exceeded its authority in undertaking to pass the particular sentence imposed. We find nothing in these cases to conflict with the well-established rule in this court that the writ of habeas corpus cannot be made to perform the office of a writ of error.

If such would be its effect, then this court could readily be converted into an appellate court in criminal proceedings,—a jurisdiction denied to it by the statute. No attack can be successfully made upon the right and authority of the circuit court of the United States to take jurisdiction of the offense charged in the indictment. No objection is made to the constitutionality of the statute, or the right and authority of the court to consider and determine the guilt or innocence of the accused, and for that purpose to weigh and determine the effect of the testimony offered. The contention is that, in the respects pointed out, the testimony wholly fails to support the charge. The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of habeas corpus. Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions. See, among other cases in this court, *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391; *Ex parte Terry*, 128 U. S. 289, 306, 32 L. ed. 405, 409, 9 Sup. Ct. Rep. 77; *Davis v. Beason*, 133 U. S. 333, 33 L. ed. 637, 10 Sup. Ct. Rep. 299, 8 Am. Crim. Rep. 89; **Ex parte Parks*, 93 U. S. 18, 22, 23, 23 L. ed. 787-789; *Kaizo v. Henry*, 211 U. S. 146, 148, 53 L. ed. 125, 126, 29 Sup. Ct. Rep. 41.

We will proceed, then, to examine such of the objections as go to the authority of the court to try and sentence the accused. It is insisted that the trial in the circuit court of the United States at Pensacola, Florida, was without jurisdiction, because the trial took place when the court had no lawful authori-

ty to sit, as it was not held at any legal term of court. It is contended that the right to hold a term at Pensacola because of the proceedings disclosed in the record had ended before the accused were tried at the session beginning in November, 1906. It appears that the regular term of court at Pensacola commenced on March 3, 1906, continued in session until May 12, 1906. The clerk of the court testified that the court was in session in Tallahassee, held by the same judge as held the court at Pensacola, on May 13, 14, 15, and 16, 1906. It appears that the clerk was in the habit of using a rubber stamp for the purpose of evidencing the adjournments of the court, and also the adjournments from day to day when the court was not present. These adjournments appear to have been in accordance with a rule of the court which provides that, during the temporary absence of the judge, the court shall be deemed open daily at each of the clerk's offices in the district for the transaction of business on the equity side of the court, and also for the filing of papers, and the transaction of business of a general character in court, and the clerk shall be present, in person or by deputy, and the record of the same shall be entered upon the minutes of the court.

Such adjournments were had from June 6, 1906, the last day the judge was present at Pensacola, until he returned to the circuit court for the northern district of Florida in November, 1906, subsequent to which time the indictment, trial, and conviction of the appellants took place. The argument of [450] the appellants comes to this,—“that as there was no legal adjournment of the term at Pensacola to a day certain when the court proceeded to hold the term at Tallahassee, there was no legal authority to resume the sitting of the court at Pensacola in November, and consequently there was no legal term of the court at which the proceeding resulting in the conviction of the accused could be had.

But we cannot agree to this contention. The statutes of the United States provide for two terms of the United States circuit court for the northern district of Florida, the one beginning on the first Monday of February, at Tallahassee, the other the first Monday in March, at Pensacola. U. S. Rev. Stat. § 658, U. S. Comp. Stat. 1901, p. 531. Section 612 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 494) provides that the circuit courts of the United States can be held at the same time in different districts of the same circuit. Section 672 (U. S. Comp. Stat. 1901, p. 546) provides that if neither of the judges of the circuit court be present to open and adjourn any regular or adjourned special session, either of them

may, by a written order, directed alternatively to the marshal, and, in his absence, to the clerk, adjourn the court from time to time, as the case may require, to any time before the next regular term. We think the purpose of the law was to provide for statutory terms of court for the northern district of Florida, beginning on the first Monday of February and March, respectively, which term should continue until the beginning of the next term, unless finally adjourned in the meantime. Such is the general and recognized practice in the circuit courts of the United States. *East Tennessee Iron & Coal Co. v. Wiggin*, 15 C. C. A. 510, 37 U. S. App. 129, 68 Fed. 446.

There was certainly no adjournment of the court for the term when the judge was absent, holding court at Tallahassee, or was out of the state. There was an attempt, at least, to keep the court open pending the absence of the presiding judge by the adjournments in pursuance of rule 13.

*Nor do we find anything in the ob- [451] jections made to the manner in which the record of the sessions was kept, which it is unnecessary to examine in further detail, it being sufficient to say that we think the court that sat in November, 1906, was legally in session, with authority to proceed against the accused.

It is next objected that the order for the impaneling of the grand jury was made by a judge of the circuit court for the fifth circuit, who, although within his circuit, was not within the district where the court was located when the trial was had. If there were otherwise merit in this objection, it certainly could not be made on habeas corpus. Such objections must be made by proper pleas filed in the court of original jurisdiction. *Kaizo v. Henry*, 211 U. S. 146, 149, 53 L. ed. 125, 126, 29 Sup. Ct. Rep. 41.

It is contended that competent testimony was adduced to show that the indictments were not properly presented by the grand jury, in that the one under which the accused was tried was not regularly found by the grand jury nor voted upon by them. Testimony was introduced to the effect that, after the presentation of the original indictment, the grand jury were informed by the district attorney that the indictment needed amendment in some particular, this amendment was read over in the presence of the grand jury, was incorporated into an indictment, the indictment was regularly returned into court, where it was produced with the consent of all the grand jurors. No objection was taken at the trial to the indictment for this reason, and upon proper pleas a trial and conviction were had; certainly an objection of that kind, if ever

available, cannot be made for the first time in a habeas corpus proceeding.

It was objected in the court below that the original sentence exceeded the authority of the court, in that it required service at hard labor. Upon motion of the government's counsel, that much of the sentence [52] was stricken out. There is no contention that hard labor has been, or will be, imposed upon the appellants, and, at most, only that part of the sentence in excess of the law will be void. *United States v. Pridgcon*, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746.

We find no error in the judgments of the Circuit Court in refusing to release the petitioners upon the writs of habeas corpus, and the same will be affirmed.

Affirmed.

UNITED STATES, Plff. in Err.,
v.

ANSONIA BRASS & COPPER COMPANY,
American Steel Casting Company, et al.

(See S. C. Reporter's ed. 452-476.)

Error to state court — Federal question — lien on vessel building for United States.

1. Claims by the United States, in proceedings under the supply lien law of a state, to establish the rights of creditors furnishing supplies for the construction of vessels building for the United States, that under the contract for the construction of one of the vessels the title vested in the government as fast as paid for; that a lien was reserved to the government under the contracts for building the other vessels, superior to the claim of the supply lien creditors under the state law; that the right of the government to its superior claims could not be affected by, and was not subject to, such law; and that the state had no power to retard, impede, or control the operation of the Federal government in making and carrying out such contracts,—are assertions of rights and immunities, the

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kiple v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On the priority of state or United States in payment from assets of a debtor—see notes to *State v. Foster*, 29 L.R.A. 226; *Prince v. Bartlett*, 3 L. ed. U. S. 614; and *Field v. United States*, 9 L. ed. U. S. 94.
54 L. ed.

creation of Federal authority, which, when denied by a state court, present a case under U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, for a writ of error from the Federal Supreme Court.

[For other cases, see *Appeal and Error*, 1725-1731, in *Digest Sup. Ct.* 1908.]

United States — priority as creditor — how lost.

2. A stipulation executed by the United States district attorney on behalf of the government, conformably to U. S. Rev. Stat. §§ 3753, 3754, U. S. Comp. Stat. 1901, p. 2530, with a view to obtaining possession of vessels building for the United States, which were in the hands of a receiver appointed in proceedings under a state supply lien law, does not deprive the United States of any right which it had to assert claims to priority under the building contracts or rights existing by reason of the sovereignty of the United States, since the evident purpose of these sections is that neither the United States nor the claimants to the property shall lose any rights because of the release under the stipulation, but the rights of the parties shall continue to be such as they were before the change of possession.

[For other cases, see *United States, V.*, in *Digest Sup. Ct.* 1908.]

Shipping — vessel building for United States — passing of title — application of state lien law.

3. A dredge building for the Federal government became, as fast as paid for, the property of the government, so as not to be subject to seizure or encumbrance under state lien laws, where the ownership clause of the building contract provided that parts paid for were to become the sole property of the United States, and required insurance to be effected by the contractor on behalf of the government to at least the amount of each partial payment, notwithstanding other provisions in the contract, which gave the government the right to reject defective work or material, or even the entire dredge, if, upon trial and before final acceptance, it proved defective, and to complete the vessel in the event of the annulment of the contract, and required a bond in the sum of \$60,000 for the faithful performance of the contract, and made the contractor responsible for the payment of all liabilities for labor and material incurred in the prosecution of the work.

[For other cases, see *Shipping*, III., in *Digest Sup. Ct.* 1908.]

Shipping — title to vessel building for United States — intervention in proceedings under state lien laws.

4. There is no room for the application of the doctrine governing cases where the United States claims an interest in property lawfully in possession of the court which is administering it,—as in equity or in admiralty,—and the government intervenes to protect its interest therein, that its rights must be adjudicated in recognition of rights and demands of others interested in the same property, where a vessel, build-

ing for the United States, in the hands of a receiver appointed under the state supply lien law, has been released to the United States under a stipulation which fully protects the rights of the United States, which claims the exclusive right and title to the vessel as far as the parts were completed and paid for.

[For other cases, see Shipping, III., in Digest Sup. Ct. 1908.]

United States — priority as creditor — lien for partial payments on vessel building for government.

5. The lien of the Federal government for partial payments, reserved in a contract for the construction of a revenue cutter, in accordance with the joint resolution of Congress of May 5, 1894 (28 Stat. at L. 582, 583), which merely directs how contracts thereafter made shall provide with reference to liens upon such vessels, is one created only by the terms of the contract, and is not an express statutory lien by authority of the United States, which would be superior to any asserted rights under the lien laws of a state.

[For other cases, see United States, V., in Digest Sup. Ct. 1908.]

United States — priority as creditor — lien for partial payments on vessel building for government.

6. The lien for partial payments, reserved by the Federal government in a contract for the construction of a vessel, cannot be deemed to be intended to be superior to those of contractors for labor and material who have contributed to the work, where the contract required a bond to be given, conditioned for the faithful performance of the contract, and the prompt payment to other persons supplying labor and materials in the prosecution of the work.

[For other cases, see United States, V., in Digest Sup. Ct. 1908.]

United States — priority as creditor — lien on vessel building for government.

7. A contract for the construction of a vessel for the Federal government which contains no provision for the passing of title to the vessel on partial payments, but, on the contrary, stipulates that, on certain conditions, the title shall vest in the government as collateral security, and provides for the release of liens before partial payments shall be required, must be deemed to have been made in recognition of the rights of those furnishing work or material for the vessel to secure their claims by liens, which it is made the duty of the contractor to provide for in order to protect the title of the government.

[For other cases, see United States, V., in Digest Sup. Ct. 1908.]

[No. 458.]

Argued October 18, 1910. Decided November 28, 1910.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment which, reversing a judgment of the Chancery Court of the City of Richmond, in that state, held superior to any claim or lien of the Federal government certain liens under the state supply lien law for materials furnished for the construction of certain vessels for the United States. Reversed as to one of the vessels, on the ground that title had passed to the United States, and affirmed as to the other vessels.

See same case below, 110 Va. 165, 65 S. E. 538.

The facts are stated in the opinion.

Mr. Lunsford L. Lewis argued the cause, and, with Assistant Attorney General Harr, filed a brief for plaintiff in error:

Contracts made by the United States are not subject to state registry statutes.

Dollar Sav. Bank v. United States, 19 Wall. 227, 22 L. ed. 80; Stanley v. Schwalby, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418; United States v. Snyder, 149 U. S. 210, 37 L. ed. 705, 13 Sup. Ct. Rep. 846.

We do not, of course, deny that in general, under a contract for a ship or other thing not yet *in esse*, to be constructed, no title passes to the vendee before it is finished and ready for delivery. But it is equally indisputable that where a contrary intention appears from the terms of the contract or the attending circumstances, *i. e.*, that title shall pass before completion, the intention will be effectuated.

Clarkson v. Stevens, 106 U. S. 505, 27 L. ed. 139, 1 Sup. Ct. Rep. 200.

In the contract under consideration there are at least two features which, of themselves, apart from the express provision as to title, would, according to very highly respectable authorities, English and American, be considered conclusive evidence of an intention that title should pass in advance of completion. We allude to the provision in the contract that the work and materials were to be subject to a rigid inspection by a government inspector, whose decision as to quantity and quality was to be final, and to the further provision for payments by instalments at specified stages of the work.

Woods v. Russell, 5 Barn. & Ald. 942; Laidler v. Burlinson, 2 Mees. & W. 602; Wood v. Bell, 5 El. & Bl. 772, 6 El. & Bl. 355; Seath v. Moore, L. R. 11 App. Cas. 350, 23 Eng. Rul. Cas. 262; Scudder v. Calais S. B. Co. 1 Cliff. 378, Fed. Cas. No. 12,565.

Joint resolutions of Congress do not

in their effect differ from bills, and when duly passed have the effect of law.

Cushing Law & Pr. of Legislative Assemblies, 2403; 6 Ops. Atty. Gen. 680; Mullan v. State, 114 Cal. 585, 34 L.R.A. 262, 46 Pac. 670.

Counsel, in denying the jurisdiction of this court, seems to have been misled by a remark of Chief Justice Waite, in delivering the opinion in *United States v. Thompson*, 93 U. S. 586, 23 L. ed. 982, which was corrected by the court in the opinion delivered by Mr. Justice Gray in *Stanley v. Sehwalby*, 162 U. S. 255, 278, 40 L. ed. 960, 968, 16 Sup. Ct. Rep. 754.

Mr. Eppa Hunton, Jr., argued the cause and filed a brief for defendants in error:

There is no real Federal question or color of ground for the allegation that there is such a question.

Deming v. United States, 1 Ct. Cl. 190; *Jones v. United States*, 1 Ct. Cl. 384; *Wilson v. United States*, 11 Ct. Cl. 513; *Southern P. Co. v. United States*, 28 Ct. Cl. 77; *Lyons v. United States*, 30 Ct. Cl. 352; *Story Const. p. 202*, § 1330; *Smoot's Case*, 15 Wall. 36, 21 L. ed. 107; *United States v. Bostwick*, 94 U. S. 66, 24 L. ed. 66; *United States v. Smith*, 94 U. S. 217, 24 L. ed. 115; *United States v. Bank of the Metropolis*, 15 Pet. 392, 10 L. ed. 779.

Judgments in the state courts against the United States cannot be brought here for re-examination upon a writ of error except in cases where the same relief would be afforded to private parties.

United States v. Thompson, 93 U. S. 586, 23 L. ed. 982.

A real, and not a fictitious, Federal question, is essential to the jurisdiction of this court over the judgments of state courts.

Sawyer v. Piper, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633.

When the United States voluntarily depose their sovereignty, and all their rights, privileges, and immunities as such, by entering into contracts with a Virginia corporation, these rights, privileges, and immunities belonging to them only as a sovereign do not and cannot exist when they have ceased to act as such.

Millingar v. Hartupee, 6 Wall. 258, 18 L. ed. 829.

Upon cases brought before this court from the court of last resort of the state, it will not examine into the whole case, but only into the Federal questions presented.

Montgomery v. Hernandez, 12 Wheat, 129, 6 L. ed. 575; *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429.

Counsel for the government has no warrant of attorney to insist upon a sovereign-
54 L. ed.

ty which his client, powerful but just, has waived.

Briggs v. A Light Boat, 11 Allen, 157; *United States v. Bostwick*, supra; *The Siren*, 7 Wall. 159, 19 L. ed. 132; *The Davis (United States v. Douglas)* 10 Wall. 17, 19 L. ed. 875; *Carr v. United States*, 98 U. S. 438, 25 L. ed. 211; *United States v. Stinson*, 60 C. C. A. 615, 125 Fed. 907; *Walker v. United States*, 139 Fed. 413.

Mr. R. G. Bleckford also argued the cause and filed a brief for defendants in error:

The United States voluntarily becoming a claimant, its sovereignty was laid aside, and the courts were entitled to proceed under the laws of the forum, as in the case of a controversy arising between man and man.

United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282; *Fink v. O'Neil*, 106 U. S. 280, 27 L. ed. 199, 1 Sup. Ct. Rep. 325; *Carr v. United States*, 98 U. S. 438, 25 L. ed. 211; *The Davis (United States v. Douglas)* 10 Wall. 22, 19 L. ed. 878; *Mountain Copper Co. v. United States*, 73 C. C. A. 621, 142 Fed. 629; *Walker v. United States*, 139 Fed. 413; *United States v. Clark*, 70 C. C. A. 584, 138 Fed. 299; *United States v. Detroit Timber & Lumber Co.* 67 C. C. A. 1, 131 Fed. 677; *United States v. Ingate*, 48 Fed. 253; *United States v. Tetlow*, 2 Low. Dec. 159, Fed. Cas. No. 16,456; 29 Am. & Eng. Enc. Law, p. 172; *Johnston v. Stimmel*, 89 N. Y. 117; 27 Am. & Eng. Enc. Law, p. 537.

The Galveston contract, which was the first of the three contracts, expressly recognizes that the rights which were given by the Trigg Company to the United States government were subject, and were intended to be subject, to the lien laws of the state.

23 Ops. Atty. Gen. 174; *Penn. Iron Co. v. William R. Trigg Co.* 106 Va. 557, 56 S. E. 329.

These contracts have been in use many years, and the government is now estopped to claim in violation of its own construction.

United States v. Alabama G. S. R. Co. 142 U. S. 621, 35 L. ed. 1136, 12 Sup. Ct. Rep. 306; *Brawley v. United States*, 96 U. S. 168, 24 L. ed. 622.

That a contractual lien was intended appears from the fact that payments are expressly allowed on contracts theretofore made, in which no lien is reserved and for which no lien is created.

1 Jones, Liens, § 105.

As a general rule, no title passes to a vessel under construction.

2 Mechem, Sales, § 755; 2 Parsons, Contr. 8th ed. 259, 260; Merritt v. Johnson, 7 Johns. 473, 5 Am. Dec. 289; Andrews v. Durant, 11 N. Y. 35, 62 Am. Dec. 55; People ex rel. Pacific Mail S. S. Co. v. Tax & A. Comrs. 58 N. Y. 244; Hall v. Green, 1 Houst. (Del.) 546, 71 Am. Dec. 96; Shaw v. Smith, 48 Conn. 306, 40 Am. Rep. 170; Yukon River S. B. Co. v. Gratto, 136 Cal. 538, 69 Pac. 252; Williams v. Jackman, 16 Gray, 514; Low v. Austin, 20 N. Y. 182; Briggs v. A Light Boat, 7 Allen, 287; Wright v. Tetlow, 99 Mass. 397; Forsyth v. Dickson, 1 Grant, Cas. 26; Scull v. Shakespear, 75 Pa. 297; Lang's Appeal, 81 Pa. 18; Coursin's Appeal, 79 Pa. 220; Strong v. Dinniny, 175 Pa. 586, 34 Atl. 919; Haney v. The Rosabelle, 20 Wis. 247; Elliott v. Edwards, 35 N. J. L. 265; West Jersey R. Co. v. Trenton Car Works Co. 32 N. J. L. 517; Stevens v. Shippen, 29 N. J. Eq. 602; Revenue Cutter No. 1, 1 Brown, Adm. 76, Fed. Cas. No. 11,713; Revenue Cutter No. 2, 4 Sawy. 143, Fed. Cas. No. 11,714; The Sam Slick, 1 Sprague, 289, Fed. Cas. No. 12,283; Clarkson v. Stevens, 106 U. S. 505, 27 L. ed. 139, 1 Sup. Ct. Rep. 200; The Poconoket, 67 Fed. 262; The John B. Ketcham, 2d. 38 C. C. A. 518, 97 Fed. 872; Trigg Co. v. Bucyrus Co. 104 Va. 79, 51 S. E. 176.

All the foregoing cases maintain the proposition that the appointment of an inspector, the paying of instalments, and the like, are consistent either with the retention of ownership by the vendor or its passage to the vendee; that the legal intendments of the contract being to place the ownership with the vendor, such stipulations are not sufficient to rebut presumptions of law arising from the contract.

Nor is the result changed when the person for whom the vessel is to be built installs expensive boilers or engines.

The John B. Ketcham, 2d. supra.

All persons are presumed to know the law; therefore the makers of this contract are presumed to be aware of the legal intendments that follow from their contract; knowing this, if their intent varied from the presumption, presumably they would have inserted specific provisions to secure that result.

Andrews v. Durant; Hall v. Green; Williams v. Jackman; Briggs v. A Light Boat; Elliott v. Edwards; and Haney v. The Rosabelle,—supra.

The only expression in the contract or specifications upon which the government relies or can rely, to indicate the intent that property in the vessel passed to the government, is the above-quoted § 211 in the speci-

fications. In all essential particulars that provision is the same as the provision in the contract for the Stevens battery, under review in Clarkson v. Stevens, 106 U. S. 516, 27 L. ed. 144, 1 Sup. Ct. Rep. 200.

There is a variance of intent between the contract and the specifications, and the contract controls.

Williams v. Fitzmaurice, 3 Hurlst. & N. 844; Neelon v. Toronto, 25 Can. S. C. 579; Andrews v. Tucker, 127 Ala. 602, 29 So. 34; Tischler v. Apple, 30 Fla. 132, 11 So. 273; Meyer v. Berlandi, 53 Minn. 59, 54 N. W. 937; Boteler v. Roy, 40 Mo. App. 234; Isaacs v. Dawson, 174 N. Y. 537, 66 N. E. 1110; Palladino v. New York, 56 Hun, 565, 10 N. Y. Supp. 66; Demarest v. Haide, 20 Jones & S. 398; Reichert v. Brown, 38 Misc. 782, 78 N. Y. Supp. 834, 30 Am. & Eng. Enc. Law, pp. 1201, 1202.

There are provisions of the contract which indicate intents inconsistent with the notion that the property passed. The 4th section authorizes the government to annul the contract if due progress is not made. This is inconsistent with the intent to pass title.

Briggs v. A Light Boat, 7 Allen, 294.

The government reserved the right at the period of final acceptance to reject property which had already been vested in it, if § 211 of the specifications had the effect of vesting the property, as the government contends. Under these circumstances the property did not vest.

Clarkson v. Stevens, 106 U. S. 515-517, 27 L. ed. 144, 145, 1 Sup. Ct. Rep. 200; People ex rel. Pacific Mail S. S. Co. v. Tax & A. Comrs. 58 N. Y. 244.

The Virginia recordation statute binds the government.

Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293-295, 35 L. ed. 193, 11 Sup. Ct. Rep. 528; Murdock v. Memphis, 20 Wall. 590-636, 22 L. ed. 429-444; Ryan v. United States, 136 U. S. 86, 34 L. ed. 454, 10 Sup. Ct. Rep. 913.

The recording statute provides that the instruments within its scope shall be void as to creditors, in event its provisions are not complied with. Applying the statute, the reserved liens in the Galveston and Mohawk contracts, and § 211 of the Benyuard specifications, are void as to creditors. As to the creditors, those contracts are as if they had never been executed, and so the courts have declared.

March v. Chambers, 30 Gratt. 304; Dobyys v. Waring, 82 Va. 169; Price v. Wall, 97 Va. 336, 75 Am. St. Rep. 788, 33 S. E. 599; Smith v. Howard, 173 Mass. 88, 53 N. E. 144; Kerr v. Moon, 9 Wheat. 565, 6 L. ed. 161.

461] *Mr. Justice Day delivered the opinion of the court:

This is a writ of error to the supreme court of appeals of Virginia. The controversy grows out of contracts made between the United States and the William R. Trigg Company, a corporation organized under the laws of the state of Virginia, carrying on business at Richmond, Virginia, for the construction of certain vessels for the United States, namely, a sea-going suction dredge, called the Benyuard, for the War Department; a revenue cutter, called the Mohawk, for the Treasury Department; and a cruiser, for the Navy Department, called the Galveston. The contract price for the Benyuard, apart from its pumping machinery, was \$254,550; for the Mohawk, \$217,000; and for the Galveston, \$1,027,000. These contracts were dated, for the Benyuard, September 9, 1901; for the Mohawk, April 20, 1900; and for the Galveston, December 14, 1899.

In December, 1902, S. H. Hawes & Company filed a bill in the chancery court at the city of Richmond, on behalf of themselves and other creditors, asserting liens under the supply lien law of the state of Virginia, averring the insolvency of the Trigg Company, and asking for the appointment of a receiver, which was accordingly made. The receiver took possession of the property of the Trigg Company, including the vessels above named. Under §§ 3753 and 3754 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 2530) a stipulation was executed by the United States district attorney, on behalf of the United States, for the release and discharge of the vessels, and the material on hand applicable thereto.

Thereafter the case proceeded to judgment, and, on final appeal, to the supreme court of appeals of Virginia, the liens under the supply lien law of the state were held superior to any claim or lien of the government. In the case of the Benyuard, two **462]** of the five judges of that court *dissented from the opinion of the majority, holding that the title to the Benyuard had passed to the United States under the terms of the contract under which it was constructed. The case is reported in 110 Va. 165, 65 S. E. 538.

It is contended that there is no jurisdiction in this court to review the judgment of the supreme court of appeals of Virginia, as no Federal question was decided in that court which would lay the foundation for the writ of error. In the third class of cases provided for in § 709 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 575), it is expressly provided that where any right, title, privi-

lege, or immunity claimed under the Constitution, treaty, or statute of the United States, or an authority exercised under the United States, is specially set up or claimed by either party, and the decision is against such right, title, privilege, or immunity, the same may be re-examined and reviewed by writ of error from this court.

An examination of the record discloses that the government claimed in the case that under the contract the title to the dredge vested in the United States by virtue of the terms of the contract; that a lien was reserved to the United States under the contract for the cutter Mohawk and the cruiser Galveston, which was superior to the claims of the supply liens' creditors under the laws of the state of Virginia. The government further contended that the right of the government to its superior claims upon the vessels, whether of title or lien, could not be affected by, and was not subject to, the lien statutes of the state of Virginia. The government also claimed that the state had no power to retard, impede, or control the operation of the Federal government in making and carrying out such contracts as are herein under consideration.

We think that from this statement of the claims made in the court below on behalf of the United States, assertions were made of rights and immunities which were the creation of Federal authority, and the denial thereof *by the judgment of **463** the state court brings the case within the provisions of § 7099 of the Revised Statutes of the United States. It is not necessary to lay the foundation for jurisdiction that the claims for Federal rights asserted should be well founded; it is enough if they are substantial claims of Federal rights within the statute, and such as were duly asserted and directly or necessarily denied in the judgment and decision of the state court.

Nor do we think there is anything in the stipulation entered into on the part of the government by the United States district attorney, with a view to getting possession of the vessels, which were in the hands of the receiver, which in anywise deprived the government of the right to assert any such immunity and privilege as it has because of the nature and character of the contracts and the lien of the government in the premises.

An examination of these sections, 3753, 3754, shows that they are intended to permit the United States to obtain possession of property claimed by it, when the same has been seized by judicial proceedings under the laws of the state, and to give to it and to the persons asserting

rights in the property protection in their rights, notwithstanding such changes in possession.

In § 3753 it is expressly provided that "nothing herein contained shall, however, be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial process any claim against any property of the United States, or against any property held, owned, or employed by the United States, or by any department thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce any such claim."

Section 3754 provides for the protection of persons asserting claims against such property, and that after final judgment given in the court of last resort, to which the Secretary of the Treasury may deem [464] proper to carry "the proceedings, affirming the rights of the persons asserting claims for the security or satisfaction of which such proceedings were instituted in the state courts against such property, notwithstanding the claims of the United States, the final judgment shall be deemed to all intents and purposes as a final determination of the rights of such persons, and shall entitle such persons, as against the United States, to such right as they would have in case the possession of such property had not been changed. The section provides for the payment of such final judgment out of the treasury of the United States.

The evident purpose of these sections is that neither the United States nor the claimants to the property shall lose any rights because of the release of the property under the stipulation, but, as were the rights of the parties before the change of possession, such they shall continue to be. We do not agree that, by entering into a stipulation which embodied these terms, the United States lost any right which it had to assert claims under the contracts, or rights by reason of the sovereignty of the United States, if any such exist. We think this court has jurisdiction of this case upon this writ of error.

Taking up the consideration of the case as to these several vessels, and first as to the Benynard, this dredge was constructed under the provisions of a contract which are thus summarized by the master in the Virginia chancery court:

"Materials furnished and the work done by the William R. Trigg Company were to be subject to rigid inspection by an inspector appointed on the part of the government, his decision to be final as to quantity and quality.

If the Trigg Company should fail to begin or prosecute the work in accord-

ance with the specifications, which were made part of the contract, the contract might be annulled by the government. In that case all payments were to cease, and all money or reserved percentage must *be retained until the final completion and acceptance of the boat. The government was to have the right to recover anything paid for such completion in excess of the original contract price with the William R. Trigg Company, including all extra cost of inspection; and might proceed under § 3709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 2484) to provide for the completion of the boat by open purchase or contract, unless the time for such completion should be extended.

"It was expressly provided that the William R. Trigg Company should be responsible for and pay all liabilities incurred in the prosecution of the work for labor and materials.

"Section 9 of the contract was as follows:

"It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all materials and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material, or to require the fulfillment of any of the terms of the contract."

"Section 199 of the specification was as follows:

"The purpose and spirit of these specifications are that the contractor is to provide and deliver a staunch dredge hull and first-class machinery, complete in every respect."

"Section 206 of the specifications was as follows:

"It is understood and agreed that the contractor assumes full responsibility for the safety of his employees, plant, and materials, and for any damage or injury done by or to them from any source or cause."

"Section 209 provided for sea trials at the expense of the contractor, any defects that might appear to be remedied at his expense, and trials to be repeated until the steamer should be found satisfactory in all respects. Section 210 provided that if the requirements of the specifications were complied with, ten (10) equal payments *should be made, based on the reports [466] of the inspector, the first when the hull and propelling machinery should be 10 per cent complete, the second when 20 per cent complete, and so on, to the last payment, to be made when the vessel should be turned over to the United States after successful

trial; from each of said payments, except the last, 20 per cent to be reserved until final payment.

"Section 211 was as follows:

"The parts paid for under the system of partial payments above specified shall become thereby the sole property of the United States; but this provision shall not be interpreted as relieving the contractor from the sole responsibility for the proper care and protection of said parts prior to the delivery of the dredge to the United States, or from any other of the provisions of these specifications."

"Section 212 provided for insurance against fire and marine risks at the contractor's cost, for and in behalf of the United States, to at least the amount of each partial payment.

"The evidence shows that the government had paid \$142,550.80 on account of this contract when the receiver was appointed in this cause, and that said dredge was then 70 per cent complete."

It is the contention of the government that the terms of this contract are such that by its expressed provisions the vessel was to become the property of the United States as fast as it was paid for. A majority of the learned judges of the supreme court of appeals of Virginia were of opinion that title did not pass to the government under this contract, and that it was subject to the superior lien of claimants under the state laws of Virginia. It is undoubtedly true that the mere facts that the vessel is to be paid for in instalments as the work progresses, and to be built under the superintendence of a government inspector, who had power to reject 467] or approve the materials, will *not of themselves work the transfer of the title of a vessel to be constructed, in advance of its completion. But it is equally well settled that if the contract is such as to clearly express the intention of the parties that the builder shall sell and the purchaser shall buy the ship before its completion, and at the different stages of its progress, and this purpose is expressed in the words of the contract, it is binding and effectual in law to pass the title. 2 Parsons, Constr. 8th ed. 259, and cases cited.

All sections of the agreement must be read in the light of the purposes of the contracting parties, as gathered from the entire contract, and must be considered in connection with other provisions of the contract. And it is said that § 212, as to insurance, does not show an intention to protect the title transferred to the government, but must be read in the light of the purpose of the government to acquire title to the dredge in the event that it

ultimately elected to take it over as a purchaser, the ownership in the meantime remaining in the builder until such final decision was made, and the insurance was required for the government's security for the partial payments.

But we cannot agree to this construction of § 212. The ownership clause provides that parts paid for *are to become the sole property of the United States* (specifications, § 211), insurance was to be provided by the contractor preceding each partial payment, that is, as fast as title vested in the government by reason of the partial payments, insurance was to be effected "to at least the amount of such partial payment, and the property was to be kept insured to at least the aggregate of the payments made until delivery and final acceptance."

It is insisted that the right to reject the dredge or to annul the contract is inconsistent with the passage of title under the provisions of § 211 of the specification, however positive that section may be in terms. Section 9 of the contract provides: "It is further agreed by and be- [468] tween the parties hereto that until final inspection and acceptance hereof, and payment for, all the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material, or to require the fulfilment of any of the terms of this contract."

Let it be conceded that this section gave the government the right to reject defective work or material, or even the entire dredge, if, upon trial and before final acceptance, it proved defective,—is that right inconsistent with the vesting of title in the parts as paid for, as specifically provided in § 211? We think not. It may be that in such contingency the government might reject the dredge. This might be true consistently with the acquirement of title in parts accepted and paid for after inspection. That is, if the whole, upon final trial, proved defective, all, including the restoration of that acquired, might be within the power of the government. See, in this connection, *The Poconoket*, 67 Fed. 262, 266.

The provisions of § 4 look rather to the completion of the vessel by the government in the event of the annulment of the contracts for failure to keep its requirements. In that contingency it is provided that payments shall cease and reserved payments be retained until the final completion and acceptance of the work. In this section the United States is given a remedy for the cost of completion upon the failure of the

contractor to prosecute the work according to the contract.

Nor do we find it inconsistent with the vesting of the title in parts that bond was taken in the sum of \$60,000 for the performance of the contract. The United States might well secure itself in this sum, notwithstanding it took title to parts as paid for. Security might nevertheless be required for the faithful doing of the work within the stipulated time. It is also true 469] that the Trigg Company *was to be responsible for and pay all liabilities for labor and material incurred in the prosecution of the work. We are at a loss to see any inconsistency between this provision and the passing of the title in parts as paid for. Construing the whole contract, we find nothing in its other provisions which cuts down or lessens the binding force of the clear and distinct provisions of § 211 as to ownership. The parties therein dealt with a specific part of the contract, they expressed themselves clearly upon the subject, and it is not to be presumed, in the absence of clear expression or necessary implication, that they intended to supersede this provision in dealing with other specific or general parts of the agreement.

It is suggested, in this connection, that the contract with the government in the case of the *Penynard* is not different in effect than the one passed upon in *Clarkson v. Stevens*, 106 U. S. 505, 27 L. ed. 139, 1 Sup. Ct. Rep. 200. In that case the contract provided that the materials received at the yard for the construction of the steamer should be distinctly marked with the letters "U. S.," and should become the property of and belong to the United States. There was no provision that title to the vessel should vest in the United States as fast as parts thereof were constructed, and Mr. Justice Matthews, who delivered the opinion of the court, approved the opinion of the court of errors and appeals of New Jersey, expressing the view that the declaration as to the materials excluded the implication sought to be raised as to the title in the unfinished ship; "for," said Mr. Justice Matthews, "the inference is obvious, from the particularity of such a provision, that the larger interest would not be left to mere intendment." P. 516.

In *Briggs v. A. Light Boat*, 7 Allen, 287, a builders' lien, taken under the Massachusetts statute on a light boat being built for the United States, was sustained. In that case the contract made no pro- 470] vision for a lien in favor *of the government, or the passing of the title to the boat in progress of construction. Mr. Chief Justice Bigelow, delivering the opinion of

the supreme judicial court of Massachusetts, used this significant language (page 297):

"If this were a suit brought by the builders to enforce a lien for materials furnished for the construction of a ship under a contract directly with the government, or for repairs on a public vessel, the title of which was vested in the United States at the time the work was done or the supplies were furnished, the argument founded on public policy, and the suggestions arising from the inconvenience of causing delay and embarrassment to the public service, would be entitled to very great weight. It might in such case be open to grave doubt whether a lien on the property of the United States could be given by virtue of an enactment of the legislature of a state, or whether services rendered and materials supplied directly to the government must not be presumed to have been furnished exclusively on the faith and credit of the United States, to the exclusion of any intent to rely on a lien upon the public property. But considerations of this nature have no application to a case like the present. It would have been competent for the United States, if they wished to avoid the inconvenience or danger of delay arising from liens in favor of private persons, to make their contract in such form as to divest the builder of any title to the property in the vessel during the process of construction, or to stipulate for the application of the purchase money to the extinguishment of all claims for materials furnished to the builder."

As we construe the contract for the construction of the *Benynard*, it did "divest the builder of any title to the property in the vessel during the process of construction." The question in this aspect of the case then becomes one as to the right of a state lien law to fasten upon the property *of the United States, and that prop- [471 erty a vessel intended for the use of the government in carrying on its necessary operations in the exercise of its governmental authority.

It was in recognition of the inability of contractors for labor and material to take liens upon the public property of the United States that Congress passed the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), amended February 24, 1905 (33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1909, p. 948), providing for bonds in favor of those who furnished labor or materials in the construction of public works. It was in view of this purpose to provide protection for those who could not protect themselves by liens upon public property that the statute was given liberal construction

in this court. See *United States Fidelity & G. Co. v. Golden Pressed Fire Brick Co.* 191 U. S. 416, 425, 48 L. ed. 242, 246, 24 Sup. Ct. Rep. 142; *United States v. Hill v. American Surety Co.* 200 U. S. 197, 203, 50 L. ed. 437, 440, 26 Sup. Ct. Rep. 168.

As we read the decision of the supreme court of appeals of Virginia, it is not held that a lien was fixed upon the dredge, if in fact the title thereto passed to the United States. In any event, it could not be tolerated that property of the United States could be seized or encumbered under state lien laws of the character in question. We are not now dealing with the right of a state to provide for such liens while property to the chattel in process of construction remains in the builder, who may be constructing the same with a view to transferring title therein to the United States upon its acceptance under a contract with the government. We are now treating of property which the United States owns. Such property, for the most obvious reasons of public policy, cannot be seized by authority of another sovereignty, against the consent of the government. The *Benyard*, as fast as constructed, became one of the instrumentalities of the government, intended for public use, and could not be seized under state laws to answer the claim of a private person, however meritorious. 472] *Nor do we think the case one for the application of the doctrine governing cases where the United States claims an interest in property lawfully in possession of a court which is administering it,—as in equity or in admiralty,—and the government intervenes to protect its interest therein. In such instances its rights must be adjudicated in recognition of the rights and demands of others interested in the same property. In this case the vessels were released under a stipulation which fully protected the rights of the United States, and the government claims the exclusive right and title in the *Benyard* as the parts were completed and paid for.

In the case of the *Mohawk* there is no such stipulation as to passing of the title on partial payments in the progress of the work as is found in the contract for the *Benyard*. The Secretary of the Treasury was, in his discretion, to make partial payments under the contract during the progress of the work, not to exceed 75 per cent of the value of the labor and materials actually furnished and delivered, and a lien was reserved for such payments, in the following language:

"Provided, That a lien shall be, and hereby is, reserved to the United States upon the hull, machinery, fittings, and equipment of said vessel, and the materials on

hand for use in her construction, respectively and collectively, for all moneys advanced on account thereof, and that such lien shall commence with the first payment, and shall thereupon attach to the work and the materials furnished, and shall in like manner attach from time to time, as the work progresses, and as further payments are made, and shall continue until the completion and acceptance of said vessel."

This lien, it is asserted, was reserved in accordance with a joint resolution of Congress passed May 5, 1894 (28 Stat. at L. 582, 583), which is as follows:

"Resolved by the Senate and House of Representatives *of the United States [473 of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, authorized to make partial payments, from time to time, upon existing contracts and all contracts hereafter made for the construction of vessels for the Treasury Department, but not in excess of 75 per cent of the amount of the value of the work already done; and that the contracts hereafter made shall provide for a lien upon such vessels for all advances so made: Provided, That nothing in this joint resolution shall be construed to hereafter authorize any partial payments except on contracts stipulating for the same, and then only in accordance with such contract stipulation."

On behalf of the government it is contended that this resolution makes the lien of the government, reserved under the contract, an express statutory lien by authority of the United States, and consequently superior to any asserted rights under the lien laws of a state. But we cannot agree to this contention. The joint resolution, if it be conceded to have the effect of an act of Congress, does not undertake to create a statutory lien, but directs how contracts thereafter made shall provide with reference to liens upon such vessels. As to future contracts, it is directed that they shall provide for liens upon vessels for advances thus made. We think the lien mentioned is only one created by the terms of the contract, and is to be considered in the light of the other provisions thereof.

At the time of entering into the contract, a bond was required and was given by the Trigg Company in the penal sum of \$45,000, conditioned for the proper construction of the vessel according to the contract and specifications, and that the Trigg Company should promptly make payments to other persons supplying labor and materials in the prosecution of the work. We think this requirement was a distinct recognition on the part of the government that the Trigg Company might become in-

474] debted *to other persons who should perform labor or furnish materials in the building of the vessel, who might become entitled, by reason of such claims against the company, to liens upon the property.

The contract was made with the Virginia corporation, and it was intended that the bond required of the Trigg Company should protect the government against rights arising out of labor performed or material furnished in the construction of the vessel. Conceding it to be true for this purpose, as asserted by the counsel for the government, that the United States can make contracts providing liens of this character which shall be superior to the claims of any person for liens under state laws, it is none the less certain that it may, if it chooses, recognize the authority of the states to protect persons who may furnish labor or materials for the construction of government work. Indeed, such, as we have seen, is the policy of the government in respect to public buildings and structures, upon which liens cannot be taken under the laws of the states. In order that such claims may be satisfied, the United States has made provision for their protection by bonds upon which persons may recover damages, so that those who furnish property of which the government receives the benefit shall not entail a loss by so doing. Read in the light of this policy, so manifestly just and proper, and the requirements of this contract and bond, we think that the government did not intend that the lien which it reserved for itself should be superior to that of contractors for labor and material who had contributed to the work.

The case of the Galveston is controlled by the same principles. In that contract there was no provision for taking title to the vessel; on the contrary, it was stipulated that, on certain conditions, the title should vest in the United States as collateral security, and the eighteenth clause of the contract provides for the release of liens 475] *before partial payments shall be required. This clause is distinct and clear in its requirements and reads:

"When a payment is made under this contract, as a condition precedent thereto, the Secretary of the Navy may, in his discretion, require, for the protection of the party of the first part, evidence satisfactory to him, to be furnished by the party of the first part, that no lien or rights *in rem* of any kind against said vessels, or her machinery, fittings, or equipment, or the material on hand for use in the construction thereof, have been or can be acquired for or on account of any work done or any machinery, fitting, equipment, or material

already incorporated as a part of said vessel, or on hand for that purpose, or that such liens or rights have either been released absolutely, or so subordinated to the rights of the government as to make its lien for all payments paramount, so as not to encumber or hinder in any way the right of the government to accept or reject said vessel, and so as to become absolutely extinguished in case of the acceptance of the vessel."

The effect which we give this provision is strengthened by the opinion rendered to the Secretary of the Navy by the Attorney General, that in his opinion the practice of the Navy Department in making such contracts recognized that liens of this class might be acquired on vessels where there was no provision in the contract for vesting title in the same in the United States. 23 Ops. Atty. Gen. 174, 176.

We think that this contract, as the one for the Mohawk, was made in recognition of the rights of those who should furnish work or material for the vessel to secure their claims by liens which it was made the duty of the contractor to provide for in order to protect the title of the United States.

Upon the whole case we reach the conclusion that judgment must be affirmed as to the Mohawk and Galveston, *and [476 reversed as to the Benyuard, and it is so ordered. The case is remanded to the Supreme Court of Appeals of Virginia for further proceedings not inconsistent with this opinion.

LUCINO ALMEIDA CHANTANGCO and
Enrique Lete, Plffs. in Err.,

v.

EDUARDO ABAROA.

(See S. C. Reporter's ed. 476-486.)

Judgment—in criminal case as bar to a civil action.

A civil action for indemnification for the damages resulting from the malicious or unlawful burning of a storehouse and its contents may not be maintained in the Philippine courts, where there has been a judgment of acquittal against the same defendant for the same malicious and unlawful burning, in view of the positive legislation in the Philippine Codes, civil and criminal, drawing a distinction between a civil liability which results from the mere negligence of the defendant, and a liability for the civil consequences of a crime by which another has sustained loss or in-

NOTE.—On judgment in criminal action as *res judicata* in civil action—see note to Micks v. Mason, 11 L.R.A. (N.S.) 653.

jury, and of the plain inference from art. 17 of the Penal Code, that civil liability springs out of and is dependent upon facts which, if true, would constitute a crime or misdemeanor, and of the provisions of Code Crim. Proc. §§ 108, 112, 742, which plainly contemplate that the civil liability of the defendant shall be ascertained and declared in the criminal proceedings.

[No. 2.]

Submitted October 24, 1910. Decided November 23, 1910.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a judgment of the Court of First Instance for the Third Judicial District, holding that a judgment of acquittal in a criminal action for the malicious or unlawful burning of a storehouse and its contents is a bar to a civil action for indemnification for damages resulting from the same malicious or unlawful burning. Affirmed.

See same case below, 8 Philippine, 178. The facts are stated in the opinion.

Messrs. **Aldis B. Browne, Alexander Britton, Evans Browne, and W. A. Kincaid** submitted the cause for plaintiffs in error:

There was no determination in the criminal action of the matter in controversy in this action, such as to warrant the application of the principle of *res judicata*. A judgment in a criminal action is not evidence in a civil action to support the defense of former adjudication, even though both actions involve the same subject-matter or transaction.

1 Greenl. Ev. § 537; Jones, Ev. § 589, p. 745; 1 Wharton, Ev. § 776; Herman, Estoppel, § 413; 2 Black. Judgm. § 529; 1 Freeman, Judgm. § 319; R. v. Boston, 4 East, 572; Jones v. White, 1 Strange, 68; Buller, N. P. 233; Petrie v. Nuttall, 11 Exch. 569; Justice v. Gosling, 12 C. B. 44; Cottingham v. Weeks, 54 Ga. 275; Marceau v. Travelers' Ins. Co. 101 Cal. 338, 35 Pac. 856, 36 Pac. 813; Burke v. Wells, F. & Co. 34 Cal. 62; Cluff v. Mutual Ben. L. Ins. Co. 99 Mass. 317; Morch v. Raubitschek, 159 Pa. 559, 28 Atl. 369; Betts v. New Hartford, 25 Conn. 180; Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 98; Johnson v. Girdwood, 143 N. Y. 660, 39 N. E. 21, 7 Misc. 651, 28 N. Y. Supp. 151; Chamberlain v. Pierson, 31 C. C. A. 157, 59 U. S. App. 55, 87 Fed. 424; Dyer County v. Chesapeake, O. & S. W. R. Co. 87 Tenn. 712, 11 S. W. 943; United States v. Jadicke, 73 Fed. 100; Von Hoffman v. Kendall, 44 N. Y. S. R. 484, 17 N. Y. Supp. 54 L. ed.

713; United States v. Schneider, 35 Fed. 107; McDonald v. Stark, 176 Ill. 456, 52 N. E. 37; Gray v. McDonald, 104 Mo. 309, 16 S. W. 398; Wilson v. Manhattan R. Co. 2 Misc. 127, 20 N. Y. Supp. 852; Skidmore v. Bricker, 77 Ill. 164; Tumlin v. Parrott, 82 Ga. 735, 9 S. E. 718; Sibley v. St. Paul F. & M. Ins. Co. 9 Biss. 31, Fed. Cas. No. 12,830; State v. Corron, 73 N. H. 434, 62 Atl. 1044, 6 A. & E. Ann. Cas. 486; Frierson v. Jenkins, 72 S. C. 341, 110 Am. St. Rep. 608, 51 S. E. 862, 5 A. & E. Ann. Cas. 77, and note; Britton v. State, 77 Ala. 209; State v. Bradnack, 69 Conn. 214, 43 L.R.A. 620, 37 Atl. 492; People v. Kenyon, 93 Mich. 19, 52 N. W. 1033; Stone v. United States, 167 U. S. 178, 188, 189, 42 L. ed. 127, 131, 132, 17 Sup. Ct. Rep. 778.

Even where both actions are of the same nature, as, for instance, where both are civil actions, it is well settled that the principle of *res judicata* requires that there shall be identity of parties, either in fact or in privity of interest, as well as identity of the matter at issue.

Robbins v. Chicago, 4 Wall. 657, 672, 18 L. ed. 427, 430; American Bell Teleph. Co. v. National Improved Teleph. Co. 27 Fed. 667; Frank v. Wedderin, 16 C. C. A. 1, 30 U. S. App. 329, 68 Fed. 818; Theller v. Hershey, 89 Fed. 575; Hanke v. Cooper, 48 C. C. A. 144, 108 Fed. 922; Litchfield v. Goodnow (Litchfield v. Crane) 123 U. S. 549, 31 L. ed. 199, 8 Sup. Ct. Rep. 210; Wilgus v. Germain, 19 C. C. A. 188, 44 U. S. App. 369, 72 Fed. 775; Hale v. Finch, 104 U. S. 261-265, 26 L. ed. 732-734; Stryker v. Goodnow (Stryker v. Crane) 123 U. S. 527, 540, 31 L. ed. 194, 199, 8 Sup. Ct. Rep. 203; Southern P. R. Co. v. United States, 168 U. S. 48, 49, 42 L. ed. 376, 377, 18 Sup. Ct. Rep. 18; Russell v. Place, 94 U. S. 606, 608, 24 L. ed. 214, 215; De Sollar v. Hanscome, 158 U. S. 216, 221, 39 L. ed. 956, 959, 15 Sup. Ct. Rep. 816; Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 688, 39 L. ed. 859, 862, 15 Sup. Ct. Rep. 733, 18 Mor. Min. Rep. 205; New Orleans v. Citizens' Bank, 167 U. S. 371, 396, 397, 42 L. ed. 202, 210, 211, 17 Sup. Ct. Rep. 905; Southern P. R. Co. v. United States, 183 U. S. 519, 528, 46 L. ed. 307, 312, 22 Sup. Ct. Rep. 154; 1 Greenl. Ev. § 523; Lovejoy v. Murray, 3 Wall. 1, 10, 18 L. ed. 129, 131; Gaines v. Hennen, 24 How. 553, 16 L. ed. 770; Gaines v. Relf, 12 How. 506, 13 L. ed. 1085; Palanca Tanguinlay v. Quiros, 10 Philippine, 360; Merchant v. International Bkg. Corp. 9 Philippine, 554; O'Connell v. Mayuga, 8 Philippine, 422; Cromwell v. Sac County, 94 U. S. 351, 356, 24 L. ed. 195, 199; Fayerweather v. Ritch, 195 U.

S. 276, 299, 49 L. ed. 193, 210, 25 Sup. Ct. Rep. 58.

The jury in the civil action must decide upon the mere preponderance of the evidence; whereas, in order to a criminal conviction, they must be satisfied of the party's guilt beyond a reasonable doubt.

1 Greenl. Ev. § 537; 3 Greenl. Ev. § 29; 1 Wharton, Crim. Law, § 1.

Both the distinction and the rule which is its necessary and wholesome sequence have been engrafted upon and are now part of the jurisprudence of the Philippine Islands.

Ocampo v. Jenkins, 8 Manila Off. Gaz. (No. 4) 128, December 24, 1909.

No brief was filed for defendant in error.

Mr. Justice Lurton delivered the opinion of the court:

This is a writ of error to the supreme court of the Philippine Islands to review a judgment affirming a judgment of the court of the first instance in favor of the defendant.

The action was to recover indemnification of damages for the destruction of a storehouse and a stock of merchandise therein, valued at \$58,473.49, Mexican, which the complaint alleged was "burned maliciously or unlawfully by Eduardo Abaroa," the defendant to the complaint, and defendant in error here.

The defense was, first, a general denial, and second, that the defendant, in a criminal action for the same burning and damage alleged, had been acquitted and held not guilty of the malicious burning now alleged, and in consequence of such judgment was not liable in a civil action for any damage to the plaintiff. The judgment in the criminal proceeding referred to was in these words:

"The evidence introduced by the prosecution indicates *that the defendant might have been the author of the crime, but it is not conclusive. All persons charged with crime are presumed to be innocent until they are proven otherwise. There being in my mind some doubt as to the guilt of the defendant, I should and do hereby acquit him, with the costs of these proceedings *de officio*, and the attachment heretofore levied on his property is hereby vacated, reserving to the complaining witness whatever right he may have to bring a civil action against the said Eduardo Abaroa."

Upon a final hearing upon all of the proofs, the court of first instance adjudged that the cause of action alleged and proved was one arising from the criminal act which was the subject of the former criminal proceeding; and that the defendant,

having been acquitted in the criminal action, was not civilly liable. This judgment was affirmed by the supreme court of the Philippine Islands upon an elaborate opinion.

We have not had the benefit of either brief or argument for the defendant in this writ of error, but have found much assistance in the opinions of each of the Philippine courts, as well from very helpful briefs filed by learned counsel for the plaintiffs in error. The contention which has been very forcibly pressed is that the judgment of acquittal in the criminal action does not operate as a bar to a subsequent civil action for indemnification of damages resulting from the same malicious or unlawful burning of the house and goods of the plaintiff, which was charged in the criminal action.

The proposition upon which the supreme court of the Philippine Islands grounded its judgment affirming that of the lower court in favor of the defendant Abaroa was, "that it has not been alleged or shown by the plaintiffs, as a cause of action instituted civilly against the defendant, that the aforesaid fire was caused through any fault or negligence on the part of the defendant, nor is there *shown any motive [48] or cause distinct from that, the subject of the case already terminated in accordance with the provisions of articles 1093, 1902, and 1903 of the Civil Code; and second, that one who is not criminally responsible for a crime or misdemeanor cannot be made civilly responsible for the crime of which he has been acquitted."

The general rule of the common law is that a judgment in a criminal proceeding cannot be read in evidence in a civil action to establish any fact there determined. The reason for this rule is, primarily, that the parties are not the same, and, secondarily, that different rules of evidence are applicable. In the old case of *Jones v. White*, 1 Strange, 67, 68, Eyre, J., said: "If a verdict be given in evidence, it must be between the same parties; and therefore an indictment, which is at the suit of the King, cannot be read in an action which is at the suit of the party." The requisite of mutual estoppel is essential to make a judgment in one action obligatory in another, although the point in issue is the same in each case. Unless the parties are the same, the matter is *res inter alios*. *Buller*, N. P. 233; 1 Wharton, Ev. § 776; *Dyer County v. Chesapeake*, O. & S. W. R. Co. 87 Tenn. 712, 11 S. W. 943.

Neither will identity of parties always operate to make a judgment in a criminal action admissible in evidence in a civil action. There must be identity of issue.

Thus, in *Stone v. United States*, 167 U. S. 178, 187, 42 L. ed. 127, 131, 17 Sup. Ct. Rep. 778, *Stone* was sued by the United States to recover the value of timber alleged to have been cut by him from public lands. He had been theretofore indicted, tried, and acquitted for unlawfully cutting the same timber from the public lands, and pleaded this judgment as a bar to a suit for civil liability. This was held to be no defense, and *Coffey v. United States*, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437, distinguished as having been placed upon the ground "that the facts ascertained in the criminal case, as between the United 482] States and the claimant, could *not be 'again litigated between them, as the basis of any *statutory punishment* denounced as a consequence of the existence of the facts.'" With respect to the application of *Coffey's Case*, Mr. Justice Harlan, for the court, said:

"In the present case the action against *Stone* is purely civil. It depends entirely upon the ownership of certain personal property. The rule established in *Coffey's Case* can have no application in a civil case not involving any question of criminal intent or of forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of property. In the criminal case, the government sought to punish a criminal offense, while in the civil case it only seeks, in its capacity as owner of property illegally converted, to recover its value. In the criminal case his acquittal may have been due to the fact that the government failed to show, beyond a reasonable doubt, the existence of some fact essential to establish the offense charged, while the same evidence in a civil action brought to recover the value of the property illegally converted might have been sufficient to entitle the government to a verdict. Not only was a greater degree of proof requisite to support the indictment than is sufficient to sustain a civil action, but an essential fact had to be proved in the criminal case, which was not necessary to be proved in the present suit. In order to convict the defendant upon the indictment for unlawfully, wilfully, and feloniously cutting and removing timber from lands of the United States, it was necessary to prove a criminal intent on his part, or, at least, that he knew the timber to be the property of the United States. *R. v. Cohen*, 8 Cox, C. C. 41; *R. v. James*, 8 Car. & P. 131; *United States v. Pearce*, 2 McLean, 14, Fed. Cas. No. 16,020; *Cutter v. State*, 36 N. J. L. 125, 126. But the present action for the conversion of the timber would be supported

by proof that it was in fact the property of the United States, whether the defendant *knew that fact or not. *E. E. Bolles* [483 *Woodenware Co. v. United States*, 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. Rep. 398. An honest mistake of the defendant as to his title in the property would be a defense to the indictment, but not to the civil action. *Broom's Legal Maxims*, 5th ed. 366, 367. It cannot be said that any fact was conclusively established in the criminal case, except that the defendant was not guilty of the public offense with which he was charged. We cannot agree that the failure or inability of the United States to prove in the criminal case that the defendant had been guilty of a crime either forfeited its right of property in the timber or its right in this civil action, upon a preponderance of proof, to recover the value of such property."

There are peculiarities about the character of the action now under consideration which, as will appear later, may bring it under the principles of *Coffey v. United States*, *supra*, rather than *Stone v. United States*, the indemnification here sought being a part of the punishment attached to the offense of which the defendant has been acquitted.

The case is, however, one which we conceive must be governed by the local law of the Philippine Islands, and the single question to which we need address ourselves is as to whether that law was rightly applied by the local tribunals.

Article 1902 of the Civil Code in force in the Philippine Islands reads thus: "A person who, by an act or omission, causes damage to another when there is fault or negligence, shall be obliged to repair the damage so done." By §§ 1092 and 1093 of the same Code provision is made for the enforcement of civil liability, varying in character according to the origin of the liability. Thus, § 1092 provides that civil obligations arising from crimes and misdemeanors shall be governed by the provisions of the Penal Code. On the other hand, § 1093 provides that "those arising from acts or omissions, in which fault or negligence, not punished by law, occurs, shall *be subject to the provisions of [484 chapter second of title sixteen of this book." The action here involved comes directly under § 1092, above set out, and is not an action arising from "fault or negligence, not punished by law." The complaint alleges that the act of burning was "malicious and unlawful," and not that it was the result of any "fault

or negligence." This was the construction placed upon the complaint by both the courts below, and is a construction not challenged here. It follows that we must turn to the Penal Code to discover when a civil action arises out of a crime or misdemeanor, and the procedure of the enforcement of such civil liability. Article 17 of the Penal Code reads as follows: "Every person criminally liable for a crime or misdemeanor is also civilly liable." May this civil liability be enforced without a prior legal determination of the fact of the defendant's guilt of crime? Does civil liability exist at all if the defendant has been found not guilty of the acts out of which the civil liability arises? The opinion of the court below was that a judgment of conviction was essential to an action for indemnification under the applicable local law. To this conclusion we assent, upon the following considerations:

First, by the positive legislation of the Philippine Codes, civil and criminal, a distinction is drawn between a civil liability which results from the mere negligence of the defendant and a liability for the civil consequences of a crime by which another has sustained loss or injury.

Second, the plain inference from article 17, above set out, is that civil liability springs out of and is dependent upon facts which, if true, would constitute a crime or misdemeanor.

Third, the Philippine Code of Procedure plainly contemplates that the civil liability of the defendant shall be ascertained and declared in the criminal proceedings.

Thus, § 742 of the Code of Criminal Procedure, after *requiring that, in a criminal proceeding, all of the minor or incidental offenses included in the principal crime shall be decided, adds: "All questions relating to the civil liability which may have been the subject-matter of the charge shall be decided in the sentence."

By § 108 of the same Code the prosecuting official is required to prosecute the right of the injured person to restitution or indemnity, unless such person renounces the right.

By § 112 of the same Code the civil action is held to be part of the criminal action, "unless the person prejudiced or injured renounces the same, or expressly reserves the right to institute it after the conclusion of the criminal action."

In *United States v. Catequista*, 1 Philippine, 537, 538, the court below failed to determine the liability of the defendant to indemnify the person injured by the misdemeanor of which he had been convicted.

Concerning this, Ladd J., for the court, said:

"The court also erred in not determining in the judgment the civil liability of the defendant for the *daños* and *perjuicios*, which resulted from the criminal act. Such civil liability is a necessary consequence of criminal responsibility (Penal Code, art. 17), and is to be declared and enforced in the criminal proceeding, except where the injured party reserves his right to avail himself of it in a distinct civil action. Code of Criminal Procedure of Spain, article 112, Provisional Law for the Application of the Penal Code in the Philippines, article 51, No. 4. No such waiver or reservation is disclosed by the record here."

It is true that one of the plaintiffs in the present case reserved whatever right he may have had to bring a civil action. This was obviously of no avail, inasmuch as there resulted a judgment for the defendant, and the plain inference from the foregoing is that a verdict of acquittal *must [486 carry with it exemption from civil responsibility.

The effect of the application of the substantive law of the Philippine Islands, given by the court below, not only in the present case, but in the prior cases cited above, accords with the interpretation of identical provisions in the law of Spain by the Supreme Court of that kingdom, as shown by citations from the Spanish Supreme Court Reports. Some of these we have not been able to verify. We have, however, examined the decision of that court cited as of January 3, 1877. In that case the defendant had been tried and acquitted upon a criminal complaint. Notwithstanding this result, the trial court gave a judgment in demnifying the injured person for a loss supposed to have been suffered by him as a consequence of the crime of which the defendant had been acquitted. This judgment was annulled. Upon this point the court, in substance, said that indemnity for damages in penal cases was a consequence of the commission of a crime. The defendant was therefore not liable civilly, inasmuch as he had been found not liable criminally.

The foregoing considerations eliminate any question of the effect of such a judgment of acquittal under the principles of the common law and require an affirmance of the judgment of the court below as properly based upon the applicable substantive law of the Philippine Islands, which has not been superseded by legislation since the establishment of the present Philippine government.

Judgment affirmed.

487] *CHARLES RICHARDSON, Plff. in Err.,
v.

H. V. MCCHESENEY, Secretary of State of the Commonwealth of Kentucky, et al.

(See S. C. Reporter's ed. 487-493.)

Error to state court — moot case.

1. A writ of error to review a decree of a state court refusing to require a state official, when certifying the names of nominees for Congress to the clerks of the various county courts, to proceed under the Kentucky congressional apportionment act of April 15, 1882, rather than under the act of May 26, 1890, which is attacked as invalid, must be dismissed as presenting a moot case, where the election to be affected by the decree has long since been held, and the persons elected have been admitted to their respective seats, and their successors elected according to the same scheme of apportionment.

[For other cases, see Appeal and Error, 1110-1137, in Digest Sup. Ct. 1908.]

Abatement — termination of office.

2. The expiration of the term of office of a state official, and the induction of his successor into office, abates a suit to require him, when certifying the names of nominees for Congress to the clerks of the various county courts to proceed under a specified apportionment act rather than under a later one, attacked as invalid, there being no statutory authority for the substitution of his successor in a suit of this character. [For other cases, see Abatement, II. d, in Digest Sup. Ct. 1908.]

[No. 23.]

Argued October 31 and November 1, 1910.
Decided November 28, 1910.

IN ERROR to the Court of Appeals of the State of Kentucky to review a decree which affirmed a decree of the Circuit Court of Green County, in that state, sustaining the demurrer to and dismissing a bill to require the secretary of the commonwealth, when certifying the names of nominees for

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On error to state courts in cases presenting merely moot or abstract questions—see note to *Campbell v. California*, 50 L. ed. U. S. 382.

54 L. ed.

Congress to the clerks of the various county courts, to proceed under a specified apportionment act rather than under a later one, attacked as invalid. Dismissed for want of jurisdiction.

See same case below, 128 Ky. 363; 129 Am. St. Rep. 299, 108 S. W. 322.

The facts are stated in the opinion.

Mr. William H. Holt argued the cause, and, with Messrs. George Du Relle, W. C. Halbert, E. L. Worthington, and W. D. Cochran, filed a brief for plaintiff in error.

No brief was filed for defendants in error.

Mr. Justice Lurton delivered the opinion of the court:

Shortly stated, this is an attack upon the validity of the Kentucky act of May 26, 1890, and certain amendments thereto, apportioning the state into eleven congressional districts. The bill alleges that the districts do not conform to the requirement of the acts of Congress apportioning representatives among the states, which acts require that such districts shall be of contiguous territory, "containing as nearly as practicable an equal number of inhabitants." The averments of the bill are that the districts are grossly and unnecessarily unequal in population.

The bill was filed in an equity court of the state. A demurrer, as not stating a case good in law, was sustained and the bill dismissed. This judgment was affirmed upon an appeal to the court of appeals of Kentucky. The ground upon which the Kentucky court rested its judgment was, in substance that neither the Constitution of the United States nor of the state contained any provision which vested in the court any authority to annul an apportionment of the state into districts for the election of Congressmen, and that the matter pertained to the political department of the government, and was subject only to the supervising control of the Congress, if any such power of supervision existed at all.

The bill, in substance, alleges that a congressional election in each of the eleven congressional districts of the state will be held in November, 1908. That under the law of Kentucky it is the duty of the defendant H. V. McClesney, as secretary of the commonwealth, or his successor in office at the time, to certify, within sixty days prior to said election, the names of the nominees of the Republican and Democratic parties for members of Congress *in each [491] district, to clerks of the various county courts of the state, and the duty of such clerks to print the name so certified upon the official ballots to be used in said congressional election.

The complainant's interest in the matter is that he is a citizen of the United States and of the state of Kentucky, and a qualified voter and resident of Hart county, one of the counties of said state, and as such entitled to vote for a Congressman in the district to which the county is lawfully attached. The act of the general assembly dividing the state in congressional districts prior to the act of May 26, 1890, was an act passed April 15, 1882. By this act of 1882 the counties of Hart, Green, and Taylor formed part of the fourth congressional district. By the act of May 26, 1890, and acts amendatory, the three counties named were made part of the eleventh district, and certain counties were taken from the eleventh and placed in other districts.

The contention is that, the act of 1890 and its amendments being void, because of gross inequality of inhabitants, the aforesaid act of April 15, 1882, is the apportionment act in force, and that the approaching election should be held for the election of eleven members of Congress in the eleven districts organized by the act of 1882, and not in the districts as shaped by the later illegal arrangement.

The object and prayer of the bill is to require the defendant H. V. McChesney, or his successor in office, to proceed in conformity with the apportionment act of April 15, 1882, by certifying the names of party nominees for Congress made in districts organized in conformity with that act, and to require the county court clerks, who are made defendants, to print only the names of nominees so certified upon the ballots of the election of Congressmen at the election to be held in November, 1908, and that said McChesney, or his successor, be restrained **492** *from certifying, or the defendant clerks from printing, otherwise.

Without considering the question of the authority for judicial interference in respect to a congressional apportionment act, we are of opinion that this writ of error must be dismissed.

The matter which the defendant McChesney, as secretary of the commonwealth of Kentucky, is to be prohibited from doing, relates solely to an election to be held in November, 1908, and the thing which he is to be required to do relates only to the same election. The election to be affected by a decree, according to the prayer of the bill, has long since been held, and the members of Congress were, in November, 1908, elected under the apportionment act of 1890. They were, as we may judicially know, admitted to the respective seats, and, as we may also take notice, their successors have been

elected according to the same scheme of apportionment. The thing sought to be prevented has been done, and cannot be undone by any judicial action. Under such circumstances there is nothing but a moot case. *Mills v. Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; *Jones v. Montague*, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611.

The duty of the court is limited to the decision of actual pending controversies, and it should not pronounce judgment upon abstract questions. However such opinion might influence future action in like circumstances.

Aside from this, we may judicially take notice that the defendant H. C. McChesney is no longer secretary of the commonwealth of Kentucky, his term having expired and a successor having been inducted into office, who has not been substituted as a defendant to this suit.

This is not a suit against the state of Kentucky. The state is not the subject of suit. Nor is it a suit against the secretary of state as one of a corporation or continuing board, "where the obligations sought to be enforced devolve upon a corporation or continuing body," as *pointed **493** out in *United States ex rel. Bernardin v. Butterworth*, 169 U. S. 600, 603, 42 L. ed. 873, 874, 18 Sup. Ct. Rep. 441, distinguishing *Leavenworth County v. Sellow*, 99 U. S. 624, 25 L. ed. 333, and *Thompson v. United States*, 103 U. S. 480, 26 L. ed. 521. The only ground for making McChesney a defendant is to enjoin him personally from doing something which he may not lawfully do, and to require him personally to do another thing which it is claimed is his legal duty to do as an administrative act requiring no discretion. If he disobey the mandate or injunction of the court he personally would be in contempt. He only can be rightly made to bear the costs of this proceeding if the complainant should succeed, and he only could be compelled to obey the decree of the court. As his official authority has terminated, the case, so far as it seeks to accomplish the object of the bill, is at an end, there being no statute providing for the substitution of McChesney's successor in a suit of this character. The case is governed by *United States v. Boutwell*, 17 Wall. 604, 21 L. ed. 721; *United States ex rel. Bernardin v. Butterworth*, 169 U. S. 600, 42 L. ed. 873, 18 Sup. Ct. Rep. 441, and *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 441, 49 L. ed. 540, 544, 25 Sup. Ct. Rep. 375.

Dismiss the writ of error.

UNITED STATES OF AMERICA TO THE
USE OF MATTIE McC. HINE and Robert E. Hine, Plffs. in Err.,

v.

ALEXANDER PORTER MORSE, the Union Trust Company of the District of Columbia, and Daniel Boone Clarke Waggaman, Executors of Daniel B. Clarke, Deceased.

(See S. C. Reporter's ed. 493-512.)

Judgment — collateral attack.

1. A decree of the supreme court of the District of Columbia for the sale of an infant's real property for purposes of reinvestment, made with jurisdiction over the res and of the parties, is not open to collateral attack, even though the court erred in holding that a case had been made, either under its inherent power as a court of equity, or its statutory authority. [For other cases, see Judgment, III. 1, in Digest Sup. Ct. 1908.]

Estoppel — of surety.

2. The validity of a decree for the sale of an infant's real estate for purposes of reinvestment, and of the order appointing a trustee to make the sale, and of the bond reciting the due appointment of such trustee, executed to secure the faithful discharge by him of his duties, is not open to question by one who voluntarily became a surety upon the bond, thereby enabling his principal to obtain the proceeds of the sale.

[For other cases, see Estoppel, 27-30, in Digest Sup. Ct. 1908.]

[No. 25.]

Argued November 1, 1910. Decided November 28, 1910.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed, on a second appeal, a judgment of the Supreme Court of the District, overruling a demurrer to the plea in an action upon a bond, and dismissing the action. Reversed, with directions to sustain the demurrer, and remand the cause for further proceedings.

See same case below on first appeal, 29 App. D. C. 433; on second appeal, 31 App. D. C. 433.

The facts are stated in the opinion.

NOTE.—On conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuylér Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

54 L. ed.

Mr. William Hepburn Russell argued the cause, and, with Mr. W. H. Robeson, filed a brief for plaintiffs in error:

The supreme court of the District having exercised jurisdiction over the subject-matter of the suit in which the bond was given, its determination of its own jurisdiction is, after this lapse of time, binding upon all persons before the court in that case, including the trustee Waggaman and his surety Clarke, and defendants are now precluded from questioning the jurisdiction of the court to decree the sale, appoint the trustee; and require the bond.

Florentine v. Barton, 2 Wall. 210, 216, 17 L. ed. 783, 785; Evers v. Watson, 156 U. S. 527, 533, 39 L. ed. 520, 522, 15 Sup. Ct. Rep. 430; State v. Waupacea County Bank, 20 Wis. 640.

The test of jurisdiction is whether the court had power to enter upon the inquiry; not whether its conclusion was right or wrong.

Lake County v. Platt, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 567; Brown, Jurisdiction of Courts, §§ 64-66.

The decree of sale under which the trustee Waggaman sold the property and acquired the funds for the security of which he gave the bond cannot be collaterally questioned by his surety.

McCormick v. Sullivan, 10 Wheat. 192, 6 L. ed. 300; Skillern v. May, 6 Cranch, 267, 3 L. ed. 220; Clary v. Hoagland, 6 Cal. 685; Tallman v. McCarty, 11 Wis. 402; Dugan v. Baltimore, 70 Md. 1, 16 Atl. 501; Ex parte Watkins, 3 Pet. 193, 203, 209, 7 L. ed. 650, 653, 655; Ex parte Parks, 93 U. S. 20, 23 L. ed. 787; Florentine v. Barton, 2 Wall. 216, 17 L. ed. 785; Pulaski County v. Stuart, 28 Gratt. 879; Harvey v. Tyler, 2 Wall. 328, 342, 17 L. ed. 871, 873; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; Thompson v. Tolmie, 2 Pet. 157, 7 L. ed. 381; Grignon v. Astor, 2 How. 319, 11 L. ed. 283; Voorhees v. Jackson, 10 Pet. 449, 473, 478, 9 L. ed. 490, 499, 501; Griffith v. Bogen, 18 How. 158, 164, 15 L. ed. 307, 310.

The surety, Clarke, was estopped from denying the jurisdiction of the equity court to enter the decree appointing Waggaman trustee, and authorizing him to make sale of the property, whether such decree is valid or invalid.

Stephens v. Crawford, 1 Ga. 574, 44 Am. Dec. 686; Kincannon v. Carroll, 9 Yerg. 11, 30 Am. Dec. 391; Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187; Plowman v. Henderson, 59 Ala. 559; Moore v. Earl, 91 Cal. 632, 27 Pac. 1087; Parker v. Campbell, 21 Tex. 763; Cutler v. Dickinson, 8 Pick. 386; Williamson v. Woolf, 37 Ala. 298; Norris v. State, 22 Ark. 524; Burnett v. Henderson, 21 Tex. 588; Coons v. People, 76 Ill. 383;

Bell v. People, 94 Ill. 230; Allen v. Magruder, 3 Cranch, C. C. 6, Fed. Cas. No. 230; Mix v. People, 86 Ill. 329; Twin City Power Co. v. Barrett, 61 C. C. A. 288, 126 Fed. 302; Taylor v. State, 51 Miss. 79; Green v. Wardwell, 17 Ill. 278, 63 Am. Dec. 367; Hoboken v. Harrison, 30 N. J. L. 73.

Mr. John Selden argued the cause and filed a brief for defendants in error:

The operation of every judgment must depend upon the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined.

Rose v. Himely, 4 Cranch, 269, 2 L. ed. 617; Hickey v. Stewart, 3 How. 762, 11 L. ed. 819; Reynolds v. Stockton, 140 U. S. 264, 265, 35 L. ed. 467, 468, 11 Sup. Ct. Rep. 773.

Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgment.

Windsor v. McVeigh, 93 U. S. 282, 23 L. ed. 917.

And though there be jurisdiction for certain purposes in a cause, the jurisdiction may be exceeded in the judgment.

Williamson v. Berry, 8 How. 542, 12 L. ed. 1190; Bigelow v. Forrest, 9 Wall. 351, 19 L. ed. 700; Re Frederick, 149 U. S. 76, 37 L. ed. 656, 13 Sup. Ct. Rep. 793; Re Bonner, 151 U. S. 256, 38 L. ed. 151, 14 Sup. Ct. Rep. 323; Ex parte Reed, 100 U. S. 23, 25 L. ed. 539; Re Mills, 135 U. S. 270, 34 L. ed. 110, 10 Sup. Ct. Rep. 762; Ex parte Lange, 18 Wall. 176, 21 L. ed. 878.

And where the ultimate judgment is founded upon any order or process which the court was without authority to direct, the judgment itself is a nullity.

Lamaster v. Keeler, 123 U. S. 376, 391, 31 L. ed. 238, 242, 8 Sup. Ct. Rep. 197; Ex parte Rowland, 104 U. S. 612, 26 L. ed. 864; Ex parte Fisk, 113 U. S. 718, 28 L. ed. 1119, 5 Sup. Ct. Rep. 724; Ex parte Terry, 128 U. S. 305, 32 L. ed. 409, 9 Sup. Ct. Rep. 77; Elliott v. United States, 23 App. D. C. 466.

The question of jurisdiction is always examinable collaterally.

Reynolds v. Stockton, *supra*; Elliott v. Peirsol, 1 Pet. 340, 341, 7 L. ed. 170, 171; Wilcox v. Jackson, 13 Pet. 511, 10 L. ed. 270; Hickey v. Stewart, *supra*; Williamson v. Berry, 8 How. 540-543, 12 L. ed. 1189, 1190; Thompson v. Whitman, 18 Wall. 467, 468, 21 L. ed. 901; Kilbourn v. Thompson, 103 U. S. 197, 198, 26 L. ed. 389; Brown v. Fletcher, 210 U. S. 82, 52 L. ed. 966, 28 Sup. Ct. Rep. 702.

In the District of Columbia, the jurisdiction of equity to decree a sale of the

estate of an infant in landed property is purely statutory.

Thaw v. Ritchie, 5 Mackey, 202; Stansbury v. Inglehart, 9 Mackey, 134; American Security & T. Co. v. Muse, 4 App. D. C. 12; Clark v. Mathewson, 7 App. D. C. 384.

The bill in question was within the purview of none of the enactments.

Thaw v. Ritchie, 5 Mackey, 200, s. c. 136 U. S. 519, 34 L. ed. 531, 10 Sup. Ct. Rep. 1037; Bank of United States v. Ritchie, 8 Pet. 128, 143, 8 L. ed. 890, 896; Bank of United States v. Beverley, 1 How. 134, 150, 11 L. ed. 75, 82; White v. Joyce (White v. Miller) 158 U. S. 128, 144, 39 L. ed. 921, 927, 15 Sup. Ct. Rep. 788; Hansel v. Chapman, 2 App. D. C. 370; Glenn v. Sothoron, 4 App. D. C. 135; Tolmie v. Thompson, 3 Cranch, C. C. 123, Fed. Cas. No. 14,080; Thompson v. Tolmie, 2 Pet. 157, 165, 166, 7 L. ed. 381, 384; Hastings v. Granberry, 3 Cranch, C. C. 319, Fed. Cas. No. 6,200; Shaw v. Shaw, 4 Cranch, C. C. 715, Fed. Cas. No. 12,724; American Security & T. Co. v. Muse, 4 App. D. C. 22; District of Columbia v. McBlair, 124 U. S. 320, 31 L. ed. 449, 8 Sup. Ct. Rep. 547.

The proceedings are *res judicata* of nothing.

Graffam v. Burgess, 117 U. S. 186, 29 L. ed. 841, 6 Sup. Ct. Rep. 686; Ensminger v. Powers, 108 U. S. 301, 27 L. ed. 735, 2 Sup. Ct. Rep. 643; Jenkins v. Robertson, L. R. 1 H. L. Sc. App. Cas. 122.

The bill, and with few exceptions all of the steps taken under it, can be viewed no otherwise than as a succession, in effect, of impositions upon judicial authority. And it is not in this tribunal that such impositions, whatever the forms they may have assumed, have ever been permitted to prevail.

Lord v. Veazie, 8 How. 251, 255, 12 L. ed. 1067, 1069; Cleveland v. Chamberlain, 1 Black, 419, 425, 426, 17 L. ed. 93, 94; American Wood Paper Co. v. Heft, 8 Wall. 333, 336, 19 L. ed. 379, 380; Johnson v. Waters, 111 U. S. 640, 659, 28 L. ed. 547, 553, 4 Sup. Ct. Rep. 619; Dakota County v. Glidden, 113 U. S. 222, 225, 226, 28 L. ed. 981, 982, 5 Sup. Ct. Rep. 428; East Tennessee, V. & G. R. Co. v. Southern Teleg. Co. 125 U. S. 695, 31 L. ed. 853, 8 Sup. Ct. Rep. 1391; Gardner v. Goodyear Dental Vulcanite Co. 131 U. S. ciii. Appx. and 21 L. ed. 141; Meyer v. Pritchard, 131 U. S. ccix. Appx. and 23 L. ed. 961; Little v. Bowers, 134 U. S. 547, 557, 33 L. ed. 1016, 1020, 10 Sup. Ct. Rep. 620; South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co. 145 U. S. 300, 36 L. ed. 712, 12 Sup. Ct. Rep. 921; Hatfield v. King, 184 U. S. 162, 46 L. ed. 481, 22 Sup. Ct. Rep. 477.

A contract to do an act forbidden by law is void, and cannot be enforced in a court of justice.

Tiffany v. Boatman's Sav. Inst. 18 Wall. 375, 384, 385, 21 L. ed. 868-870; *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; *Continental Wall Paper Co. v. Louis Voight & Sons Co.* 212 U. S. 227, 262, 53 L. ed. 486, 505, 29 Sup. Ct. Rep. 280.

If the equity court was wholly without jurisdiction of the case made by the bill, that court was equally without jurisdiction to require, or to accept, a bond of any description whatever, in aid of the relief sought by the bill; and the condition of a bond thus required or accepted must, in legal reasoning, have been, *ab initio*, impossible of performance.

Bradley v. Galt, 5 Mackey, 317.

It was one of the express covenants of the bond that Waggaman had been duly appointed trustee to make the sale. But this recital in the bond is but the recital of a conclusion of law.

3 Rob. Pr. 530; *Dixon County v. Field*, 111 U. S. 83, 92, 28 L. ed. 360, 363, 4 Sup. Ct. Rep. 315; *Katzenberger v. Aberdeen*, 121 U. S. 172, 177, 30 L. ed. 911, 913, 7 Sup. Ct. Rep. 947; *Lake County v. Graham*, 130 U. S. 675, 681, 682, 32 L. ed. 1065, 1067, 1068, 9 Sup. Ct. Rep. 654.

Questions which are judicial in their nature cannot be excluded from the consideration of the judicial power through recitals by Congress in their enactments.

United States v. Claflin, 97 U. S. 546, 548, 549, 24 L. ed. 1082-1084.

Or by individuals in their contracts.

Tucker v. State, 11 Md. 322.

A void deed is no deed, and can create no estoppel, whether the invalidity of the instrument arises from coverture, infancy, or insanity.

Merriam v. Boston, C. & F. R. Co. 117 Mass. 241; *Pells v. Webquish*, 129 Mass. 469; *Mason v. Mason*, 140 Mass. 63, 3 N. E. 19; *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735; *Bank of America v. Banks*, 101 U. S. 240, 247, 25 L. ed. 850, 853.

From want of authority in the obligor (as in the case of a corporation) to engage in the transaction.

Dixon County v. Field, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Lake County v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654; *California Nat. Bank v. Kennedy*, 165 U. S. 362, 367, 42 L. ed. 198, 200, 17 Sup. Ct. Rep. 831; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 567, 43 L. ed. 1081, 1088, 19 Sup. Ct. Rep. 817; *Everest & S. Estoppel*, 195.

Or from any other cause whatever.

54 L. ed.

Bigelow, Estoppel, 5th ed. 18, 349, 451, 452, 465n; 2 *Herman, Estoppel*, §§ 599, 623; *Everest & S. Estoppel*, 195; *Duchess of Kingston's Case*, 3 Smith, Lead. Cas. 9th Am. ed. 2101; 7 Rob. Pr. 919; 1 *Brandt, Suretyship & Guaranty*, §§ 56, 57; *Casfrey v. Dudgeon*, 38 Ind. 512, 10 Am. Rep. 126; *Levy v. Wise*, 15 La. Ann. 38.

Avoiding the deed avoids the estoppel.

Cadwell v. Colgate, 7 Barb. 256; *Thomas v. Burrus*, 23 Miss. 550, 57 Am. Dec. 154; *Crum v. Wilson*, 61 Miss. 233; *Levy v. Wise*, *supra*; *Hudson v. Winslow Twp.* 35 N. J. L. 437; *Bigelow, Estoppel*, 369n.

Stipulations in admiralty, where the court is without jurisdiction, are incapable of enforcement, and stand in place of the *res*.

The Fidelity, 16 Blatchf. 569, Fed. Cas. No. 4,758; *The Monte A.* 12 Fed. 331; *The Berkeley*, 58 Fed. 920.

Bonds executed for the relief of void attachments, as they stand in place of the attachments, are themselves void, and cannot create estoppels.

Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 Sup. Ct. Rep. 718; *Planters' Loan & Sav. Bank v. Berry*, 91 Ga. 264, 18 S. E. 137; *First Nat. Bank v. La Due*, 39 Minn. 416, 40 N. W. 367; *Cadwell v. Colgate*, *supra*; *Homan v. Brinckerhoff*, 1 Denio, 185; *Brookman v. Hamill*, 43 N. Y. 554, 3 Am. Rep. 731; *Poole v. Kermit*, 59 N. Y. 554.

And so, of forthcoming bonds.

Buckingham v. Bailey, 4 Smedes & M. 538.

If, in a void proceeding, one give bond for the accomplishment of an unlawful object, the obligee, who has participated in that object, can maintain no action upon the instrument.

Daniels v. Tearney, 102 U. S. 420, 26 L. ed. 188.

For the discouragement of unlawful contracts, the law must refuse to enforce them when the parties to them are equal participants in wrongdoing.

Collins v. Blanton, 1 Smith, Lead. Cas. 9th Am. ed. 668; *Craig v. Missonri*, 4 Pet. 410, 7 L. ed. 903; *Randall v. Howard*, 2 Black, 585, 588, 589, 17 L. ed. 269-271; *Wheeler v. Sage*, 1 Wall. 518, 530, 531, 17 L. ed. 646, 649; *Higgins v. McCrea*, 116 U. S. 671, 684, 685, 29 L. ed. 764, 769.

The person supposed to be estopped is the very person imposed upon.

Hayne v. Maltby, 3 T. R. 441; *Miller v. Bagwell*, 3 M'Cord, L. 433; 1 *Brandt, Suretyship & Guaranty*, §§ 56, 57.

Mr. Justice Lurton delivered the opinion of the court:

This was an action upon a bond executed

500] by Thomas E. *Waggaman, as principal, and Daniel B. Clarke, as his surety. The bond was in these words and figures:

In the Supreme Court of the District of Columbia. In Equity. No. 20,225,
Docket 46.

Mattie McC. Hine et al.

v.

Robert Edward Hine et al.

Know all men by these presents, that we, Thomas E. Waggaman, principal, and Daniel B. Clarke, surety, all of the District of Columbia, acknowledge ourselves indebted to the United States of America in the penal sum of \$18,000, for the payment of which we bind ourselves and every of our heirs, executors, and administrators, jointly and severally, for and in the whole. Sealed with our seals, and dated this 7th day of July, A. D. 1899.

Whereas the said Thomas E. Waggaman has been duly appointed trustee to make sale of the real estate in the proceedings in this cause mentioned.

Now the condition of the above obligation is such, that if the above bounden Thomas E. Waggaman shall well and truly discharge the duties devolving upon him as such trustee, and shall in all things obey such order and decree as this court shall make in the premises, then the above obligation to be void and of no effect; else to be in full force and virtue.

The bond, as shown by its recitals, was executed in a pending equity cause in the supreme court of the District, wherein the parties for whose use this suit is brought were parties, either plaintiff or defendant.

The declaration, in substance, averred a breach of the bond, in this: That Waggaman had assumed the duty and function of trustee for the sale directed by the decree, had sold and conveyed the property as directed, but had not accounted for the proceeds, having unfaithfully violated 501] *the trust and confidence reposed in him by squandering and misappropriating such proceeds. It was further averred that on November 21, 1905, the said Waggaman had disobeyed a decree of the court, requiring him to pay into court the sum of \$8,147.27, with interest from August 1, 1904, and was therefore in default.

The defenses with which we are concerned upon this writ are those made by the surety, who, by a plea which the court below sustained, challenged the obligation of the bond. The insistence is that the supreme court of the District exceeded its authority in decreeing a sale of the land which was sold by Waggaman, and his appointment to make such a sale was a

nullity, and the bond executed by him with the defendant Clarke as surety mere waste paper.

The proceeding in the supreme court in which this bond was executed was a bill in equity to sell lot No. 1912 I street N. W., Washington, District of Columbia, as the property of a minor, for purpose of reinvestment under like trusts. The title was held under the will of Robert B. Hine, who died in 1895. So much of the will as concerns the title to the premises of which a sale was decreed was in these words:

"I give and bequeath to my dear wife, Mattie McC. Hine, a life interest in all my real estate. As executrix she will collect the income arising from my said real estate, and after paying all necessary expenses of collection, fire insurance, and repairs, shall retain the remainder of the income for her own use. After the death of my said wife, I give and bequeath my real estate to my son, Robert Edward, and any other children that may hereafter be born to me. If my said wife should marry again, she will, from the date of such remarriage, be entitled to retain for her own use, one half of the net income of my estate, and will pay the remainder to a trustee for my son, and any other children who may hereafter be born to me. Provided, further, that should my wife marry *again, and should no child of mine [502 by her be then surviving, the whole net income from my estate shall be retained by her, during her life, and after her death, my real estate shall be sold, and of the proceeds, one third shall be paid to my father, the Rev. Henry Hine, now of Boston Spa, Yorkshire, England, if he then be living, he not being then living, to my mother, Amelia Burnett Hine, neither of them being then living, to my sister Amelia Burnett Hine, and the residue shall be equally divided between my brothers and sisters, share and share alike. If neither parent, nor my sister Amelia Burnett Hine, outlives my said wife, then the whole net proceeds of the sale of my real estate, shall be equally divided between my brothers and sisters. Should any of these have died before this distribution takes place, their surviving children shall receive the share of the deceased parent, share and share alike."

The complainant in the suit was Mattie McC. Hine, the widow of the testator, who averred that she had never remarried. The defendants were the only issue of her marriage with testator, her son, Robert E. Hine, then an infant of nine years of age, and the persons who, under the will, were given contingent interests. The minor, Robert E. Hine, was duly served and answered by guardian *ad litem*. The other

defendants were made parties by publication, as persons not to be found in the District. The bill alleged that the dwelling house was deteriorating in value, that it was often unrented, that repairs, insurance, and taxes left an inconsiderable net income, which would go on diminishing. That she believed she could obtain \$8,500 for the premises, a sum much larger than the value of the property to the remaindermen when her estate should fall in, and that the proceeds could be so invested as to much improve her income and better "enable her to provide for the remainderman during his minority." The bill alleged that 503] the will did not *prohibit a sale. The prayer was for a decree of sale and for a reinvestment, in pursuance of § 973, D. C. Rev. Stat.

Upon the pleadings and proof the court directed a sale of the said lot, and in the same decree appointed Thomas E. Waggonman "trustee to make the sale," requiring him to execute a bond of surety "conditioned for the faithful performance of the trust reposed in him by this decree, or which may be reposed in him by any future order or decree in the premises." By the same decree he was required "to bring into court the money arising on such sale . . . to be disposed of under the direction of the court," etc.

The contention is that the supreme court of the District has no inherent or general power as a court of equity to decree the sale of an infant's property for the purpose of reinvestment, and that its jurisdiction was wholly dependent upon statutory power conferred by §§ 969 et seq., D. C. Rev. Stat. taken from the act of Congress of August 18, 1856 [11 Stat. at L. 118, chap. 163]. Section 969 reads as follows:

"Where real estate is limited by deed or will to one or more for life or lives, with a contingent limitation over to such issue of one or more of the tenants for life as shall be living at the death of their parent or parents, and the deed or will does not prohibit a sale, the supreme court of the District may, upon the application of the tenants for life, and if the court shall be of the opinion that it is expedient to do so, order a sale of such estate, and decree to the purchaser an absolute and complete title in fee simple."

The contention is that the only jurisdiction conferred by the statute is confined to real estate which is by deed or will "limited to one or more lives, with a contingent limitation over to such issue of one or more of the tenants for life as shall be living at the death of either parent," and that, under the will of Robert B. Hine, the devise to Robert Edward Hine is a vested, and not a contin-

gent, *remainder, while the contingent [504 remainders—contingent on the death of said Robert and the subsequent remarriage of his mother, the said Mattie—are not limitations over to issue of either Robert B. Hine or Mattie Hine. For this construction of the statute of the court below relied upon *American Security & T. Co. v. Muse*, 4 App. D. C. 12, 20; *Thaw v. Ritchie*, 5 Mackey, 200, and *Clark v. Mathewson*, 7 App. D. C. 384.

Clearly, under the will there was a life tenant and a remainder over at the death of the life tenant to Robert E. Hine, who was the issue of the testator and of the life tenant. The remainder was not absolute, for if the remainderman should die, and his mother, the life tenant, remarry, this lot was to be sold and the proceeds paid over to certain collaterals named. Technically the interest was a vested remainder, subject to open and let in the testator's brothers and sisters, and to be divested upon the death of Robert E. Hine and remarriage of the life tenant. The contention now is that if the court erred in the construction of the will, or in the interpretation and application of the statute, and decreed a sale for reinvestment, not strictly authorized by the statute, that its action and decree is to be regarded as a nullity, that the sale is void, and that the appointment of Waggonman as trustee and the execution of his bond are absolute nullities.

But if we assume that, upon a critical construction of the will and of the statute, the bill seeking a sale of this property for reinvestment did not state a case clearly within the statutory authority of the court, it does not necessarily follow that the decree of sale and all else that occurred are to be treated as mere nullities, subject to collateral attacks such as this is.

The supreme court of the District is one of general jurisdiction. It possesses all of the powers which by statute are conferred upon the circuit and district courts of the United States. *D. C. Rev. Stat. §§ 760 [505 and 765. It may be said, indeed, to have the usual powers incident to a court of equity at the date of the Revolution, not incompatible with the changed form and principles of government, or affected by subsequent legislation. *Clark v. Mathewson*, 7 App. D. C. 382.

The inherent power of a court of equity over the persons and estates of infants is very wide. For the purpose of maintenance, the power over real estate is undoubtedly more comprehensive than it is over the sale of real estate for purposes of reinvestment, though manifestly for the interest of the minor. The weight of authority seems to be that it does not extend

to sales merely because it shall appear to be for the interest of the infant (*Bispham*, Eq. § 549; *Story*, Eq. § 1357; 3 *Pom. Eq. Jur.* §§ 1304, 1309), though there is not lacking very respectable authority for the power to sell real estate when shown to be for the manifest interest of the minor. 2 *Kent*, Com. 11th ed. *230; *Hedges v. Riker*, 5 *Johns Ch.* 167; *Thompson v. Mebane*, 4 *Heisk.* 370; and *Talbot v. Provine*, 7 *Baxt.* 502. The supreme court of the District had jurisdiction over the subject-matter, the *res*. It had jurisdiction over the parties. It was, according to due course of equity proceeding, called upon to examine the will and the statute which gave the power to make the sale in certain circumstances. If, then, jurisdiction consists in the power to hear and determine, as has so many times been said, and the court errs in holding that a case has been made either under its inherent power or its statutory authority, can it be said that it has usurped jurisdiction and that its decrees are absolute nullities? To this we cannot consent. If the court was one of general, and not special, jurisdiction, if, under its inherent power, supplemented by statutory enlargement, it had jurisdiction under any circumstances to sell the real estate of minors for reinvestment, it had jurisdiction to examine and determine whether the particular application was within or beyond its 506] authority. To do this *was jurisdiction. If it errs, its judgment is reversible by proper appellate procedure. But its judgment, until it be corrected, is a judgment, and cannot be regarded as a nullity.

In the leading case of *Ex parte Watkins*, 3 *Pet.* 193, 203, 206, 7 *L. ed.* 650, 653, 654, the opinion was by Chief Justice Marshall. The question arose upon a writ of habeas corpus. The petitioner had been indicted and convicted. He sought to be discharged from prison because the indictment upon its face charged no offense cognizable by courts of the United States. The court said, among other things:

"An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. The circuit court for the District of Columbia is a court of record, having general jurisdiction over criminal cases. An offense cognizable in any court is cognizable in that court. If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or 1128

not is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case as in the other; and must remain in full force unless reversed regularly by a superior court capable of reversing it."

After referring to and commenting upon *Kempe v. Kennedy*, 5 *Cranch*, 173, 3 *L. ed.* 70, and *Skillern v. May*, 6 *Cranch*, 267, 3 *L. ed.* 220, the court added:

"Had any offense against the laws of the United States been in fact committed, the circuit court for the District of Columbia could take cognizance of it. The question *whether any offense was or was not [507 committed, that is, whether the indictment did or did not show that an offense had been committed, was a question which that court was competent to decide. If its judgment was erroneous, a point which this court does not determine, still it is a judgment, and, until reversed, cannot be disregarded."

This case was followed in *Ex parte Parks*, 93 *U. S.* 18, 23, 23 *L. ed.* 187, 788, and in *Re Coy*, 127 *U. S.* 731, 757, 32 *L. ed.* 274, 280, 8 *Sup. Ct. Rep.* 1263, 1272, where this court, speaking by Mr. Justice Miller, said of the language just cited from *Ex parte Watkins*, that—

"It may be said that this language is too broad in asserting that, because every court must pass upon its own jurisdiction, such decision is itself the exercise of a jurisdiction which belongs to it, and cannot, therefore, be questioned in any other court. But we do not so understand the meaning of the court. It certainly was not intended to say that because a Federal court tries a prisoner for an ordinary common-law offense, as burglary, assault and battery, or larceny, with no averment or proof of any offense against the United States, or any connection with a statute of the United States, and punishes him by imprisonment, he cannot be released by habeas corpus because the court which tried him had assumed jurisdiction.

"In all such cases, when the question of jurisdiction is raised, the point to be decided is whether the court has jurisdiction of that class of offenses. If the statute has invested the court which tried the prisoner with jurisdiction to punish a well-defined class of offenses, is forgery of its bonds or perjury in its courts, its judgment as to what acts were necessary under these statutes to constitute the crime is not reviewable on a writ of habeas corpus."

The principle has been applied in many cases, notably in cases in which want of jurisdiction as a court of the *United [508

States was apparent on the record. *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 557, 559, 31 L. ed. 202, 204, 205, 8 Sup. Ct. Rep. 217; *Dowell v. Applegate*, 152 U. S. 327, 337, 38 L. ed. 463, 467, 14 Sup. Ct. Rep. 611.

In *McNitt v. Turner*, 16 Wall. 352, 365, 21 L. ed. 341, 347, the court, after passing upon various jurisdictional objections to a judicial sale of a title in controversy, said:

"But there is a comprehensive and more conclusive answer to all the objections to the sale which have been considered, and to others suggested which have not been adverted to.

"Upon the filing of the notice with the proof of publication, and the subsequent filing of the petition of the administrator for authority to sell, the circuit court had jurisdiction of the case. No presumption on that subject is necessary. Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding, being *coram judice*, can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error. The order of sale before us is within this rule. *Grignon v. Astor*, 2 How. 341, 11 L. ed. 292, was, like this, a case of a sale by an administrator. In that case, this court said: 'The purchaser under it is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error; and so where an appeal is given, but not taken, in the time allowed by law.' This case and the case of *Voorhees v. Jackson*, 10 Pet. 449, 9 L. ed. 490, are the leading authorities in this court upon the subject. Other and later cases have followed 509] *and been controlled by them. *Stow v. Kimball*, 28 Ill. 93, affirms the same doctrine."

The line between a judgment which is a plain usurpation of jurisdiction and one which is merely erroneous, and reviewable only by seasonable appeal, is a plain one. The case in hand falls, in our judgment, within those which are merely reversible upon appellate proceedings, and the judgment decreeing the sale and appointing Waggaman as trustee to make the sale was not a nullity.

54 L. ed.

In *Voorhees v. Jackson*, 10 Pet. 449, 474, 9 L. ed. 490, 500, this court said:

"The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity; in the other, mere waste paper. There can be no middle character assigned to judicial proceedings which are irreversible for error. Such is their effect between the parties to the suit; and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution. It would be a well-merited reproach to our jurisprudence if an innocent purchaser, no party to the suit, who had paid his money on the faith of an order of a court, should not have the same protection under an erroneous proceeding as the party who derived the benefit accruing from it."

In *Fauntleroy v. Lum*, 210 U. S. 230, 237, 52 L. ed. 1039, 1042, 28 Sup. Ct. Rep. 641, it is laid down that a judgment cannot be collaterally impeached by showing that it was based upon a mistake of law.

But aside from the view we have expressed as to the validity of the proceedings when collaterally attacked, we are of opinion that the question of the validity of the decree of sale, the order appointing Waggaman trustee to make the sale, and the validity of the bond in suit, is *not [510 open to question by one who voluntarily became the surety upon the bond, thereby enabling his principal to obtain the proceeds of sale. Having obtained the trust and confidence of the court by aid of the security afforded by the solemn obligation to faithfully execute the order of the court, and to pay into the court the proceeds of the sale which he undertook to make, neither the trustee so appointed, nor the surety for his performance of the trust, is in a situation to deny the regularity of the transaction. The proceeds which Waggaman received are either the funds of the beneficial owners of the property, or, if the sale be in fact void so far as to confer no title, the purchaser, in equity and justice, must be protected before the money is distributed. The benefit which Waggaman expected to secure, he has been enabled to enjoy through the voluntary execution of this bond by Clarke as his surety. That bond recites his due appointment, and it would be inequitable and unjust to permit either the principal or his surety to deny the fact.

This rule of estoppel has been applied in many cases. It was applied in respect to the bond of an Indian agent. The surety upon the bond denied liability because the government did not produce the commission showing the appointment of his principal. The court said: "The bond upon which the suit was brought recites that he was appointed agent, and, the obligors in the bond are therefore estopped from denying it." *Bruce v. United States*, 17 How. 437, 442, 15 L. ed. 129, 131.

The principle was applied to a distiller's bond, where one of the defenses was that the bond was invalid. The court said:

"But we prefer to place our judgment upon the broader ground marked out by the adjudications of this court, to which we have referred. Everyone is presumed to know the law. Ignorance, standing alone, can never be the basis of a legal right. If a [511] bond is liable to the objection *taken in this case and the parties are dissatisfied, the objection should be made when the bond is presented for execution. If executed under constraint, the constraint will destroy it. But where it is voluntarily entered into and the principal enjoys the benefits which it is intended to secure and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of the rights of the government and of the liability of the obligors." *United States v. Hodson*, 10 Wall. 395, 409, 19 L. ed. 937, 940.

It was applied in respect of a stay bond executed under a void act of legislation. "Not to apply the principle of estoppel to the bond in this case would," said the court, "it seems to us, involve a mockery in judicial administration, and a violation of the plainest principles of reason and justice." *Daniels v. Tearney*, 102 U. S. 415, 422, 26 L. ed. 187, 189.

The opinions of the highest courts of the states are full of applications of the rule of estoppel. In *Plowman v. Henderson*, 59 Ala. 559, the sureties upon the bond of an administrator were not permitted to show the illegality of his appointment. To the same effect is *White v. Weatherbee*, 126 Mass. 450.

The sureties upon the bond of a sheriff were held estopped to deny the validity of his appointment or the regularity of his bond. *Jones v. Gallatin County*, 78 Ky. 491.

In *People v. Norton*, 9 N. Y. 176, the sureties upon the bond of a trustee appointed by a chancery court were held estopped to deny the validity of the order appointing him.

In *State v. Anderson*, 16 Lea, 321, 335, and *United States v. Maurice*, 2 Brock, 96, Fed. Cas. No. 15,747, the rule is recognized and applied.

The questions which we have considered arose upon *plea which set out the [512] proceedings in the case in which the bond had been taken, and averred their nullity for want of jurisdiction. Another and distinct defense relied upon in the plea was that, after the proceeds of sale had come to the possession of said Waggaman, Mattie McC. Hine, one of the beneficiaries for whose use this suit is prosecuted by the United States, had agreed with the said Waggaman that he should retain in his possession and for his own purposes the fund aforesaid, and should pay to her interest at the rate of 5 per cent per annum, quarterly. That this agreement was acted upon and the interest so paid from the date of the receipt of the proceeds, in 1899, to May 1, 1904, and that the agreement was without the knowledge or consent of the surety. There was a demurrer and joinder thereon to so much of the said plea as set out and relied upon the nullity of the proceedings under which the bond had been executed, and a replication and issue upon the plea, relying upon any alleged agreement between Waggaman, the principal, and Mrs. Hine, as one of the beneficiaries in the bond. The demurrer was overruled, and complainants, electing to stand upon it, declined to further plead; whereupon the action was dismissed. From this judgment there was an appeal to the court of appeals of the District, where the judgment was affirmed.

So much of the plea as sought to defend the action in whole or in part in consequence of the alleged agreement between the principal in the bond and Mrs. Hine, without the consent of the surety, remains at issue undisposed of, and is accordingly not considered by us.

The judgment of the Court of Appeals, so far as it determined the validity of the plea aforesaid, was erroneous, and the case is reversed and remanded with direction to sustain the demurrer, and remand the case for further proceedings not inconsistent with this opinion.

Reversed.

513]*EAGLE MINING & IMPROVEMENT COMPANY, Appt.,
v.

MARY R. HAMILTON et al. and Humphrey B. Hamilton, Jr., Administrator of the Estate of Humphrey B. Hamilton, Deceased.

(See S. C. Reporter's ed. 513-516.)

Appeal — from territorial court — scope of review.

1. The jurisdiction of the Federal Supreme Court, under the act of April 7, 1874 (18 Stat. at L. 27, chap. 80), on an appeal from a territorial court, is limited to the inquiry whether the findings of fact made by the court below support its judgment, and to a review of exceptions which have been duly taken to rulings upon the admission or rejection of evidence.

[For other cases, see Appeal and Error, VIII. 1, 3, e. in Digest Sup. Ct. 1908.]

Appeal — from territorial court — statement of facts.

2. The findings of a territorial district court, having been adopted and affirmed by the supreme court of the territory, serve the purpose of the statement of facts required by the act of April 7, 1874 (18 Stat. at L. 27, chap. 80), on appeal to the Federal Supreme Court.

[For other cases, see Appeal and Error, V. o. in Digest Sup. Ct. 1908.]

[No. 51.]

Submitted November 7, 1910. Decided November 28, 1910.

APPEAL from the Supreme Court of the Territory of New Mexico to review a decree which affirmed a decree of the District Court of the Fifth Judicial District in and for the County of Lincoln in that territory, in favor of plaintiffs in consolidated suits to establish a trust in real property. Affirmed.

See same case below, 14 N. M. 271, 91 Pac. 718.

The facts are stated in the opinion.

Mr. Samuel Parker submitted the cause for appellant. Messrs. George W. Prichard and Archibald G. Graham were on the brief:

This court, sitting as a court of review, will pass upon the weight or sufficiency of evidence in equity cases.

Dirst v. Morris, 14 Wall. 484, 20 L. ed. 722; Hyde v. Booraem, 16 Pet. 169, 10 L. ed. 925; Ridings v. Johnson, 128 U. S. 212, 32 L. ed. 401, 9 Sup. Ct. Rep. 72.

An appeal, distinguished from a writ of error, presents for review in this court questions of both law and fact.

NOTE.—As to review by United States Supreme Court of territorial decisions—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.
54 L. ed.

United States v. Goodwin, 7 Cranch, 108, 3 L. ed. 284; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Hemmenway v. Fisher*, 20 How. 255, 15 L. ed. 799; *Re Neagle*, 135 U. S. 42, 34 L. ed. 63, 10 Sup. Ct. Rep. 658.

The improper rejection of testimony on the trial before a judge without a jury is error, subject to review.

Arthurs v. Hart, 17 How. 6, 15 L. ed. 30; *Gregg v. Moss*, 14 Wall. 564, 20 L. ed. 740; *Cannon v. Pratt*, 99 U. S. 619, 25 L. ed. 446; *Hornbuckle v. Stafford*, 111 U. S. 389, 28 L. ed. 468, 4 Sup. Ct. Rep. 515.

Mr. James G. Fitch submitted the cause for appellees:

The jurisdiction of this court is limited to determining whether the facts found are sufficient to sustain the judgment rendered, and to reviewing the rulings of the court on the admission or rejection of evidence, when exceptions have been duly taken.

Haws v. Victoria Copper Min. Co. 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282; *Stringfellow v. Cain*, 99 U. S. 610, 25 L. ed. 421; *Idaho & O. Land Improv. Co. v. Bradbury*, 132 U. S. 509, 33 L. ed. 433, 10 Sup. Ct. Rep. 177; *Mammoth Min. Co. v. Salt Lake Foundry & Mach. Co.* 151 U. S. 447, 38 L. ed. 229, 14 Sup. Ct. Rep. 384; *Gildersleeve v. New Mexico Min. Co.* 161 U. S. 577, 40 L. ed. 813, 16 Sup. Ct. Rep. 663; *Salina Stock Co. v. Salina Creek Irrig. Co.* 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1036; *Harrison v. Perea*, 168 U. S. 323, 42 L. ed. 482, 18 Sup. Ct. Rep. 129; *Karrick v. Hannaman*, 168 U. S. 333, 42 L. ed. 488, 18 Sup. Ct. Rep. 135; *Holloway v. Dunham*, 170 U. S. 615, 42 L. ed. 1165, 18 Sup. Ct. Rep. 784; *Naeglin v. DeCordoba*, 171 U. S. 638, 43 L. ed. 315, 19 Sup. Ct. Rep. 35; *Young v. Amy*, 171 U. S. 179, 43 L. ed. 127, 18 Sup. Ct. Rep. 802; *Simms v. Simms*, 175 U. S. 162, 44 L. ed. 115, 20 Sup. Ct. Rep. 58; *Marshall v. Burtis*, 172 U. S. 630, 43 L. ed. 579, 19 Sup. Ct. Rep. 290.

Alleged errors in the admission or rejection of evidence cannot be passed upon by this court on appeal from a territorial court, where this cannot be done without examining the weight of the evidence and disregarding the facts found.

Young v. Amy, supra.

Mr. Justice Hughes delivered the opinion of the court:

This is an appeal from a decree of the supreme court of the territory of New Mexico in two suits which were consolidated. The first suit was brought in August, 1903, *in a district court of the territory, [514 by the appellant, Eagle Mining & Improvement Company, against the appellees, the

widow and heirs of Humphrey B. Hamilton, deceased, to have it adjudged that the decedent held a certain undivided interest in mining property in trust for the appellant, and to compel conveyance. In November, 1904, the appellees, one of whom was the administrator of the decedent's estate, brought suit against the appellant, alleging that Hamilton had rendered services as its attorney in connection with the mining property and otherwise, and that the legal title had been taken by him pursuant to an agreement, by which it was to be held as security for the appellant's indebtedness to him; the appellees prayed for foreclosure and recovery of the amount found to be due. The suits were consolidated and a referee was appointed to take testimony. Hearing was had, and a decree was entered in favor of appellees, which set forth separately findings of fact and conclusions of law.

The court found that Hamilton had acquired the legal title to the undivided one-half interest in question under an agreement with the appellant, by which he was to negotiate for the purchase in its behalf, and was to surrender a certain equitable claim of lien upon another interest in the property; that in consideration of this surrender and of his services in acquiring the one-half interest, Hamilton was to receive the difference between an agreed sum and the amounts to be advanced by the appellant to effect the purchase; that for the payment of this difference—found to amount to \$9,500—Hamilton was to hold the legal title as security; and that the agreement to this effect was evidenced by writings signed by Hamilton “and delivered to, accepted and acquiesced in by, the said company.”

As a conclusion of law, the court found that the heirs of Hamilton were entitled **515]** to hold the legal title to the *undivided interest until the payment of \$9,500, with interest and costs of suit, had been made to the administrator of Hamilton's estate; that upon such payment they should convey to the appellant, and that in default of payment the undivided interest should be sold to satisfy the indebtedness.

It was further found that Hamilton had been retained by the appellant as its attorney, and at its request had rendered legal services from the date of its organization until his death without express agreement as to the amount to be paid therefor; that these services were reasonably worth \$9,519.99, upon which, after deducting payments, there was due \$8,419.99. And, as a conclusion of law, the court held that the administrator was entitled to judgment for the last-mentioned sum.

It was decreed accordingly, and from

this decree appeal was taken to the supreme court of the territory, where it was affirmed. [14 N. M. 276, 91 Pac. 718.]

The record before us contains the testimony taken before the referee, and the letters and documents which, in connection with the testimony, he submitted to the court in his report; and the argument here is directed largely to the effect of the evidence and to the findings of the court below as to matters of fact.

But we are not at liberty to review these findings of fact. We cannot go behind the findings to ascertain whether they are justified by the evidence. Under the act of April 7, 1874, chapter 80 (18 Stat. at L. 27), the jurisdiction of this court, upon this appeal, is limited to the inquiry whether the findings of fact made by the court below support its judgment, and to a review of exceptions which have been duly taken to rulings upon the admission or rejection of evidence. *Stringfellow v. Cain*, 99 U. S. 610, 25 L. ed. 421; *Neslin v. Wells, F. & Co.* 104 U. S. 428, 26 L. ed. 802; *Idaho & O. Land Improv. Co. v. Bradbury*, 132 U. S. 509, 33 L. ed. 433, 10 Sup. Ct. Rep. 177; *Haws v. Victoria Copper Min. Co.* 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282; *Grayson v. *Lynch*, 163 [516 U. S. 468, 41 L. ed. 230, 16 Sup. Ct. Rep. 1064; *Bear Lake & River Waterworks & Irrig. Co. v. Garland*, 164 U. S. 1, 41 L. ed. 327, 17 Sup. Ct. Rep. 7; *Apache County v. Barth*, 177 U. S. 538, 44 L. ed. 878, 20 Sup. Ct. Rep. 718. The findings of the district court, having been adopted and affirmed by the supreme court of the territory, serve the purpose of the statement of facts required by the statute. *Stringfellow v. Cain*; *Neslin v. Wells, F. & Co.*; and *Hawes v. Victoria Copper Min. Co.*,—supra.

Nor are there any rulings upon questions of evidence which are properly before us for review, for no exceptions to such rulings appear in the record. When the evidence was taken before the referee appointed by the district court, various objections were made and were noted upon the record; but the referee did not attempt to pass upon the objections, and reported to the court the entire proceedings, including the testimony and documents to which objection had been made. What, if any, rulings were made by the court upon these objections, is not shown. In the progress of the cause a memorandum of opinion was filed by the judge sitting in the district court, in which the admissibility of certain testimony, relied upon by the appellant, was said to be doubtful; but it does not appear that the testimony was excluded, and, as we have said, there are no exceptions which bring up

any question for review with respect to the admission or rejection of evidence.

As the facts found by the court unquestionably support the judgment, it is Affirmed.

517] *UNITED STATES, Plff. in Err.,
v.

FRANK H. MASON. (No. 510.)

UNITED STATES, Plff. in Err.,
v.

FRANK H. MASON. (No. 511.)

UNITED STATES, Plff. in Err.,
v.

FRANK H. MASON. (No. 512.)

(See S. C. Reporter's ed. 517-531.)

Embezzlement — by clerk of Federal court — fees and emoluments.

1. A clerk of a Federal district court cannot be charged with embezzling the surplus fees and emoluments of his office until he refuses or fails to make his half-yearly return, or to pay over the surplus shown to exist by such return or the audit thereof, even if such surplus fees and emoluments can in any event be the subject of embezzlement.

[For other cases, see Embezzlement, in Digest Sup. Ct. 1908.]

Embezzlement — public moneys — fees of clerk of court.

2. The duty of a clerk of a Federal district court to pay over to the United States the surplus fees and emoluments of his office which his half-yearly return or the audit thereof shows to exist over and above the compensation and allowances authorized by law to be retained by him is not governed by the Federal statutes relating to the embezzlement of "public money" or "money or property of the United States," but such fees and emoluments are received by the clerk, not as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties, and with respect to the amount payable when the return is made, the clerk is not a trustee, but a debtor.

[For other cases, see Embezzlement, in Digest Sup. Ct. 1908.]

[Nos. 510, 511, 512.]

Argued October 18, 19, 1910. Decided
November 28, 1910.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts to review judgments sustaining the demurrers to counts of indictments of the clerk of a Federal district court for embezzlement, which rest upon the alleged con-

version of the surplus fees and emoluments of his office. Affirmed.

See same case below, 177 Fed. 552.

The facts are stated in the opinion.

Assistant Attorney General Fowler argued the causes and filed a brief for plaintiff in error.

Mr. Boyd B. Jones argued the causes, and, with Mr. George L. Wilson, filed a brief for defendant in error.

Mr. Justice Hughes delivered the opinion of the court:

The defendant, the clerk of the district court of the *United States for the district of Massachusetts, was indicted for the embezzlement of certain moneys of the United States. Separate indictments were found as to moneys received by the clerk in the years 1906, 1907, and 1908, respectively. They are precisely alike, save for the difference in the years and the amounts specified. In each case the circuit court sustained a demurrer as to three counts of the indictment, the second, third and fourth, and the judgments on the demurrers are brought here for review.

Each of these three counts—which are set forth in the margin†—states that the moneys were a "portion of a *surplus [519] of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him." The charge of the second count is that the defendant "the same public moneys *unlawfully did fail safely to keep" as [520] required by acts of Congress, "and, on the contrary, the same then and there unlawfully did convert to his own use," and thereby "was guilty of embezzlement of said public moneys so converted." The third count is the same as the second, except that it charges that the defendant converted the moneys "fraudulently" as well as "unlawfully." The fourth count charges that he should have paid the money, that is, the alleged surplus, to the United States, "in the manner provided by law," and that he "the same money unlawfully, wrongfully, and fraudulently did convert to his own personal use and embezzle."

†Second count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason during all of the year 1908 was, and ever since has been, an officer of the United States, to wit, clerk of the district court of the United States for the district of Massachusetts, and on said 1st day of February, in the year 1909, had in his possession and under his control, to wit, at Boston, aforesaid, certain public moneys of the United States, a particular description whereof is to said grand jurors

To sustain the counts, the assignment of errors refers to §§ 5490 and 5497 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 3704, 3707), and to the act of March 3, 1875, chapter 144 (18 Stat. at L. p. 479, U. S. Comp. Stat. 1901, p. 3675).

Section 5490 is as follows:

"Every officer or other person charged by any act of Congress with the safe-keeping of the public moneys, who fails to safely keep the same, without loaning, using, converting to his own use, depositing in banks, or exchanging for other funds than as specially allowed by law, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged; 521] and shall be imprisoned *not less than six months nor more than ten years, and

finied in a sum equal to the amount of money so embezzled."

Section 5497, with the addition made by the amendment of February 3, 1879, chapter 42 (20 Stat. at L. 280, U. S. Comp. Stat. 1901, p. 3707), provides:

"Every banker, broker, or other person not an authorized depository of public moneys, . . . who uses, transfers, converts, appropriates, or applies any portion of the public money for any purpose not prescribed by law, . . . is guilty of an act of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be punished as prescribed in section fifty-four hundred and eighty-eight.

"And any officer connected with, or em-

unknown, to wit, moneys to the amount and of the value of \$387, which, during said year 1908, had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and were a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year 1908, which said public moneys said Frank H. Mason, on said 1st day of February, in the year 1909, as such officer, was charged, by certain acts of Congress, to wit, §§ 823, 828, and 844 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, pp. 632, 635 and 647), and the act approved June 28, 1902, 32 Stat. at L. 419, chap. 1301, and by divers other acts of Congress, safely to keep; that said Frank H. Mason, on said 1st day of February, in the year 1909, at Boston, aforesaid, the same public moneys unlawfully did fail safely to keep, as required by said acts of Congress, and, on the contrary, the same then and there unlawfully did convert to his own use: and that thereby said Frank H. Mason then and there was guilty of embezzlement of said public moneys so converted.

Third count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason, during all of the year 1908, was, and ever since has been, an officer of the United States, to wit, clerk of the district court of the United States for the district of Massachusetts, and on said 1st day of February, in the year 1909, had in his possession and under his control, to wit, at Boston, aforesaid, certain public moneys of the United States, a particular description whereof is to said grand jurors unknown; to wit, moneys to the amount and of the value of \$387, which, during said year 1908, had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and were a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year 1908,

which said public moneys said Frank H. Mason, on said 1st day of February, in the year 1909, as such officer, was charged, by certain acts of Congress, to wit, §§ 823, 828, and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Stat. at L. 419, chap. 1301, and by divers other acts of Congress, safely to keep; that said Frank H. Mason, on said 1st day of February, in the year 1909, at Boston, aforesaid, the last-mentioned public moneys unlawfully did fail safely to keep, as required by said acts of Congress, and, on the contrary, the same then and there unlawfully and fraudulently did convert to his own use; and that thereby said Frank H. Mason then and there was guilty of embezzlement of said public moneys so converted.

Fourth count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason, during all of the year 1908, was, and ever since then has been, an officer of the United States, to wit, clerk of the district court of the United States for the district of Massachusetts, and, on said 1st day of February, in the year 1909, had in his possession and under his control, to wit, at Boston, aforesaid, a portion of the money of the United States, a particular description whereof is to said grand jurors unknown, to wit, money to the amount and of the value of \$387, which, during said year 1908, had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and was a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year 1908, which money last aforesaid he should, on said 1st day of February, in the year 1909, have paid to the United States at Boston, aforesaid, in the manner provided by law; and that said Frank H. Mason, on said 1st day of February, in the year 1909, at Boston, aforesaid, the same money unlawfully, wrongfully, and fraudulently did convert to his own personal use and embezzle.

ployed in, the internal revenue service of the United States, and any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or other property of the United States, and any officer of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or assistant, whether the same shall be the money or property of the United States or of some other person or party, shall, where the defense is not otherwise punishable by some statute of the United States, be punished by a fine equal to the value of the money and property thus embezzled or converted, or by imprisonment not less than three months nor more than ten years, or by both such fine and imprisonment."

By the act of March 3, 1875, chapter 144, § 1 (18 Stat. at L. p. 479, U. S. Comp. Stat. 1901, p. 3675), "any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable [522] *thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be deemed guilty of felony."

It is also contended in argument, that the facts alleged in the indictment bring it within the scope of § 5489 of the Revised Statutes, which provides that if "any public depositary fails safely to keep all moneys deposited" he shall be deemed guilty of embezzlement; and this, under § 5493, is to be construed "to apply to all persons charged with the safe-keeping, transfer, or disbursement of the public money, whether such persons be indicted as receivers or depositaries of the same."

What, if any, application these provisions may have to the clerk of the district court, with respect to the fees and emoluments of his office, can be determined only after a consideration of the history of his relation to these moneys and of the statutes which specifically define his rights and duties. Prior to 1841 the clerks were not required to render any account of their fees to the government. *United States v. Hill*, 120 U. S. 169, at page 176, 30 L. ed. 627, 630, 7 Sup. Ct. Rep. 510. The act of March 3, 1791, chapter 22, § 1 (1 Stat. at L. 217), fixed their compensation for attending court and made an allowance for traveling. That of May 8, 1792, chapter 36, § 3 (1 Stat. at L. 277), added such fees as were allowed by the supreme court of the state, and authorized the court to grant a reasonable compensation for the discharge of duties not performed by the clerks of

the state court, and for which the laws of the state made no allowance. But, under these statutes, the fees and emoluments received by the clerks were their own property. And they were to be recovered "in like manner as the fees of the officers of the states respectively for like services." 1 Stat. at L. 278, § 6, chap. 36, U. S. Comp. Stat. 1901, p. 658.

In 1841, for the first time, the clerks were limited as to the amount which they were entitled to retain out of their fees. The act of March 3, 1841, chapter 35, § 1 (5 *Stat. at L. 427), provided that the [523] fees and emoluments retained by the clerks after the payment "of such necessary office and other expenses as shall be allowed by the Secretary of the Treasury," within a prescribed limit, should "not exceed, in any case, four thousand five hundred dollars; the overplus of fees and emoluments to be paid into the public Treasury, under such rules and regulations as may be prescribed by the Secretary of the Treasury, subject to the disposition of Congress." This was followed by the act of May 18, 1842, chapter 29 (5 Stat. at L. 483), which limited the amount which the clerk could retain out of the fees and emoluments of his office "for his own personal compensation, over and above the necessary expenses of his office, and necessary clerk hire included, also to be audited and allowed by the proper accounting officers of the Treasury," to the sum of \$3,500 per year. The clerks were required to make verified returns semiannually, "embracing all the fees and emoluments of their respective offices, of every name and character," and also "all the necessary office expenses of such officer, together with the vouchers for the payment of the same." It was also provided that the officer, with each return, should "pay into the Treasury of the United States, or deposit to the credit of the Treasurer thereof, as he may be directed by the Secretary of the Treasury, any surplus of the fees and emoluments of his office which his half-yearly return, so made as aforesaid, shall show to exist over and above the compensation and allowances hereinbefore authorized to be retained and paid by him." Where the return showed that a surplus might exist, the Secretary of the Treasury was to cause the return to be carefully examined, and the accounts of disbursements to be regularly audited, "and an account to be opened with such officer in proper books to be provided for that purpose."

The plain object of this statute was to limit the amount *which the clerk was [524] to retain, and to require an accounting, an audit of expenses, and a payment of the

surplus. Otherwise the established method of administering the office was not changed. The fees were to be recovered as theretofore; and to the extent of the amount of the fixed compensation of the clerk and the necessary expenses of his office, he was entitled to use and to pay as formerly. The statute suggests no other course. What, if anything, should be paid into the public treasury at the end of the half year, when he was to make his return, depended upon the amount of the fees, the amount of the expenses, and the result of the audit. If his fixed compensation and his necessary expenses exhausted the fees, there would be nothing to pay. The amount payable was to be determined when the return was made.

This was the state of the law as to the clerks' fees and emoluments at the time of the passage of the act of August 6, 1846, chapter 90 (9 Stat. at L. 59), which was entitled, "An Act to Provide for the Better Organization of the Treasury and for the Collection, Safe-Keeping, Transfer, and Disbursement of the Public Revenue." It made careful provision with respect to the duties of the Treasurer, Assistant Treasurers, and of collectors and receivers of public moneys, and the manner in which these moneys should be deposited and disbursed. By § 6 of this act "all public officers of whatever character" were required "to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by this act, all the public money collected by them," until it was ordered "by the proper department or officer of the government" to be transferred or paid out. See Revised Statutes, § 3639, U. S. Comp. Stat. 1901, p. 2422. By § 16 it was provided that if any officer "charged by this act, or any other act, with the safe-keeping, transfer, and disbursement of the public moneys," should use, loan, deposit, or exchange, except as allowed by the act, 525] "any portion of the public *moneys intrusted to him," every such act should be deemed an embezzlement. 9 Stat. at L. 63, chap. 90, U. S. Comp. Stat. 1901, pp. 2423, 3704.

This last-mentioned section is the source of § 5490 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3704), which we have quoted above as one of the statutes relied upon to sustain the counts in question, and in construing it we may refer to the purpose and scope of the act from which it was derived. *McDonald v. Hovey*, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. Rep. 142; *United States v. Le Bris*, 121 U. S. 278, 30 L. ed. 946, 7 Sup. Ct. Rep. 894; *Logan v. United States*, 144 U. S. 263, 302, 36 L. ed. 429, 442, 12 Sup. Ct. Rep. 617. See-

tion 5493 must be construed in the same way for a similar reason. And it is clear that the Treasury act of 1846, and the provisions of § 16, did not apply to the fees and emoluments received by clerks of courts, and that the clerks were not charged, within the meaning of that act, with the safe-keeping of these fees and emoluments as public moneys. These were governed by other rules. They lay outside of the prohibition of § 16 against loaning, using, converting to his own use, depositing in banks, and exchanging for other funds, for it was upon these fees that the clerk depended for his livelihood and for the payment of the expenses of his office, subject only to the duty twice a year to make his accounting, and to pay over the surplus if the fees exceeded the total amount allowed him.

The statute relating to the Treasury was speedily supplemented by the act of March 3, 1849, chapter 110, entitled, "An Act Requiring All Moneys Receivable from Customs and from All Other Sources to be Paid Immediately into the Treasury, without Abatement or Reduction, and for Other Purposes" (9 Stat. at L. 398). This is the source of § 3617 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2413), providing that "the gross amount of all moneys received from whatever source for the use of the United States," with the exceptions stated (not here important), "shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or *de- [526] duction on account of salary, fees, costs, charges, expenses, or claim of any description whatever." But this, obviously, had no application to clerks of courts, who continued to receive, hold, and use their fees and emoluments subject to the prescribed limitations and the duty to account.

In 1849 the supervisory power of the Secretary of the Treasury over the accounts of clerks was transferred to the Secretary of the Interior (act of March 3, 1849, chapter 108, § 4, 9 Stat. at L. 395). In 1853, a statute was passed regulating the fees of clerks and other officers of the courts throughout the United States, and the duties of clerks with respect to their returns and payments were defined. This established the present fee bill (act of February 26, 1853, chapter 80, 10 Stat. at L. 161, U. S. Comp. Stat. 1901, p. 632). In 1870, the supervisory power passed to the Attorney General. Act of June 22, 1870, chapter 150, § 15, 16 Stat. at L. 164.

The provisions of the act of 1853, as modified by the subsequent legislation, have been incorporated in the Revised Statutes, §§ 823 to 857 (U. S. Comp. Stat. 1901, pp.

632-658), and these continue the policy of the act of 1842, *supra*.

Section 823 provides that "the following and no other compensation shall be taxed and allowed to . . . clerks of the circuit and district courts." Section 828 prescribes the clerks' fees. Section 833 provides for semiannual returns to the Attorney General, as follows:

"Every district attorney, clerk of a district court, clerk of a circuit court, and marshal, shall, on the first days of January and July, in each year, or within thirty days thereafter, make to the Attorney General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year. He shall *state separately in such returns the fees and emoluments received or payable under the bankrupt act; . . . Said returns shall be verified by the oath of the officer making them."

Section 839 defines the amount which may be retained out of the clerk's fees for his compensation over and above expenses:

"No clerk of a district court, or clerk of a circuit court, shall be allowed by the Attorney General, except as provided in the next section, and in section eight hundred and forty-two, to retain of the fees and emoluments of his office, or, in case both of the said clerkships are held by the same person, of the fees and emoluments of the said offices, respectively, for his personal compensation, over and above his necessary office expenses, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding three thousand five hundred dollars a year for any such district clerk, or for any such circuit clerk, or exceeding that rate for any time less than a year."

Sections 844, 845, and 846 contain the following provisions, which are applicable to the payment by clerks of the surplus shown by their returns and for the examination and audit of their accounts:

"Sec. 844. Every district attorney, clerk, and marshal shall, at the time of making his half-yearly return to the Attorney General, pay into the Treasury, or deposit to the credit of the Treasurer, as he may be directed by the Attorney General, any surplus of the fees and emoluments of his office which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him.

"Sec. 845. In every case where the re-

turn of a district attorney, clerk, or marshal shows that a surplus may exist, the Attorney General shall cause such returns to be carefully examined, and the accounts of disbursements *to be regularly au- [528] dited by the proper officer of his Department, and an account to be opened with such officer in proper books to be provided for that purpose.

"Sec. 846. The accounts of district attorneys, clerks, marshals, and commissioners of circuit courts shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts."

Section 857 brings forward the provision of the act of 1792 (1 Stat. at L. 278, chap. 36, U. S. Comp. Stat. 1901, p. 658), as to the manner in which the fees shall be recovered.

Section 5 of the act of February 22, 1875, chapter 95 (18 Stat. at L. 334), provides that if any clerk of any district or circuit court of the United States shall wilfully refuse or neglect to make or to forward any report, certificate, statement, or other document required by law to be made or forwarded by him, it shall be the duty of the President to remove him from office, and he shall not be eligible to any appointment as clerk or deputy clerk for the period of two years thereafter. By § 6 of the same act, the wilful refusal or neglect to make or to forward the report or other documents mentioned in the preceding section is made a misdemeanor.

We have also to note the proviso contained in the appropriation act of June 28, 1902, chapter 1301 (32 Stat. at L. 475, 476, U. S. Comp. Stat. Supp. 1909, p. 239), as follows:

"That each clerk of the district and circuit courts shall, on the first days of January and July of each year, or within thirty days thereafter, make to the Attorney General, in such form as he may prescribe, written returns for the half year ending on said days, respectively, of all fees and emoluments of his office of every name and character, and of all necessary expenses of his office, including *necessary clerk [529] hire, together with the vouchers for the payment of the same for such last half year; and the word 'emoluments' shall be understood as including all amounts received in connection with the admission of attorneys to practice in the court, all amounts received for services in naturalization proceedings, whether rendered as clerk, as com-

missioner, or in any other capacity, and all other amounts received for services in any way connected with the clerk's office."

There has thus been established a distinct system with respect to the fees and emoluments of the clerks. Its features are to be explained by the history of the clerk's office and the requirements of its convenient administration. It is urged that the fees and emoluments are attached to the office, and are received in an official capacity. This consideration, however, does not aid the prosecution, for they were attached to the office before the statute of 1841, when they belonged to the clerk without any duty on his part to account for any portion of them. The fees and emoluments stand in a different category from other moneys which he may receive by virtue of his office, as, for example, moneys paid into court. Revised Statutes, §§ 995, 996, U. S. Comp. Stat. 1901, p. 711.

In *United States v. Hill*, 123 U. S. 681, 31 L. ed. 275, 8 Sup. Ct. Rep. 308, the action was on the official bond of the clerk of the district court of the United States for the district of Massachusetts, and it was asserted that this court had jurisdiction to review the judgment because the suit was brought for the enforcement of a "revenue law." The court held that § 844 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 647), requiring the clerk to pay into the Treasury any surplus of fees and emoluments shown by his return, was not a revenue law within the meaning of § 699, and in delivering the opinion of the court, Chief Justice Waite said:

"Certainly it will not be claimed that the clerk of a district court of the United States is an 'officer of the *revenue,' but there is nothing to indicate that the term 'revenue' has any different signification in this subdivision of the section from that which it has in the other. The clerk of a court of the United States collects his taxable 'compensation,' not as the revenue of the United States, but as the fees and emoluments of his office, with an obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law. This obligation does not grow out of any 'revenue law,' properly so called, but out of a statute governing an officer of a court of the United States."

None of the statutes relating to embezzlement of moneys or property of the United States, which we have quoted, affords a basis for the counts in question. There may be an honest difference of opinion with regard to the amount the payment of which from the fees collected may properly be allowed. Provision has been made for the examination of the matter and for the

ascertainment of the amount due. Pending such audit there would be no justification for indicting the clerk as an embezzler, upon the allegation that he had in his hands a surplus which he had converted to his own use. It is not a question of public moneys, which are to be deposited as such, and are to be disbursed in accordance with the Treasury system. A fixed compensation is to be retained, the expenses of the office are to be defrayed, and the question of the necessity of the expenses is to be passed upon; and the clerk is not in default until he refuses or fails to make his return or to pay over the surplus shown by his return to exist, or the amount found upon the audit of his accounts to be payable.

We have not before us a case where a clerk has refused or failed to make the return required by statute, or to pay over the surplus shown by his return to exist, or established by the audit. None of the three counts makes that charge. The second and third counts charge that the moneys in question constituted a portion [531] of the surplus over and above his authorized allowances, and that he converted the moneys to his own use. Whether or not this surplus was shown by his return, or was the result of the audit contemplated by the statute, is not stated. The fourth count alleges that the clerk should have paid to the United States the moneys which it is said were a part of the surplus; but it is not alleged that the duty had arisen upon the return and accounting required by the statute.

But, for the reasons we have stated, even the duty to pay the surplus shown by the return or audit is not governed by the statutes relating to embezzlement, which have been referred to in support of these counts. The amount with which the clerk is chargeable upon his accounting is not the "public money" or "the money or property of the United States" within the meaning of their provisions. The fees and emoluments are not received by the clerk as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties, and with respect to the amount payable when the return is made, the clerk is not trustee, but debtor. Any other view must ignore not only the practical construction which the statutes governing the office have received, but their clear intent.

The second, third, and fourth counts of the indictment are insufficient, and the judgment of the Circuit Court is therefore in each case affirmed.

532] *UNITED STATES, Plff. in Err.,
v.

FRITZ AUGUSTUS HEINZE.

(See S. C. Reporter's ed. 532-546.)

Appeal — by government in criminal case.

1. A judgment of a Federal circuit court holding insufficient on demurrer certain counts of an indictment charging wilful misapplication of the funds of a national bank, in violation of U. S. Rev. Stat. § 5209, U. S. Comp. Stat. 1901, p. 3497, because the facts alleged did not constitute a crime under that section, as it should be construed, is reviewable in the Supreme Court, under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1909, p. 220), as based upon the construction of the statute upon which the indictment was founded.

[For other cases, see Appeal and Error, 314-316, in Digest Sup. Ct. 1908.]

Indictment — misapplying national bank funds — double conversion.

2. An indictment for the wilful misapplication of funds of a national bank by an officer, with intent to defraud, in violation of U. S. Rev. Stat. § 5209, U. S. Comp. Stat. 1901, p. 3497, by receiving and discounting with its money an absolutely unsecured promissory note of a named partnership, whereby the proceeds of the discount of the note were wholly lost to the bank, need not charge a conversion by the recipient of the proceeds of the discount, provided it does allege a conversion by such officer. [For other cases, see Indictment, 92-99, in Digest Sup. Ct. 1908.]

Indictment — misapplying national bank funds — conversion.

3. A conversion is charged by the allegation of an indictment for wilful misapplication of the funds of a national bank, in violation of U. S. Rev. Stat. § 5209, U. S. Comp. Stat. 1901, p. 3497, that defendant, being president of the bank, and having control of its funds, with intent to injure and defraud, received and discounted a promissory note for a specified sum, for his use, benefit, and advantage, knowing that the note was wholly unsecured, whereby the proceeds of the discount were wholly lost to the bank.

[For other cases, see Indictment, 92-99, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — appeal by government in criminal case.

4. Congress could, by the act of March 2, 1907, authorize the government to bring up

NOTE. — On appeals by the Federal government in criminal cases—see note to *United States v. Stevenson*, ante, 153.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621, and *State v. Loomis*, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.*, 14 L.R.A. 579.

54 L. ed.

a criminal case from a Federal circuit court to the Supreme Court when a demurrer to an indictment has been sustained, although the same privilege is denied the accused when the indictment is sustained,—even assuming that the United States is bound to afford the equal protection of the laws to persons within its jurisdiction.

[For other cases, see Constitutional Law, 380-401, in Digest Sup. Ct. 1908.]

[No. 380.]

Argued November 3, 1910. Decided December 5, 1910.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment sustaining a demurrer to certain counts of an indictment for misapplying funds of a national bank. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Assistant Attorney General Fowler argued the cause and filed a brief for plaintiff in error:

The court has jurisdiction to review the judgments of the court below in both cases, No. 380 and No. 671, because the judgments were based upon an erroneous construction of § 5209 of the United States Revised Statutes.

United States v. Keitel, 211 U. S. 385, 53 L. ed. 239, 29 Sup. Ct. Rep. 123; *United States v. Biggs*, 211 U. S. 518, 53 L. ed. 309, 29 Sup. Ct. Rep. 181; *United States v. Corbett*, 215 U. S. 237, ante, 173, 30 Sup. Ct. Rep. 81.

This court has jurisdiction of case No. 671, notwithstanding one ground for quashing the indictment is not reviewable by this court.

United States v. Stevenson, 215 U. S. 190, ante, 153, 30 Sup. Ct. Rep. 35.

The court was in error in holding that the several counts in question of the two indictments did not sufficiently allege a case of misapplication against the defendant.

Evans v. United States, 153 U. S. 593, 38 L. ed. 833, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; *United States v. Simmons*, 96 U. S. 360, 364, 24 L. ed. 819, 820; *United States v. Corbett*, 215 U. S. 233, 243, ante, 173, 176, 30 Sup. Ct. Rep. 81; 28 Am. & Eng. Enc. Law, p. 679; 2 Words & Phrases, pp. 1562, 1563.

It is not necessary that any advantage accrue to the defendant from the conversion. (28 Am. & Eng. Enc. Law, p. 682), and the many cases cited.

Neither U. S. Rev. Stat. § 5209, U. S. Comp. Stat. 1901, p. 3497, nor any case construing the same, can be cited in support of the court's holding that, if the money

misapplied goes to a third party, it is necessary to allege such a state of facts as would make out a case against such party, unless he be jointly indicted with the bank official.

United States v. Britton, 107 U. S. 655, 666, 27 L. ed. 520, 524, 2 Sup. Ct. Rep. 512; *Dow v. United States*, 27 C. C. A. 140, 49 U. S. App. 605, 82 Fed. 906; *United States v. Harper*, 33 Fed. 478.

With reference to money and negotiable instruments, an action of conversion will not lie against an innocent purchaser; and consequently such action must be confined to the party who disposes of them to such purchaser.

Talty v. Freedmen's Sav. & T. Co. 93 U. S. 321, 326, 23 L. ed. 886, 887; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *State v. Omaha Nat. Bank*, 59 Neb. 492, 81 N. W. 319; *Falman v. Lobach*, 1 Duer. 354.

The late Solicitor General Bowers had also filed a brief for plaintiff in error:

The omission of an allegation of insolvency in the first fifteen counts in quite immaterial, and cannot justify a different result as to the first fifteen counts and the sixteenth count.

Evans v. United States, 153 U. S. 584, 593, 38 L. ed. 830, 833, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668.

An allegation in general terms of a wilful misapplication by the bank officer, and of such officer's actual intent to injure and defraud the bank, is sufficient.

Evans v. United States; *United States v. Corbett*; and *United States v. Simmons*,—*supra*.

The statute does not punish outside chicanery unless there is infidelity of a bank officer or agent; and the only reason why outside chicanery is punished under the statute is that it induces or aids the bank officer's or agent's breach of his trust.

Coffin v. United States, 162 U. S. 664, 669, 670, 40 L. ed. 1109, 1111, 1112, 16 Sup. Ct. Rep. 943.

The statute reaches misapplication of the bank's funds to the use or for the benefit of others than the bank officer or agent himself.

United States v. Britton, 107 U. S. 655, 37 L. ed. 520, 2 Sup. Ct. Rep. 512; *Evans v. United States*, 153 U. S. 587, 38 L. ed. 831, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668.

Certain decisions of this court, while not expressly treating the necessity of a supplementary conversion by the third person who receives the funds diverted from the bank, really contradict the position of the circuit court.

Coffin v. United States, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394; *Coffin*

v. United States, 162 U. S. 664, 40 L. ed. 1109, 16 Sup. Ct. Rep. 943; *Putnam v. United States*, 162 U. S. 687, 40 L. ed. 1118, 16 Sup. Ct. Rep. 723.

The statute does not mention conversion at all; and no act of technical conversion by the bank officer or agent himself is necessary to the offense of wilful misapplication of the bank's funds unless the application of such funds by another than the bank, in violation of the official trust or agency, and with an actual intent to defraud the bank, is necessarily also a conversion under the common law. The true nature of the offense is clear; and the question whether it also amounts to a conversion is really unimportant.

Coffin Case and *Evans Case*, *supra*; *United States v. Fish*, 24 Fed. 585; *United States v. Northway*, 120 U. S. 327, 30 L. ed. 664, 7 Sup. Ct. Rep. 580.

It was not necessary to allege that the maker of the discounted note was insolvent.

Evans v. United States 153 U. S. 584, 593, 38 L. ed. 830, 833, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668.

A general allegation of the wilfulness of the misapplication, and of the bank officer's intent to injure or defraud, is enough.

Evans v. United States; *United States v. Corbett*; and *United States v. Simmons*,—*supra*.

The misapplication need not be for the use or benefit of defendant himself.

United States v. Britton, 107 U. S. 665, 669, 27 L. ed. 524, 525, 2 Sup. Ct. Rep. 512; *Coffin v. United States*, *supra*.

Actual loss to the bank is unnecessary. It is enough that the transaction was unauthorized and had an evil purpose when it occurred, though the bank finally receives payment.

Evans v. United States, 153 U. S. 591, 38 L. ed. 833, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; *United States v. Morse*, 161 Fed. 435.

The count upheld in *Coffin v. United States*, *supra*, is exact precedent for the present indictment, and rules the present case, whether or not the acts charged against Heinze show a technical conversion.

Where an agent having an agreed control over a principal's property handles the property in disregard of his authority, for the benefit of another than the principal, he is guilty of conversion.

Vasse v. Smith, 6 Cranch, 226, 3 L. ed. 207.

Likewise, if, in disregard of his authority, an agent undertakes to give title to a third person, there is a conversion; and the transferee is also guilty of conversion if he knows the breach of agency.

Kitchen v. Bedford, 13 Wall. 413, 20 L. ed. 637; *White v. Wall*, 40 Me. 574.

Generally an agent of limited authority who interferes with or disposes of his principal's property beyond the extent of the authority conferred, with intent so to apply and dispose of it as to alter its condition or to interfere with the owner's dominion, converts that property.

Laverty v. Snethen, 68 N. Y. 524, 23 Am. Rep. 184.

It is not necessary that the indictment allege conversion in so many words.

Evans v. United States, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; *Coffin v. United States*, 156 U. S. 432, 449, 39 L. ed. 481, 489, 15 Sup. Ct. Rep. 394; *United States v. Fish*, supra; *Rieger v. United States*, 47 C. C. A. 61, 107 Fed. 927; *United States v. Morse*, 161 Fed. 432.

Messrs. **John C. Tomlinson** and **A. B. Browne** argued the cause, and, with Mr. **John B. Stanchfield**, filed a brief for defendant in error:

The pending writ of error is not within the act of March 2, 1907, and should be dismissed.

United States v. Keitel, 211 U. S. 370, 386, 53 L. ed. 230, 240, 29 Sup. Ct. Rep. 123; *United States v. Stevenson*, 215 U. S. 190, 195, ante, 153, 155, 30 Sup. Ct. Rep. 35.

The United States government is on an exact footing with the states in respect to the prohibitions set forth in the 14th Amendment to the Federal Constitution.

Sinking Fund Cases, 99 U. S. 700, 718, 25 L. ed. 496, 501.

Where the legislature attempts to give to the state a remedy by review in its highest court which it denies to the defendant, there is clearly a consequent denial of "due process of law," as well as a like denial of "equal protection of the laws."

Doe ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 278, 15 L. ed. 372, 375; *Holden v. Hardy*, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; *People v. King*, 110 N. Y. 418, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 646.

Omissions in an indictment cannot be supplied by intendment or implication, and where the crime is a statutory one it must be charged with precision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth.

United States v. Hess, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; *Ledbetter v. United States*, 154 U. S. 169, 39 L. ed. 1162, 15 Sup. Ct. Rep. 774.

United States, 170 U. S. 606, 42 L. ed. 1162, 18 Sup. Ct. Rep. 774.

The allegation that the bank "discounted" the notes in question conveys no information as to whom the moneys of the bank were paid.

Morse, Banks, 4th ed. 138-162; *Pape v. Capital Bank*, 20 Kan. 440, 27 Am. Rep. 183; *Atlantic State Bank v. Sereny*, 18 Inn. 36; *Tracy v. Tallmage*, 18 Barb. 462.

The counts merely allege that the notes were due and payable on demand, and it appeared from their dates that there had been an "effluxion of time" since they were made. But there can be no presumption that, by reason of that fact, the notes were dishonored obligations, or that the makers have neglected and refused to pay the notes.

Merritt v. Todd, 23 N. Y. 28, 80 Am. Dec. 243.

If it be assumed that the court in its decision did construe § 5209 of the Revised Statutes, the extent of its construction was to assert that to constitute the offense of wilful misapplication under the statute there must be a conversion to the use of the offender or of someone else, of the moneys or funds of the association, by the party charged; and such a construction is unquestionably correct.

United States v. Britton, 107 U. S. 665, 666, 27 L. ed. 524, 2 Sup. Ct. Rep. 512; *United States v. Northway*, 120 U. S. 327, 30 L. ed. 664, 7 Sup. Ct. Rep. 580; *Evans v. United States*, 153 U. S. 584, 587, 38 L. ed. 830, 831, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; *Coffin v. United States*, 156 U. S. 432, 449, 39 L. ed. 481, 489, 15 Sup. Ct. Rep. 394.

An examination of the reported cases in the lower Federal courts will show that the defendant has been in each case in terms charged with "converting" the property referred to.

United States v. Fish, 24 Fed. 587; *United States v. Harper*, 33 Fed. 473; *United States v. Youtsey*, 91 Fed. 866; *Jewett v. United States*, 53 L.R.A. 568, 41 C. C. A. 88, 100 Fed. 837; *United States v. Eastman*, 132 Fed. 552; *Geiger v. United States*, 89 C. C. A. 516, 162 Fed. 847; *United States v. Martindale*, 146 Fed. 281, *Flickinger v. United States*, 79 C. C. A. 515, 150 Fed. 2; *Dickinson v. United States*, 86 C. C. A. 625, 159 Fed. 801.

The established construction of statutes by officers charged with proceeding under them is entitled to respect, particularly when that construction finds its support in the repeated decisions of this court.

In *United States v. Carll*, 105 U. S. 611, 26 L. ed. 1135, 4 Am. Crim. Rep. 246; *Keck*

v. United States, 172 U. S. 434, 437, 43 L. ed. 505, 507, 19 Sup. Ct. Rep. 254.

Insolvency is never presumed. Ability to pay all his engagements is presumed in favor of every man, just as the law presumes against fraud and guilt.

Walrod v. Ball, 9 Barb. 276; Potter v. Merchants' Bank, 28 N. Y. 655, 86 Am. Dec. 273.

If, therefore, there is no allegation of insolvency, the counts come directly within the opinion of Mr. Justice Day, concurred in by Mr. Justice Lurton and Civil Circuit Judge Severeus, in *McKnight v. United States*, 54 C. C. A. 353, 115 Fed. 984.

Such words as "fraud," "conspiracy," "with intent to defraud," "corruptly," and words of similar import, cannot be used as predicated criminality of facts which in themselves show no criminality.

Ambler v. Choteau, 107 U. S. 586, 27 L. ed. 322, 1 Sup. Ct. Rep. 556; *United States v. Des Moines Nav. & R. Co.* 142 U. S. 544, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; *Batchelor v. United States*, 156 U. S. 426, 39 L. ed. 478, 15 Sup. Ct. Rep. 446; *United States v. Eno*, 56 Fed. 220.

The insertion in the counts of the words "converting" and "converted" did not strengthen them.

United States v. Britton, 108 U. S. 192, 27 L. ed. 703, 2 Sup. Ct. Rep. 525; *Batchelor v. United States*, supra.

The demurrer, while admitting the facts set out in the counts, did not admit the conclusions which the pleader saw fit to draw from his facts.

United States v. Des Moines Nav. & R. Co. supra.

Messrs. John C. Tomlinson, John B. Stanekfield, A. B. Browne, and Louis S. Levy also filed a supplemental brief for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

This is a writ of error directed to review the ruling of the circuit court upon a demurrer to an indictment against defendant in error.

538] *The indictment contains sixteen counts, charging him with wilful misapplication of funds of the Mercantile National Bank of New York city, in violation of § 5209 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3497). The demurrer was sustained as to fifteen counts, and the United States has brought the case here by virtue of the act of March 2, 1907, chap. 2564, providing for writs of error in certain instances in criminal cases, among which instances is a decision or judgment sustaining a demurrer to an indictment, "where such decision or

judgment is based upon the invalidity or construction of the statute upon which the indictment is founded." 34 Stat. at L. 1246, U. S. Comp. Stat. Supp. 1909, p. 220.

The averments of the first count may be taken as an example of all. It averred that Heinze was the president of the bank, and that, by "virtue of his official relation to it as its president, and by virtue of the power of control, direction, and management" which, as president, he had over its moneys, funds, and credits, he "wilfully, wrongfully, unlawfully, and with intent to injure and defraud" it "and divers other persons to the grand jurors unknown," and without the knowledge and consent of it or of its board of directors and committees, for his use and benefit and advantage, and of other persons to the grand jurors unknown, misapplied certain of its moneys, funds, and credits, to wit, the sum of \$100,000, by receiving and discounting with its moneys, etc., a certain promissory note (the names of the drawers being given) for the sum of \$100,000, payable on demand, and which note, when so received and discounted, "was not then and there well secured, and, in fact, was not secured at all," which fact he knew, and which amount, it being the proceeds of the discount of the note, was wholly lost to the bank.

The other counts charge the misapplication of the funds of the bank in the same way, the amounts and makers of the notes discounted being different. And it is alleged of some of them, not that they were not secured at all, but *that they [539] were, at the time of discount, "not well secured." A total loss to the bank of the respective amounts is alleged.

The demurrer is almost as voluminous as the indictment. It alleges defects and uncertainties, and even repugnances in the indictment. In the brief of counsel emphasis is given to the following: That there is no allegation to whom the proceeds of the discount were paid by the bank, nor to whom the notes were payable; that there is no statement that payment of the notes had been demanded, or that they had not been paid, or that the makers were in default, or that the loss to the bank was due to the discounts, or that the makers of the notes were then or at the time of the discounts insolvent or unable to pay their obligations.

The circuit court sustained the demurrer to the first fifteen counts.

— Fed. —.

Section 5209, the section for the violation of which the indictment was found, is part of the provisions for the regulation of national banking associations, and provides as follows: "Every president, director,

. . . or agent of any association, who . . . wilfully misapplies any of the moneys, funds, or credits of the association . . . with intent . . . to injure or defraud the association . . . or any individual person, . . . and every person who, with like intent, aids or abets any officer . . . in any violation of this section, shall be deemed guilty of a misdemeanor."

For its general reasons in support of its ruling on the demurrer, the court referred to its opinion in *United States v. Morse*, 161 Fed. 429, and to the views expressed on the first indictment against defendant, 161 Fed. 425. As to the pending indictment, it was said:

"This indictment seems to me to charge in counts 1-15 this, and no more; viz., that, 540] with intent to defraud the *bank, of which he was president, and for the benefit of himself and others, unnamed, defendant caused the bank to discount single named commercial paper, and the bank lost the amount paid on the discount."

And it was further said:

"The crime of which the defendant is guilty, if guilty at all, is 'wilful misapplication.' The one characteristic or essential of this crime, on which the Supreme Court has always insisted, is conversion; no method of being guilty without converting the money, funds, or credits of the bank has been pointed out. This word 'conversion' has supplied the legal measure which the court has not been able to find in 'wilful misapplication.'"

"If the facts stated in an indictment do not set forth a case of conversion, the indictment is bad, and a general allegation of wrongful intent will not cure it.

"Taking the first count, for example, could the bank have maintained an action for conversion against the recipient of the discount proceeds under the facts stated? I think not, and am therefore of opinion that counts 1-15 are demurrable."

It is contended by defendant that the ruling of the circuit court was not a construction of § 5209, but only a determination of the sufficiency of the indictment, and that the writ of error should be dismissed. We are unable to concur in that view. The court expressly ruled that the crime of which the defendant was guilty, if guilty at all, was "wilful misapplication," and that the essential ingredient of that is "conversion," and made so by the statute. And not only conversion by the officers of the bank, but by the person receiving the proceeds of the discount. The indictment was held insufficient, because the facts alleged in it did not constitute such double conversion; that is, it did not constitute

a crime under the statute, as the latter should be construed. The motion to dismiss is therefore denied.

*We are therefore brought to the [541 merits, and the first contention of defendant (and for convenience in discussion we use his contentions rather than those of the United States, although the decision below was against the latter), is that if the circuit court did consider the statute, its construction was correct.

A wilful misapplication of the funds of a bank is the essence of the crime, it is urged, and that the decision of this court has defined what constitutes a wilful misapplication, and that the facts alleged in the indictment do not fulfil the definition. The following cases are cited to sustain the contention: *United States v. Britton*, 107 U. S. 665, 27 L. ed. 524, 2 Sup. Ct. Rep. 512; *United States v. Northway*, 120 U. S. 327, 30 L. ed. 664, 7 Sup. Ct. Rep. 580; *Evans v. United States*, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; *Collin v. United States*, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394, and certain cases in the circuit courts and circuit courts of appeals.

Before examining these cases it will be well to revert to the averments of the indictment to see what exactly it charges. It charges that the defendant was the president of the bank, and as such, having control of and possession of its funds, wilfully, wrongfully, unlawfully, and with intent to injure and defraud it, and for his use, benefit, and advantage, misapplied certain of its funds. A wilful misapplication of the funds of the bank is charged, and that it was induced by and resulted in a benefit and advantage to defendant. This is a direct accusation of wrongdoing through his office, and the precise manner by which it was accomplished is averred to have been with the illegal intent to injure and defraud the bank by receiving and discounting with its moneys an absolutely unsecured promissory note of a named partnership, whereby the proceeds of the discount of the note were wholly lost to the bank.

We may now turn to the cases. In *United States v. Britton*, 107 U. S. 655, 27 L. ed. 520, 2 Sup. Ct. Rep. 512, it was decided that the "misapplication made an offense by this statute means a misapplication *for the use, benefit, or gain of [542 the party charged," or someone other than the association. And further, that to constitute the offense "there must be a conversion to its own use or the use of someone else of the moneys and funds of the association by the party charged."

The Britton Case was referred to in *United States v. Northway*, 120 U. S. 327,

30 L. ed. 664, 7 Sup. Ct. Rep. 580, as holding that it was of the essence of the criminality of the misapplication that there should be a conversion of the funds to the use of the defendant or of some person other than the association, with intent to injure or defraud the association. This case has further instruction. It makes a distinction between embezzlement and a wilful misapplication of the funds. There may be a wilful misapplication of the funds, it is said, even though the officer have not the actual possession of them. He may have such control and power of management "as to direct an application of the funds in such manner and under such circumstances as to constitute an offense." A count in an indictment was sustained which charged the misapplication to have been made by causing funds to be paid out to the use and benefit of the officer indicted in an unauthorized and unlawful purchase of the shares of stock of certain stock companies, without the knowledge and consent of the association, and with intent to injure it.

Evans v. United States, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668, was also a case of alleged violation of § 5209, where the sufficiency of an indictment was considered. *Evans* was indicted for aiding and abetting the cashier in a wilful misapplication of the funds of the bank. The misapplication was described to be the unlawful receiving and discounting with the money and funds of the bank, with intent to defraud the bank, and for the use, etc., of *Evans*, a note made by *Evans*, which, when so discounted, "was not then and there well secured," which he and the cashier well knew, and which note was never paid, by reason of which the [543] bank suffered *loss in that amount, with intent in *Evans* to injure and defraud the bank. It was said:

"While the mere discount of an unsecured note, even if the maker and the officer making the discount knew it was not well secured, would not necessarily be a crime, if the maker believed that he would be able to provide for it at maturity, yet, if his original intent was to procure the note to be discounted in order to defraud the bank, as charged in this count, every element of criminality is present. . . . The criminality really depends upon the question whether there was, at the time of the discount, a deliberate purpose on the part of the defendant to defraud the bank of the amount. . . . No averment was necessary that such discount was procured by fraudulent means, since the offense consists not in the use of fraudulent means, but in the discount of a note which both

parties know to be unsecured, with the intent thereby to defraud the bank. An averment that *Evans* was . . . insolvent, or knew himself to be so was also unnecessary, in view of the allegation that *Evans* knew that the note was not secured, and procured the same to be discounted with intent to defraud the bank."

It was said that weight must be given to the words "knowingly, wilfully, and unlawfully and fraudulently," and "to the general allegation of an attempt to defraud." Pages 592 and 593.

In *Coffin v. United States*, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394, the crime of the misapplication of funds was again considered. One of the contentions of the defendant was that certain counts in the indictment were insufficient, because they failed to aver the actual conversion of the sum misapplied to the use of any particular person. The proposition that the law required an actual conversion was yielded to, and that there must be an averment of it. The indictment was considered and held sufficient, as it described the conversion to consist of paying money out of the funds of the *bank to a designat- [544] ed person when that person was not entitled to take the funds, and that, owing to the insolvency of such person, the money was lost to the bank.

These cases established that there must be, to constitute a misapplication of the funds of the bank, a conversion, but it may be by the officer alone. The words of *United States v. Britton* are that "there must be a conversion to his own use or the use of someone else of the moneys and funds of the association by the party charged." And this is repeated in *United States v. Northway*. The language of the *Britton* Case is repeated in the *Evans* Case, but it was said that the offense consisted not in the use of fraudulent means, but in the discount of a note which both parties knew to be unsecured, with the intent to defraud the bank. In *Coffin v. United States*, conversion of the funds was again recognized as necessary to constitute the offense. In that case the wilful misapplication was alleged to have been done "with intent to convert the same to the use of the Indianapolis Cabinet Company," whose check was paid, though it had no funds in the bank. And such averment, it was said, stated the misapplication and actual conversion of money by the methods described; that is to say, by paying it out of the funds of the bank to a designated person when that person was not entitled to take the funds, and that, owing to the insolvency of such person, the money was lost to the bank. And in the same case, in

162 U. S. 664, 669, 40 L. ed. 1109, 1111, 16 Sup. Ct. Rep. 943, 946, it is said that "the primary object of the statute was to protect the bank from the acts of its own servants."

It follows from these citations that the circuit court erred in considering as necessary, not only that there should be alleged a conversion by the officer of the bank, but also by the recipient of the proceeds of the discount. The conversion may be to the use of either, and the indictment fulfils the requirement. It charged that Heinze, being president of the bank, and having control of 545] its *funds, with intent to injure and defraud it, received and discounted the note of \$100,000, knowing that it was not secured at all, and which was wholly lost to the bank. And it was charged this was done for his "use, benefit, and advantage." This charges a conversion as explicitly as it was charged in *Coffin v. United States*, supra, "that is to say," to quote the language of that case, "by paying money out of the funds of the bank to a designated person when that person was not entitled to take the funds," with the consequence that the money was lost to the bank. And it was fairly inferable (to answer certain of the objections made by defendant) that the proceeds of the discount were actually paid by the bank, and to whom paid, and that payment had been demanded and not made. It is more than an inference that the loss to the bank was due to the discounts. The charge that the bank officer received for discounting a note for \$100,000, which was wholly unsecured, and which sum was lost to the bank, is quite a direct way of saying that the loss was caused by the discounting. And the statement would receive very little strength or the act of the officer any additional degree of culpability by an allegation that the makers of the note were insolvent, the element which the circuit court found in count 16, and which induced it to sustain that count.

It is contended by the defendant that the act of March 2, 1907, is not applicable to the case, because the right it offers is "wholly unilateral." "It opens the door of this court," it is said, "to the United States as one party to the cause only, and denies the same privilege to the defendant." The ultimate contention is that defendant is thereby denied the equal protection of the laws. This inequality is asserted because the United States is given an appeal to this court, and before trial, and a defendant is only given right of review in the circuit court of appeals, and only at the end 546] of the trial. The defendant is "put to expense and peril, it is urged, though the indictment against him may be wholly 54 L. ed.

bad, "and is, at every stage of the case, forbidden the right of review upon any question in the Supreme Court, except the construction or application of the Constitution or the constitutionality of any Federal statute." And this, it is insisted, is the denial of due process of the law as well as the denial of the equal protection of the laws. We shall not follow the somewhat roundabout argument to establish the identity of those two rights. If we should yield to the argument, it would necessarily follow that if defendant has not been denied due process, he has not been denied the equal protection of the law, and this court has decided that the right of appeal is not essential to due process of law. *Reetz v. Michigan*, 188 U. S. 505, 508, 47 L. ed. 563, 566, 23 Sup. Ct. Rep. 390. The provisions have definite application, and even if the explicit clause of the 14th Amendment, forbidding a state to deny to any person within its jurisdiction the equal protection of its laws, can be said to apply to the United States, it can have no broader meaning when so applied than when applied to the states. Assuming, therefore, and assuming only, not deciding (see the *District of Columbia v. Brooke*, 214 U. S. 138, 149, 53 L. ed. 941, 945, 29 Sup. Ct. Rep. 560), that Congress may not discriminate in its legislation, it certainly has the power of classification, and the act of March 2 is well within such power.

Reversed and remanded for further proceedings in conformity with this opinion.

*UNITED STATES, Plff. in Err., [547
v.

FRITZ AUGUSTUS HEINZE.

(See S. C. Reporter's ed. 547-551.)

Appeal — by government in criminal case.

A judgment of a Federal circuit court, quashing, on motion, certain counts of an indictment for wilfully misapplying the funds of a national bank, in violation of U. S. Rev. Stat. § 5209, U. S. Comp. Stat. 1901, p. 3497, because they possessed the defects which that court had found in a prior indictment, which it held did not charge a crime under the statute, is reviewable in the Federal Supreme Court under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1909, p. 220), as a decision quashing a count in an indictment based upon the construction of the

NOTE.—On appeals by the Federal government in criminal cases—see note to *United States v. Stevenson*, ante, 153.

statute upon which the indictment is founded.

[For other cases, see Appeal and Error, 314-316, in Digest Sup. Ct. 1908.]

[No. 671.]

Argued November 3, 1910. Decided December 5, 1910.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment quashing, on motion, certain counts in an indictment for misapplying the funds of a national bank. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Assistant Attorney General **Fowler** argued the cause and filed a brief for plaintiff in error. For his contentions, see his brief as reported in *United States v. Heinze*, ante, 1139.

Messrs. **John C. Tomlinson** and **A. B. Browne** argued the cause, and, with Mr. **John B. Stanchfield**, filed a brief for defendant in error. For their contentions, see their briefs as reported in *United States v. Heinze*, ante, 1139.

Messrs. **John T. Tomlinson**, **John B. Stanchfield**, **A. B. Browne**, and **Louis S. Levy** also filed a supplemental brief for defendant in error.

Mr. Justice **McKenna** delivered the opinion of the court:

This case is brought here under the act of March 2, 1907, chap. 2564 (34 Stat. at L. 1246, U. S. Comp. Stat. Supp. 1909, p. 220), and was advanced to be heard with and was heard with No. 380, just decided. [218 U. S. 532, ante, 1139, 31 Sup. Ct. Rep. 99.]

It involves substantially the same questions as No. 380. The indictment consists of fourteen counts, seven numbered and seven numbered and lettered. The court quashed the numbered counts, and its action as to six of them this writ of error is presented to review.

The circuit court, in its opinion, expressed the similarity of this case and No. 380 as follows:

"From an examination of them which I recently made it appears, or would appear to me, that six out of the seven numbered counts in the indictment of 1910 there is exactly the same story as was contained in the corresponding number of counts in the indictment of 1909, with this difference; that the transaction which was said to have been evidenced by a demand note of 1909 is called in 1910 a demand loan, and it is then asserted, after stating the same facts

in substance as those set forth in 1909, that there was a conversion."

And the view was expressed that if the indictment "had stopped there, it might be good on demurrer." By special words followed, it was said, which defeated this effect, and made the statements of the indictment the same as the "corresponding statements of 1909, except that they have a label put on them, and they are called 'conversion.'" And finding no "magic" in that word, the court further said, "the allegations set forth specially" did "not, even *prima facie, amount to a conversion." And that calling them such did not "help the matter."

We might assume the identity of the questions in the cases on this statement, and rest the decision of this case on the opinion in No. 380, but it may be well to examine the indictment. The averment is that Heinze, with the intent to injure the Mercantile National Bank, did wilfully misapply \$60,000 of its moneys, funds, and credits, "by unlawfully, knowingly, fraudulently, and wilfully, and not for any use, benefit, or advantage of the said banking association, converting and applying the said moneys, funds, and credits to the use, benefit, and advantage of certain persons . . ." which said conversion and application of the said moneys, etc., were then and there accomplished by him by virtue of his power as president over such moneys, etc., and that he, at the time and place, and with the intent and to the use mentioned, wilfully applied the said sum "to the making of a certain demand loan" to Otto Heinze & Company, "and which said loan, when so made as aforesaid, was not then and there well secured, which fact he . . . then and there well knew;" and did cause the proceeds of said loan to be paid out of the moneys, etc., of the bank, "and applied and converted to the use and benefit" of that firm, whereby the sum of \$60,000 "then and there was wholly lost to the bank, and that its moneys, etc., were and are depleted in that amount."

Stripped of its repetitions, it charges that Heinze used his power and control as president of the bank to lend the sum of \$60,000 of its moneys to Otto Heinze & Company without taking any security whatever for it, and that this was done, not for the use of the bank, but for the use of such firm, and with the intent to defraud the bank, and to convert and apply that sum to the use, benefit, and advantage of such firm. And it is averred that it was wholly lost to the bank.

*The other numbered counts contain [550 the same allegations as count 1, except they relate to different transactions, and with

like exception the subsequent lettered counts relate to the same transactions as count 1 A. The latter count relates to the same transaction as count 1, except it alleges that the misapplication was for the benefit of Fritz Augustus Heinze and Otto Heinze & Company while in the first count it is alleged that the misapplication was alone for the benefit of Otto Heinze & Company, and with the further exception that the inducement and purpose of the loan is set out with a detail of circumstances.

It is insisted, as it was in No. 380, that this court has not the right of review of the order of the circuit court, because it only passed upon the sufficiency of the indictment, and did not construe the statute. Upon what ground the court proceeded is not very clear. As we have seen, the court said that in the six counts passed upon "there is exactly the same story as was contained in the corresponding number of counts in the indictment of 1909," the only difference being that in the indictment now under consideration the statements "have a label put on them, and they are called 'conversion.'" The court found no "magic" in the word, and said that "the allegations set forth specially did not even *prima facie* amount to a conversion." The question naturally occurs, why the court thought so? And the answer must be from the conception it had of the requirements of the statute, which it expressed when passing on the indictment of 1909, and which we considered in No. 380. In other words, that the counts had the same defect which the indictment of 1909 had, and the motion to quash was granted as to them for the same reason which the court gave in passing on the indictment of 1909. This court, therefore, has jurisdiction.

It is further contended that the circuit court granted the motion to quash in the 551] exercise of its discretion, and therefore its action is not reviewable under the act of March 2, 1907. The contention is untenable. The act of March 2, 1907, expressly provides that a writ of error may be taken by the United States "from a decision or judgment quashing . . . any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded." *United States v. Stevenson*, 215 U. S. 190, 54 L. ed. 153, 31 Sup. Ct. Rep. 35. And we have pointed out, the decision of the circuit court in this case was so based.

On the merits the case is determined by the opinion in No. 380.

Reversed and remanded for further proceedings in conformity with this opinion.

ILLINOIS CENTRAL RAILROAD COMPANY OF THE STATE OF ILLINOIS, Plff. in Err.,

v.

COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 551-563.)

Error to state court — Federal question — when raised in time.

1. The Federal Supreme Court has jurisdiction of a writ of error to the highest state court in a case in which Federal questions were first raised by a petition for rehearing, where the court entertained the petition and decided the questions so presented.

[For other cases, see *Appeal and Error*, 1292-1310, in *Digest Sup. Ct.* 1908.]

Constitutional law — due process of law — franchise tax — assessment.

2. The judicial enforcement of a railway franchise tax does not deny the railway company the due process of law guaranteed by U. S. Const., 14th Amend., because the court treated the entry of the assessment in the form provided for the purpose upon the jacket or envelop enclosing the report of the railway company as a sufficient record of the assessment.

[For other cases, see *Constitutional Law*, 528-540, in *Digest Sup. Ct.* 1908.]

Constitutional law — due process of law — franchise tax — assessment.

3. The entry of an assessment of a railway franchise tax under the name of the railway company which formerly owned the

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

As to when Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to *Chicago, I. & L. R. Co. v. McGuire*, 49 L. ed. U. S. 414.

As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On due process of law in revenue proceedings—see note to *Read v. Dingess*, 8 C. C. A. 389.

franchise furnishes no ground for the contention that the due process of law guaranteed by U. S. Const., 14th Amend., was denied by the judicial enforcement of the tax against the company operating the railroad under a power of attorney from the purchaser at a judicial sale, which, in making its report for assessment purposes, named the former railway company as the owner of the road.

[For other cases, see Constitutional Law, 528-540, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — franchise tax — assessment.

4. Construing state statutes relating to franchise tax assessments as rendering an assessment once made final, irrespective of any secret intentions of the board levying it, does not deny the due process of law guaranteed by U. S. Const., 14th Amend., to the railway company affected by such assessment.

[For other cases, see Constitutional Law, 528-540, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — franchise tax.

5. The enforcement of a railway franchise tax by a judgment *in personam* against a railway company which, while not the owner of the franchise, is operating the road under an arrangement with the purchaser at a judicial sale, and is in possession and full control of the railroad property and its earnings, does not deny the due process of law guaranteed by the 14th Amendment to the Federal Constitution.

[Due process of law in taxation, see Constitutional Law, 523-553, in Digest Sup. Ct. 1908.]

[No. 16.]

Argued October 26 and 27, 1910. Decided December 5, 1910.

N ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Franklin Circuit Court, in that state, enforcing a railway franchise tax. Affirmed.

See same case below, 128 Ky. 268, 108 S. W. 245.

The facts are stated in the opinion.

Messrs. Edmund F. Trabue and Blewett Lee argued the cause, and, with Messrs. John C. Doolan and Atilla Cox, Jr., filed a brief for plaintiff in error.

Mr. T. L. Edelen argued the cause, and, with Messrs. James Breathitt, Robert B. Franklin, and Clem J. Whittemore, filed a brief for defendant in error.

Mr. Justice Hughes delivered the opinion of the court:

The commonwealth of Kentucky recovered judgment in this suit against the Illinois Central Railroad Company for the amount of the tax, for the year 1897, upon the franchise formerly belonging to the Chesapeake,

Ohio, & Southwestern Railroad Company. The recovery *was based upon the [556 fact that the Illinois Central Railroad Company was, at the time to which the tax related, in possession of the railroad, and was operating it under a power of attorney from the purchaser at a judicial sale, and had made the report which was required by the statute relating to the taxation of franchises. The judgment was affirmed by the court of appeals of Kentucky. 128 Ky. 268, 108 S. W. 245. The Illinois Central Company petitioned for a rehearing, and presented the Federal questions now urged under the 14th Amendment of the Constitution of the United States. The court entertained the petition and extended its opinion, holding that no right of the appellant under the 14th Amendment had been violated by the decision. Thereupon this writ of error was brought, and, as the state court passed upon the Federal questions, this court has jurisdiction. Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; Leigh v. Green, 193 U. S. 85, 48 L. ed. 626, 24 Sup. Ct. Rep. 390.

The validity of the statutes of Kentucky providing for the taxation of franchises is not assailed, and nothing is shown which would open to dispute the taxable character of the particular franchise here involved. The plaintiff in error, the Illinois Central Railroad Company, contends that, by virtue of the judgment, it has been deprived of property without due process of law, *first*, in that there was no assessment upon which to base the recovery of the tax; and *second*, in that it has been held personally liable to pay a tax upon a franchise of which it was not the owner. The plaintiff in error also contends that it has been denied the equal protection of the laws, as it insists that all other railroad corporations were assessed for the purpose of franchise taxation upon a different basis and by a different method, and that, as to other railroad corporations, the assessments similar to the one in question were abandoned.

The gist of the first contention—that there was no *assessment—is that an [557 assessment implies a record, and that there was no record, but only a memorandum; that an assessment must be a definite act, and that here it was only tentative.

It appears that the railroad of the Chesapeake, Ohio, & Southwestern Railroad Company was sold at a judicial sale in the summer of 1896, to Edward H. Harriman, who thereupon, under date of August 19, 1896, executed a power of attorney to the Illinois Central Railroad Company, authorizing it "to take charge of the business, mainte-

nance, and operation of the railroad, . . . together with all the land, real estate, leaseholds, easements, . . . and all other corporate property, real and personal, lately belonging to the said Chesapeake, Ohio, & Southwestern Railroad Company, included in the said sale and conveyance, and all the rights, privileges, immunities, and franchises whatsoever" which he had acquired. It was expressly authorized to receive "all the earnings of the said railroad," to apply the same to the expenses incurred in its "management, maintenance, and operation," and to take all proceedings necessary or expedient for these purposes.

On September 15, 1896, the Illinois Central Company made a report to the auditor of public accounts of Kentucky with respect to the railroad formerly the property of the Chesapeake, Ohio, & Southwestern Railroad Company, in accordance with the statute governing the assessment of franchises. This report came before the board of valuation and assessment, which was charged under the statute with the duty of making the assessment. It was placed in an envelop, or jacket, on the outside of which a proper form was provided for the entry of the amount of capital, surplus, undivided profits, all other assets, total capital, the amount to be deducted for tangible property, the value of the franchise, and the amount of the tax. Below this there were 558] blank spaces for the *insertion of the dates of the first and final notices to the corporation, of the notice to the county clerk, and of the payment of the tax. The form upon the jacket was filled out by the insertion of the name of the "Chesapeake, Ohio, & Southwestern R. R. Co., Louisville, Ky.," and the date of the report. In the columns provided for the purpose, entries were made, setting forth the "Total Capital, \$6,700,000," "Less Tangible Property, etc. \$4,753,339," "Franchise, \$1,946,661," and "Tax, \$10,219.97." This is the amount of the tax sued for and recovered in this action.

These entries were made early in the year 1898. The fact that the making of the assessment for the year 1897 was delayed did not detract from the authority and duty to make it. *Southern R. Co. v. Coulter*, 113 Ky. 657, 68 S. W. 873. That the board of valuation and assessment was authorized to fix the value of the franchise, and to make the entries setting forth their determination, and that the entries upon the jacket were in fact made by the board in the discharge of its duty, do not admit of question. The commonwealth of Kentucky filed as a part of its petition in the suit a copy of the indorsement on the jacket as a correct copy of the assessment. This was introduced in

evidence on the commonwealth's behalf. The testimony presented in defense did not in any way challenge the authenticity or official character of the jacket entries. On the contrary, the testimony of the former state auditor, who, as such, was chairman of the board of valuation and assessment, leaves no room for doubt on this point. It also sufficiently appears upon this record, and it is not open to dispute here, that due notice of the assessment was given.

The point urged, in substance, is that the constitutional right of the plaintiff in error has been violated, because the state court has treated the entry on the jacket as a sufficient record of the assessment. It is said that this *cannot be regarded as [559 a record, because it lacks permanency. But this, of course, depends upon the means of preservation and the nature of the filing system adopted. There is no inherent reason why such a record should not be suitably preserved. It is unnecessary to review the numerous authorities which the industry of counsel has collated, for it may be assumed that an assessment should be recorded. It is obvious, however, that the state cannot be denied the right to collect its taxes, and the assessment cannot be held to have been in violation of the Constitution of the United States because for convenience it was recorded—in the form provided for the purpose—upon the jacket inclosing the report of the railroad company, instead of in a separate book. If the board did not proceed properly to make the assessment according to the statute, the corporation aggrieved had its remedy; if the assessment was otherwise properly made, it cannot be defeated because the determination was set forth in the manner described.

The fact that the assessment was entered under the heading "Chesapeake, Ohio, & Southwestern R. R. Co., Louisville, Ky.," does not invalidate it. The franchise which was the subject of the assessment had belonged to the Chesapeake, Ohio, & Southwestern Railroad Company, and the entry suitably identified it. The report which was made by the Illinois Central Company used the same description. The information given by this report, prefacing the amount of capital, value of assets, earnings, etc., is as follows:

"Name of corporation, Chesapeake, Ohio, & Southwestern Railroad company.

"Name the principal place of business of the corporation, company, or association you represent. Louisville, Kentucky.

"Give the name and official position of the officer making the report.

*"Name, J. C. Welling. Position, [560 Vice President, I. C. R. R. Co., Agt.

"The kind of business in which the said corporation, company, or association is engaged.

"Operating railroad from Louisville, Kentucky, to Memphis, Tennessee."

The conclusion that the assessment entered in this manner was made in accordance with the law of the state of Kentucky was necessarily involved in the decision of the court of appeals. And the fact that, upon the report made by the plaintiff in error in the circumstances stated, the assessment was entered under the name of the company which had formerly owned the franchise, furnishes no ground for the contention here that there has been an absence of due process of law. *Castillo v. McConico*, 168 U. S. 674, 682-684, 42 L. ed. 622, 625, 626, 18 Sup. Ct. Rep. 229; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. ed. 339.

But it is said that the assessment was only tentative, and that the entry was merely a memorandum. It does not appear to be tentative upon its face. That it was such in fact is a conclusion sought to be derived from the testimony of the former state auditor. His testimony was to the effect that he "did not expect any tax to be paid" on the assessment; that the franchise assessments which were made in 1898 were opposed, that there was considerable discussion of the matter with the railroads, and that finally, in 1899, an agreement was reached by which the assessments of 1898 were abandoned. He says that "in the matter of the Illinois Central Railroad Company, we agreed not to assess the C. & O. S. W. for the first two years; we agreed that—in other words, that the amount we assessed against the Illinois Central should be in full for all the properties they controlled for four years, this assessment, and the one sent out as final in 1898 we reconsidered and declined to assess any franchise tax against that road for one or two years,—for the first years,—two years, I think. 561] In other words, the agreement of *the board was to reconsider these assessments entirely, and take them back, in consideration of the fact that the road would pay the next two assessments on the basis agreed upon." The question is at once presented whether, after making the assessment in 1898, the board had any authority to deal with it in this manner, or to enter into such a bargain with the railroad. This is a matter of state law, and the court of appeals of Kentucky has held that the board had no such power, and that the first assessment stood. In its opinion the court said:

"The board made the assessment in the way that all other assessments were made. It gave notice of the assessment to the

railroad company, as required by statute, and at the end of thirty days it gave notice, as provided by the statute, that the assessment had become final. When this had been done, the matter passed beyond the control of the board. A final assessment had been had, as provided by law, and if any injustice was done the taxpayer it was due entirely to his failure to appear before the board and ask a reduction of the assessment. No reliance could be placed in such proceedings if the validity of the record was made to depend upon the secret intentions of the assessing officer. The validity of their actions depends upon what they do, and not upon their undisclosed purposes. When the assessment had become final, and the railroad company owed the state the amount of taxes thus fixed, the assessing officers were without authority afterward to make any agreement with the railroad to the effect that if the railroad would pay the taxes for 1899, they would forego collecting the taxes for the previous years."

And on the petition for rehearing, the court added this statement:

"When the board made an assessment and sent out the preliminary and the final notices, as provided by the statute, that the assessment had been made, its action was final, *and the legal effect of its ac- [562 tion must depend on what they did, and not on the secret intentions of the auditor."

This construction of the powers of the state officers under the statutes of the state relating to franchise assessments—this determination with regard to the finality of the assessment in question—does not violate any constitutional right of the plaintiff in error. The assessment was made in accordance with the law of the state; it was, under that law, a final assessment, and no ground is shown here for impugning it.

It is insisted further that the enforcement of the tax by a judgment *in personam* against the plaintiff in error constitutes an unconstitutional deprivation of property, that is, assuming that, under the statutes of the state, as construed by its highest court, the plaintiff in error was liable for the tax, nevertheless it could not properly be held, because it was not the owner of the franchise upon which the tax was laid. But, by virtue of the arrangement with the purchaser at the judicial sale, the plaintiff in error was operating the railroad, and was in possession and full control of the railroad property and its earnings. It cannot be doubted that, under the Federal Constitution, the state is not precluded from fixing liability for the payment of the tax, to which the franchise is subject, upon the corporation actually exercising the fran-

chise within the state, and in control of the railroad property and its earnings. There is no constitutional obligation requiring it to look further in order to secure payment of the tax which it is entitled to levy. *Carstairs v. Cochran*, 193 U. S. 10, 16; 48 L. ed. 596, 597, 24 Sup. Ct. Rep. 318; *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. ed. 701.

It is also contended that plaintiff in error has been denied the equal protection of the laws upon the ground that other railroad corporations have not been assessed upon the same basis or by the same method, or have not been held to the payment of taxes upon such an assessment. This defense was 563] not pleaded in the answer of the *Illinois Central Company*, and, in any event, the meager testimony introduced at the hearing is utterly insufficient to afford a basis for the argument. It does not satisfactorily appear that other railroad corporations were not assessed in the same way and at the same time, or, assuming that they were so assessed, that they are not liable to pay taxes accordingly. The court of appeals of the commonwealth, in denying the petition for a rehearing, said: "As shown by the opinions of this court, cited in the opinion herein, taxes have been imposed, based on the assessments in controversy. All other taxpayers than railroads were taxed, and if some railroads escaped, it is no reason that others should go free while all taxpayers of other classes paid their taxes. If any railroads escaped, they are still liable for their taxes unless barred by limitation."

No conclusion to the contrary is justified by the record, and the contention that the plaintiff in error has been denied the equal protection of the laws, as the case lies before us, is without merit.

Judgment affirmed.

DORIS GRIFFITH, alias Doris Griffin,
Plff. in Err.,
v.

STATE OF CONNECTICUT.

(See S. C. Reporter's ed. 563-572.)

Error to state court — frivolousness of Federal question.

1. The contention that the exemption of banks or trust companies and bona fide mortgages from the operation of Conn. Pub. Acts 1907, chap. 238, prohibiting exacting more than 15 per cent on loans, or accepting a note for a greater amount than that actually loaned, with intent to evade this provision, denies the equal protection of the laws guaranteed by U. S. Const., 14th Amend., is not so clearly lacking in merit as not to serve as the basis of a writ of error from the Federal Supreme Court to a state court.

For other cases, see Appeal and Error, 1110-1137, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification.

2. The exemption of banks or trust companies and bona fide mortgages from the operation of Conn. Pub. Acts 1907, chap. 238, prohibiting the exacting of more than 15 per cent interest on loans, or accepting a note for a greater amount than that actually loaned, with intent to evade this provision, does not render such statute repugnant to the equal protection of the laws clause of the Federal Constitution, but such classification has a reasonable basis.

[For other cases, see Constitutional Law, 175-202, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — illegal contract.

3. Forbidding the enforcement of contracts made in violation of Conn. Pub. Acts 1907, chap. 238, prohibiting the exacting of more than 15 per cent interest on loans, or accepting a note for a greater amount than that actually loaned, with intent to evade this provision, does not unconstitutionally impair contract obligations, as the contract clause of the Federal Constitution does not protect illegal contracts.

[For other cases, see Constitutional Law, 1052-1067, in Digest Sup. Ct. 1908.]

[No. 514.]

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On the necessity of color of merit in Federal question to sustain writ of error to state court—see note to *Offield v. New York, N. H. & H. R. Co.* 51 L. ed. U. S. 231.

On constitutionality of statutory discrimination as to interest rates—see notes to *Re Sohneke*, 2 L.R.A. (N.S.) 813, and *State v. Sherman*, 27 L.R.A. (N.S.) 898.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621, and *State v. Loomis*, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

As to what laws are void as impairing obligations of contracts—see notes to *Franklin County Grammar School v. Bailey*, 10 L.R.A. 405; *Fletcher v. Peck*, 3 L. ed. U. S. 162; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 24 C. C. A. 20; and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 12.

Submitted November 28, 1910. Decided December 12, 1910.

IN ERROR to the Supreme Court of Errors of the State of Connecticut to review a judgment which affirmed a conviction in the Superior Court of Hartford County, in that state, of exacting more than 15 per cent interest on a loan. Affirmed.

See same case below, 83 Conn. 1, 74 Atl. 1068.

Statement by Mr. Justice White:

Upon a prosecution originating in the police court of the city of Hartford, in Hartford county, Connecticut, the plaintiff in error was tried and convicted in the superior court of the county, upon an information alleging, in six counts, the commission of offenses against chapter 238 of the Public Acts of Connecticut of 1907. The offenses charged were the exacting on certain loans of money a rate of interest greater than 15 per cent per annum, contrary to the provisions of the 1st section of the act, and in accepting notes for an amount greater than that actually loaned, with intent to evade the provisions of said 1st section, contrary to the provisions of the 2d section of the act. During the course of the trial, the accused, in various forms, assailed the validity of the statute referred to because of repugnancy to the contract clause of the Constitution of the United States, and to the equal protection clause of the 14th Amendment. From a judgment imposing a fine as to the conviction upon each count, an appeal was taken to the supreme court of errors. The judgment of the superior court was affirmed (83 Conn. 1, 74 Atl. 1068), and the case was then brought here. 565] *Since the filing of the record, the state of Connecticut has moved that the writ of error be dismissed, or, in the alternative, that the judgment be affirmed.

Mr. I. Henry Harris argued the cause and filed a brief for plaintiff in error:

Reasonable and necessary classification is not offensive to the Constitution, but that which is palpably an arbitrary selection cannot be justified by calling it classification.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

There is "no fair reason for the law that would not require with equal force its extension to others it leaves untouched."

Missouri, K. & T. R. Co. v. May, 194 U. S. 269, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

Mr. Hugh M. Alcorn argued the cause and filed a brief for defendant in error:

The writ of error does not present a substantial Federal question which is now open to discussion. The action of the state court which it is here sought to have reviewed is but a reaffirmation of its previous ruling as to the validity of a state statute, and it appears from the face of the record that the determination by that court of the questions presented here is so plainly right as not to require further argument.

Fay v. Crozer, 217 U. S. 455, ante, 837, 30 Sup. Ct. Rep. 568; *Kidd, D. & P. Co. v. Muselman Grocer Co.* 217 U. S. 461, ante, 839, 30 Sup. Ct. Rep. 606; *Standard Oil Co. v. Tennessee*, 217 U. S. 413, ante, 817, 30 Sup. Ct. Rep. 543; *Hannis Distilling Co. v. Baltimore*, 216 U. S. 285, ante, 482, 30 Sup. Ct. Rep. 326; *Williams v. First Nat. Bank*, 216 U. S. 582, ante, 625, 30 Sup. Ct. Rep. 441; *Barrington v. Missouri*, 205 U. S. 483, 51 L. ed. 890, 27 Sup. Ct. Rep. 582; *David Kaufman & Sons Co. v. Smith*, 216 U. S. 610, ante, 636, 30 Sup. Ct. Rep. 419; *Ornstine v. Cary*, 204 U. S. 669, 51 L. ed. 672, 27 Sup. Ct. Rep. 788; *Thomas v. Iowa*, 209 U. S. 258, 52 L. ed. 782, 28 Sup. Ct. Rep. 487.

The regulation of interest charges has been universally recognized as a proper subject of state legislation, and the question of the constitutionality of this and kindred legislation has invariably been held by this court to be within the exclusive province of the state courts.

Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 355, 359, 43 L. ed. 475, 477, 19 Sup. Ct. Rep. 179, and cases cited; *Watson v. Maryland*, 218 U. S. 173, ante, 987, 30 Sup. Ct. Rep. 644; *Franklin v. South Carolina*, 218 U. S. 161, ante, 980, 30 Sup. Ct. Rep. 640; *Southwestern Oil Co. v. Texas*, 217 U. S. 114, ante, 688, 30 Sup. Ct. Rep. 496; *Welch v. Swasey*, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 A. & E. Ann. Cas. 957.

There is nothing in the legislation complained of which offends § 10, art. 1 of the Constitution of the United States. The language of this clause applies to all contracts which respect property or some object of value, and confer rights which may be asserted in a court of justice, and this attaches only where a legal obligation clearly exists.

Bishop's Fund v. Rider, 13 Conn. 94; *State v. Griffith*, 83 Conn. 3, 74 Atl. 1068.

The contracts in this case were prohibited by the act of 1907. Therefore no legal obligation exists, and the case does not come

within the purview of this clause of the Constitution.

Dartmouth College v. Woodward, 4 Wheat. 639, 4 L. ed. 659; *Hunt v. Hunt*, 131 U. S. 474, 24 L. ed. 1109; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

Legislation of the kind here in question does not violate the 14th Amendment.

Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; *District of Columbia v. Brooke*, 214 U. S. 150, 53 L. ed. 945, 29 Sup. Ct. Rep. 560; *Barbier v. Connelly*, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; *Atehison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard)*, 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Tracy v. Ginzberg*, 205 U. S. 178, 51 L. ed. 760, 27 Sup. Ct. Rep. 461; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, ante, 921, 30 Sup. Ct. Rep. 676.

The power to regulate interest charges has been exercised by every civilized nation, ancient or modern, whose laws survive in history, and this power has so long been recognized as a constitutional exercise of legislative authority, and has been so uniformly sustained by the courts upon grounds of public policy, that it is now too late to ask this court to consider it an open question.

Dunham v. Gould, 16 Johns. 367, 8 Am. Dec. 323.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

The motion to dismiss or affirm is in effect based upon the claim that the assignments of error present no substantial Federal question. As the contentions urged required for their elucidation a consideration of the provisions of the statute charged to have been violated, we excerpt the 1st and 2d sections of the act. They are as follows:

"Sec. 1. No person, firm, or corporation, or any agent thereof, other than a national bank or a bank or trust company duly incorporated under the laws of this state, or a pawnbroker, as provided in chapter 235 568] of the Public Acts *of 1905, shall, directly or indirectly, loan money to any person, and directly or indirectly charge, demand, accept, or make an agreement to receive therefor interest at a greater rate than 15 per centum per annum. The provisions of this section shall not apply to loans made to any national bank, or any bank or trust company duly incorporated 54 L. ed.

under the laws of this state, or to any bona fide mortgage of real or personal property.

"Sec. 2. No person, firm, or corporation, with intent to evade § 1 hereof, shall accept a note for a greater amount than that actually loaned."

The claim that the statute operates to deny the equal protection of the laws is based upon the provision exempting from the operation of the terms of § 1 "any national bank, or any bank or trust company duly incorporated under the laws of this state," and "any bona fide mortgage of real or personal property." The contentions elaborated in the assignments of error find succinct expression in the following proposition set out in the brief filed in opposition to the motion to dismiss:

"It is claimed by the plaintiff in error that the statute in question is an arbitrary, unjust, and unreasonable selection, favoring a class; is detrimental to the public, stifles competition, and that no good reason exists for the granting of the privilege of loaning money at any rate of interest without taking a mortgage on real or personal property to the favored class, to the exclusion of all others.

"It is not a police regulation; there is no care imposed or restriction in the loan of money by the favored few,—simply an arbitrary, unreasonable limitation upon all except those privileged under the statute.

"The regulation of interest charges is undoubtedly the proper subject of state legislation, but, in the first place, this statute is not a regulation of interest charges. It is *in effect a special statute permitting[569 only certain favored individuals or corporations to do an act or conduct a business.

"There is no fair reason for the law that would not require with equal force its extension to others it leaves untouched."

It is elementary that the subject of the maximum amount to be charged by persons or corporations subject to the jurisdiction of a state for the use of money loaned within the jurisdiction of the state is one within the police power of such state. The power to regulate existing, the details of the legislation and the exceptions proper to be made rest primarily within the discretion of the state legislature, and "unless such regulations are so unreasonable and extravagant as to interfere with property and personal rights of citizens, unnecessarily and arbitrarily, they are within the power of the state; and that the classification of the subjects of such legislation, so long as such classification has a reasonable basis, and is not merely arbitrary selection

without real difference between the subjects included and those omitted from the law, does not deny to the citizen the equal protection of the laws." *Watson v. Maryland*, 218 U. S. 173, ante, 987, 30 Sup. Ct. Rep. 644, and cases cited. In the case at bar, the supreme court of errors ruled that the statute was not repugnant to the 14th Amendment, following a prior ruling to that effect made in *State v. Hurlburt*, 82 Conn. 232, 72 Atl. 1079.

In the *Hurlburt* Case, discussing contentions similar to those here urged against the validity of the Connecticut statute of 1907, based upon the exemption clause in question, the court said:

"The exception from its operation of loans by national banks was merely a recognition of the legal effect, in excluding state legislation on the same subject, of the statutes of the United States which regulate 570] their right to *make such contracts. The further exception in favor of loans by trust companies chartered by this state was fully justified by the peculiar character of these institutions, each created by a special act of legislation, and subject to the inspection of the bank commissioners. Gen. Stat. 1902, chaps. 199, 202. There was also reasonable cause for the exception as to pawnbrokers. Their business can only be carried on by those found by public authority to be suitable persons to engage in it, and its character is such as to make it not improper to allow a charge of interest beyond the limit of 15 per cent a year. Pub. Acts 1905, chap. 235, p. 438. There was also sufficient reason for restricting the statute so that it should not apply to loans made to any bank or to any trust company chartered by this state. Such institutions, managed by those accustomed to financial operations and familiar with the worth of money in the market from day to day, might well be deemed to require no statutory protection against being forced by their financial necessities to pay excessive interest for moneys borrowed. Nor is the act invalidated by the exception of mortgages.

"Publicity is one of the best safeguards against the making of unconscionable contracts. Under our recording system, it is rare that any bona fide mortgage, either of real or personal property, fails to be promptly spread upon the records of the town in which is situated the property which is its subject. So far as concerned chattel mortgages, also, our General Statutes of 1902 (§§ 4132, 4134) had already made other and reasonable provision as to the rate of interest which might be charged, or which, in case of foreclosure, could be allowed. The general assembly,

in respect to the matter of usury, had the right to deal with different classes of money lenders or money borrowers in a different way, provided there were nothing apparently unreasonable in creating such distinctions, and all the members of each class were treated *in the same manner. [571 *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 354, 52 L. ed. 236, 243, 28 Sup. Ct. Rep. 114; *Home Teleph. & Telcg. Co. v. Los Angeles*, 211 U. S. 265, 281, 53 L. ed. 176, 186, 29 Sup. Ct. Rep. 50. The enactment of the statute now in question fell within this right. *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565, 573, 57 Atl. 746."

In the argument on behalf of the plaintiff in error, no attempt is made to meet the force of the foregoing statements of the court below; and, clearly, in the light of such declarations, it is impossible to conclude otherwise than that the classification complained of has a reasonable basis, and that the exemption of national banks, etc., was not a mere arbitrary selection.

In the argument for plaintiff in error no reference is made to the claim urged below of the protection of the contract clause of the Constitution. The claim appears to have had reference to a provision contained in § 5 of the act of 1907, forbidding the enforcement of contracts made in violation of the act, thereby operating to deny validity to such contracts when made by those not within the exempted classes. There was power to enact the provision (*Missouri, K. & T. Trust Co. v. Krumseig*, 172 U. S. 351, 358, 359, 43 L. ed. 474, 476, 477, 19 Sup. Ct. Rep. 179), and, as said by the court below, the contract clause of the Constitution of the United States "does not give validity to contracts which are properly prohibited by statute."

The supreme court of errors of Connecticut did not err in its judgment of affirmance. As, however, the particular classification here assailed has not been the subject of express consideration in any prior decision of this court, and hence the power to make it cannot be said to have been so explicitly foreclosed as to cause contention on the subject to be obviously frivolous, the motion to dismiss cannot prevail. *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, ante, 921, 30 Sup. Ct. Rep. 676. It is, however, manifest from the analysis which has been made of prior decisions, that applying the principles settled by the cases which have *gone before the contentions now [572 advanced against the correctness of the judgment are so wholly without merit as not to require further argument. The motion to affirm must therefore prevail.

Affirmed.

DORIS GRIFFITH, alias Doris Griffin, Plff.
in Err.,
v.
STATE OF CONNECTICUT.

(See S. C. Reporter's ed. 572.)

This case is governed by the decision in
Griffith v. Connecticut, ante, 1151.

[No. 515.]

Submitted November 28, 1910. Decided
December 12, 1910.

IN ERROR to the Supreme Court of Er-
rors of the State of Connecticut to re-
view a judgment which affirmed a convic-
tion in the Superior Court of Hartford
County, in that state, of exacting more than
15 per cent interest on a loan. Affirmed.

See same case below, 83 Conn. 1, 74 Atl.
1068.

Mr. I. Henry Harris argued the cause
and filed a brief for plaintiff in error.

Mr. Hugh M. Alcorn argued the cause
and filed a brief for defendant in error.

For contentions of counsel, see their
briefs as reported in Griffith v. Connecticut,
ante, 1151.

Mr. Justice White delivered the opin-
ion of the court:

The parties to this record are the same
as in No. 514, just decided [218 U. S. 563,
ante, 1151, 31 Sup. Ct. Rep. 132], and the
questions involved are the same, the prosecu-
tion being for similar offenses against the
Connecticut act of 1907. Both cases were
tried together. Upon the conviction in this,
however, the trial court imposed the pen-
alty of imprisonment. The two cases were
disposed of by the supreme court of errors
in one opinion. As the decision in No.
514 is necessarily controlling, it follows
that the judgment of the Supreme Court
of Errors of Connecticut must be and it is
affirmed.

573] *WILSON R. HUNTER, Plff. in Err.,
v.
MUTUAL RESERVE LIFE INSURANCE
COMPANY et al.

(See S. C. Reporter's ed. 573-591.)

**Process — service on foreign insurance
company — what is doing business.**

1. The receipt by a foreign insurance
company at its home office of premiums up-
on policies theretofore issued, together with
four isolated acts extending over a period
of three years, consisting in rewriting an
existing policy, sending a check in payment
54 L. ed.

of a policy, to be delivered upon receipt of
certain unpaid assessments, and two ad-
justments within the state of claims which
have accrued, do not constitute doing busi-
ness within the state after the company's
asserted withdrawal therefrom in good
faith, so as to preclude it from revoking its
designation of the state insurance commis-
sioner as its agent to receive service of
process.

[For other cases, see Writ and Process, 67-
77; Corporations, 758-760, in Digest Sup.
Ct. 1908.]

**Process — service on foreign insurance
company — revoking designation of
state officer.**

2. A foreign insurance company, upon
withdrawing from the state in good faith,
to escape the compulsion of N. C. act of
February 10, 1899, requiring it to become
a domestic corporation if it desires to con-
tinue to do business in the state, may re-
voke its appointment of the state insur-
ance commissioner as its agent to receive
service of process, so far as claims of citi-
zens of other states are concerned, which
are assigned after such withdrawal to a
resident of the state for collection, although
N. C. Laws 1899, chap. 54, continues the
authority of the commissioner in force
and irrevocable so long as any liability of
the company shall remain outstanding in
the state.

[For other cases, see Writ and Process, 67-
77, in Digest Sup. Ct. 1908.]

[No. 39.]

Argued November 7, 1910. Decided Decem-
ber 12, 1910.

IN ERROR to the Supreme Court of the
State of New York to review a judg-
ment which modified a judgment of the Ap-
pellate Division of the Supreme Court for
the Second Department of that state, en-
forcing, upon the submission of an agreed
case, certain foreign judgments recovered
upon policies of life insurance. Affirmed.

See same case below, 184 N. Y. 136, —
L.R.A.(N.S.) —, 76 N. E. 1072, 6 A. & E.
Ann. Cas. 291.

The facts are stated in the opinion.

NOTE.—As to what constitutes doing busi-
ness by a foreign corporation within the
state—see notes to Wagner v. Meakin, 33
C. C. A. 585, and Ammons v. Brunswick-
Balke-Collender Co. 72 C. C. A. 622.

On single or isolated transaction by for-
eign corporation as doing business in the
state—see note to A. Booth & Co. v. Weig-
and, 10 L.R.A.(N.S.) 693.

On service of process on foreign cor-
porations—see notes to Eldred v. American
Palace-Car Co. 45 C. C. A. 3, and Cella
Commission Co. v. Bohliger, 78 C. C. A.
473

On service on state officer as service on
foreign corporation—see note to Mutual
Reserve Fund Life Assn. v. Phelps, 47 L.
ed. U. S. 987.

Mr. Paul Armitage argued the cause and filed a brief for plaintiff in error:

A state has the arbitrary power to exclude foreign insurance companies altogether from her territory.

Hooper v. California, 155 U. S. 648, 655, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. Issuing a policy of insurance is not a transaction of commerce. Such contracts are not interstate transactions, though the parties may be domiciled in different states. They do not constitute a part of the commerce between the states.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Hooper v. California, 155 U. S. 648, 654, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

A state can inhibit the negotiation of insurance policies within her confines, even through the medium of agents sent from other states.

Ibid.

A state has the power, if she allow any such insurance company to enter her confines, to determine the conditions on which the entry shall be made, and the right to enforce any conditions so imposed. The power to exclude embraces the power to regulate, and the power to enact and to enforce such regulations.

Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

When a foreign insurance corporation undertakes to transact business in a state other than that in which it is incorporated, it submits itself to the authority of the courts of such other state, and is bound, so long as that business continues, by the statutory provisions respecting the method of such courts obtaining jurisdiction over it.

Pringle v. Woolworth, 90 N. Y. 509; People v. Commercial Alliance L. Ins. Co. 7 App. Div. 297, 40 N. Y. Supp. 269; Gibbs v. Queen Ins. Co. 63 N. Y. 120, 20 Am. Rep. 513; Douglass v. Phenix Ins. Co. 138 N. Y. 220, 20 L.R.A. 118, 34 Am. St. Rep. 448, 33 N. E. 938; Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; Gibson v. Manufacturers' F. & M. Ins. Co. 144 Mass. 81, 10 N. E. 729; Aldrich v. E. W. Blatchford & Co. 175 Mass. 369, 56 N. E. 700; People v. Fire Asso. of Philadelphia, 92 N. Y. 311, 44 Am. Rep. 380; Vose v. Cockcroft, 44 N. Y. 415; Sher-

man v. McKeon, 38 N. Y. 266; Phyfe v. Eimer, 45 N. Y. 102.

It becomes a material inquiry to ascertain whether, at the time of service of process in January, 1902, the Mutual Reserve Insurance Company was engaged in doing business within the state of North Carolina. For, if it was, it cannot be seriously contested that the service on the insurance commissioner was ineffectual against it.

Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 610, 43 L. ed. 571, 19 Sup. Ct. Rep. 308; Mutual Reserve Fund Life Asso. v. Phelps, *supra*.

Upon the facts herein, the defendant company continued to do business in North Carolina after the attempted revocation of the power of attorney given to the insurance commissioner, and was actually doing business within the state on the date when service of process was made in each of the suits resulting in the four judgments.

Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; Mutual Reserve Fund Life Asso. v. Phelps, *supra*; Mutual Reserve L. Ins. Co. v. Birch, 200 U. S. 612, 50 L. ed. 620, 26 Sup. Ct. Rep. 752.

So long as the defendant continued to do business in the state, it will be presumed to have assented to be sued within the state by service on the insurance commissioner, and is estopped from showing either that it has not filed the requisite authority, or that it has revoked it.

Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354.

Clearly, the state of North Carolina had the right to prescribe such conditions as it saw fit before allowing a foreign corporation to do business within its borders.

Anglo-American Provision Co. v. Davis Provision Co. 169 N. Y. 510, 88 Am. St. Rep. 608, 62 N. E. 587; Hooper v. California, *supra*.

The state had the power to make the statute and power of attorney broad enough to authorize the insurance commissioner of that state to receive process in all actions of every nature of which its courts had jurisdiction.

Aldrich v. E. W. Blatchford & Co. 175 Mass. 371, 56 N. E. 700.

The North Carolina statute applies to all causes of action owned by its citizens, no matter where the contract was entered into.

Youmans v. Minnesota Title Ins. & T. Co. 67 Fed. 282; Johnston v. Trade Ins. Co. 132 Mass. 432; Wilson v. Martin-Wilson Automatic Fire Alarm Co. 149 Mass. 24, 20 N. E. 318; Mooney v. Buford & G. Mfg. Co. 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32; Darlington v. Rogers, 36 Phila. Leg. Int. 115.

A foreign corporation cannot, as a price of admission to a state, consent to being sued there in all actions of which the courts have jurisdiction, and appoint a state officer to receive process for it, and then, while continuing to do business, revoke the appointment.

Henrietta Min. & Mill. Co. v. Johnson, 173 U. S. 224, 43 L. ed. 676, 19 Sup. Ct. Rep. 402; *State v. United States Mut. Acci. Asso. Co.* 67 Wis. 624, 31 N. W. 229; *Connecticut Mut. L. Ins. Co. v. Spratley*, *supra*; *Commercial Mut. Acci. Co. v. Davis*, 213 U. S. 245, 53 L. ed. 782, 29 Sup. Ct. Rep. 445; *Mutual Reserve Fund Life Asso. v. Phelps*, *supra*; *Ehrman v. Teutonia Ins. Co.* 1 McCrary, 123, 1 Fed. 471.

While a power of attorney is ordinarily revocable at will, yet, when it is coupled with an interest, or given as security, or as part of a contract, or for a valuable consideration which the law deems sufficient to uphold an executory contract, or when it is given to a public officer of the state for the protection of its citizens, it is irrevocable.

Mechem, Agency, § 232; *MacGregor v. Gardner*, 14 Iowa, 326; *Ewell's Evans, Agency*, 110, note 1; 2 Kent, Com. 643; *Story Agency*, 9th ed. 587; *Terwilliger v. Ontario, C. & S. R. Co.* 149 N. Y. 87, 43 N. E. 432; *Collier v. Mutual Reserve Fund Life Asso.* 119 Fed. 619.

In filing its power of attorney and entering into the agreement with the state that such power of attorney should be irrevocable, defendant did so with full knowledge of the provisions of the Craig act. It is conclusively presumed to have entered into this contract with full knowledge of, and subject to, the provisions of that act.

Mutual L. Ins. Co. v. Phinney, 178 U. S. 327, 44 L. ed. 1088, 20 Sup. Ct. Rep. 906.

Mr. William Hepburn Russell argued the cause, and, with Messrs. Frank H. Platt and William Beverly Winslow, filed a brief for defendants in error:

To confer jurisdiction upon the courts of a state to render a judgment against a foreign corporation, the general rule is that the two elements must exist that service be made upon an agent of the company who the law will imply is authorized to receive service of process, and that the corporation is engaged in doing business in such state.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Snp. Ct. Rep. 354; *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 111, 42 L. ed. 964, 968, 18 Sup. Ct. Rep. 526; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 54 L. ed.

23 Sup. Ct. Rep. 728; *Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer*, 197 U. S. 407, 49 L. ed. 810, 25 Sup. Ct. Rep. 483; *Peterson v. Chicago, R. I. & P. R. Co.* 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513; *Commercial Mut. Acci. Co. v. Davis*, 213 U. S. 245, 255, 53 L. ed. 782, 787, 29 Sup. Ct. Rep. 445.

The converse of this proposition is equally true. If service be made upon an official of the corporation who is found in the state, it will be wholly ineffective to confer jurisdiction over such corporation, unless the corporation is doing business in the state.

Conley v. Mathieson Alkali Works, *supra*; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807.

The only modification which has been made in the above-stated rule is that where the corporation has done business in a state, and has incurred liabilities to residents of the state, and has been, as a condition of being permitted to do such business and to enter into contracts in the state with the residents thereof, required to designate an agent in the state upon whom process might be served, that designation becomes in effect a vested right of the persons making such contracts, of which neither the act of the corporation in voluntarily withdrawing from doing business in the state, nor the act of the state itself in excluding the corporation, can deprive them.

Biggs v. Mutual Reserve Fund Life Asso. 128 N. C. 5, 37 S. E. 955; *Moore v. Mutual Reserve Fund Life Asso.* 129 N. C. 31, 39 S. E. 637; *Woodward v. Mutual Reserve L. Ins. Co.* 178 N. Y. 485, 102 Am. St. Rep. 519, 71 N. E. 10; *Birch v. Mutual Reserve L. Ins. Co.* 181 N. Y. 583, 74 N. E. 1115, affirmed in 200 U. S. 612, 50 L. ed. 620, 26 Sup. Ct. Rep. 752; *Mutual Reserve Fund Life Asso. v. Phelps*, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707.

The contention that service upon the insurance commissioner was sufficient to give the court jurisdiction rests upon the language of the so-called Willard act and of the power of attorney executed by the defendant corporation pursuant thereto. These were construed by the court of appeals adversely to the plaintiff's contention. Such conclusion did not constitute a denial of any right which plaintiff had under the Constitution of the United States, and was correct.

Smithsonian Institution v. St. John, 214 U. S. 19, 53 L. ed. 892, 29 Sup. Ct. Rep. 601; *St. Louis, K. C. & C. R. Co. v. Wabash R. Co.* 217 U. S. 247, ante, 752, 30 Sup. Ct. Rep. 510.

It is well settled that a power of attorney, although irrevocable in terms, is revoca-

ble unless coupled with an interest or given for a consideration.

Hunt v. Rousamanier, 8 Wheat. 174, 5 L. ed. 589; Knapp v. Alvord, 10 Paige, 205, 40 Am. Dec. 241; Story, Agency, 9th. ed. p. 587, § 476.

The fair construction of the so-called Willard act is that only a power of attorney which should be irrevocable as to those persons who contracted with the corporation in North Carolina was required.

Moore v. Mutual Reserve Fund Life Asso. and Mutual Reserve Fund Life Asso. v. Phelps, *supra*.

There are limitations to the rule that a state may impose any condition it pleases in permitting foreign corporations to enter the state to do business.

Cable v. United States L. Ins. Co. 191 U. S. 288, 307, 48 L. ed. 188, 193, 24 Sup. Ct. Rep. 74.

While the state can forbid the corporation coming into the state to make a contract, it cannot forbid its citizens lawfully making a contract with the corporation at its domicile, and thereafter performing the contract through the mail.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

The state may exclude the corporation from its borders when it cannot exclude an individual, but it cannot impair the obligation of its contracts any more than it can an individual's, nor deprive it of the benefits which flow therefrom.

Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 240, 45 L. ed. 834, 844, 21 Sup. Ct. Rep. 597.

Before it revoked the appointment of the insurance commissioner of North Carolina as its attorney upon whom process could be served in that state, the Mutual Reserve Fund Life Association was licensed to do business in that state; after such revocation it would have been, as to any new business which it might have done in the state, violating the North Carolina law, but not subjecting itself to the jurisdiction of the North Carolina courts over its person by so "doing business." Any provision in the statutes of North Carolina making it subject to such jurisdiction merely because it was "doing business" in violation of law, without service upon a then-authorized agent in the state, is in violation of the Constitution of the United States, and a judgment *in personam* against it, not based on personal service on an authorized agent, is void.

Caledonian Coal Co. v. Baker, 196 U. S. 432, 444, 49 L. ed. 540, 545, 25 Sup. Ct. Rep. 375; Wetmore v. Karrick, 205 U. S. 141, 51 L. ed. 745, 27 Sup. Ct. Rep. 434; Cella Commission Co. v. Bohlinger, 8 L.R.A.(N.S.) 537, 78 C. C. A. 467, 147 Fed. 419.

Mr. George W. Field also argued the cause for defendants in error.

Mr. Justice McKenna delivered the opinion of the court:

This writ of error is prosecuted to review a judgment of the court of appeals of the state of New York, modifying a judgment of the supreme court of that state. The judgment of the court of appeals was remitted to and made the judgment of the latter court.

The action was brought by Hunter, whom we shall call plaintiff, against the insurance company, which we shall refer to as defendant, upon five judgments obtained in the state of North Carolina, recovered by one Emrick Wadsworth, a citizen of North Carolina, and owned by plaintiff. The judgments were recovered upon policies of insurance issued by defendant, one of which was issued to a citizen of North Carolina while defendant was doing business there, the others to citizens of New York and New Jersey. They were assigned to Wadsworth long after *defendant had attempted to re- [580 move from North Carolina. Judgment was rendered for their full amount with interest and costs, to wit, the sum of \$9,965, by direction of the appellate division of the court, to which the case was submitted upon an agreed statement of facts. The court of appeals reduced the same by the amount of the four judgments recovered on the policies issued in New York and New Jersey. The Federal question presented is whether due faith and credit was refused to the judgments, in violation of the Constitution of the United States.

The judgments were obtained by default, after service made upon the insurance commissioner of the state. The decision of the case turns upon the validity of the service.

The defendant is a life insurance company, organized under the laws of New York. Prior to March 13, 1899, it was duly admitted to do business in the state of North Carolina, it complying with the laws of the state successively passed, which required insurance companies to appoint agents upon whom service of process could be made.

On March 6, 1899, the legislature passed a law known as the Willard law. The law prescribed that no foreign insurance company should do business in the state until it had, by a duly executed instrument, filed in the office of the secretary of state, constituted and appointed the insurance commissioner its true and lawful attorney, upon whom all lawful process in any action or legal proceedings might be served, and agreed that such service should have the same force and validity as if served on

the company, and that "the authority thereof" should "continue in force irrevocable so long as any liability of the company" should "remain outstanding in this commonwealth." Chapter 54 of the Laws of 1899.

On or about the 13th of April, defendant executed the power of attorney required, and 581] thereupon a license *was issued to it to do business, as provided by law, under which it did business in the state for a time.

The legislature which passed the Willard law passed also a law called the Craig act, by which it was provided that any foreign insurance company desiring to do business in the state after June 1 then ensuing must become a domestic corporation of the state. There were severe penalties prescribed for the violation of the act. The company was subjected to a penalty of \$200 a day for every day it "continued to operate or do business without having complied with the requirements of the act," and it was deprived of the right of suing in the state courts, or to enter into any new contracts, or enforce those it had made. In addition to the penalty of \$200, it was subjected to a penalty of \$500 for each day that it did business after the 1st day of June, 1899, "without first becoming a domestic corporation."

The act took effect on the 10th of February, 1899. In May of that year the board of directors of defendant passed a resolution to withdraw from the state, and to discontinue with and terminate the services of all of its agents. It also revoked the authority of the insurance commissioner to act as its attorney to receive service of process. A certified copy of the resolution was served on the commissioner, and the agents of the company were withdrawn from the state, the premiums upon the policies theretofore issued by it being remitted by mail to its home office, where the policies and premiums were payable, and losses upon policies being paid by check from its office. Outside of this the record shows four transactions: (1) The rewriting of a policy of insurance in 1899, originally issued in 1886, which was mailed from its office in New York; (2) sending a check in payment of a policy issued prior to May 17, 1899, to be delivered upon receipt of certain unpaid assessments; (3) the adjustment in North Carolina, in June, 1902, of a loss upon a policy issued 582] in Washington, *District of Columbia, the beneficiary having removed to North Carolina; (4) the adjustment, by an attorney employed for the purpose, of a claim upon a policy written in North Carolina prior to May 17, 1899. The two first transactions were prior to the beginning of the actions 54 L. ed.

in which the judgments were recovered, and the two last were subsequent to that time. These are the transactions upon which plaintiff relies to establish that defendant was doing business at that time in the state.

Three of the policies upon which judgments were recovered were issued in the state of New York long prior to the year 1899. The fourth policy was issued in New Jersey, also prior to 1899. The assignments to Wadsworth were made in December and January, 1902, and the suits were begun on January 20, 1902.

There is no controversy over the power of the state to pass the Willard and Craig acts, so called, or to make their provision conditions upon which foreign insurance corporations could do business in the state. The controversy is over the duration of the conditions. The decision upon that, plaintiff contends, depends upon the question whether the insurance company was doing business in the state at the time the actions on the policies were brought and process served; and, insisting that it was, cites Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; Mutual Reserve Fund Life Assn. v. Phelps, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707. Plaintiff further insists that, even if it be assumed that defendant had withdrawn from the state in good faith, and had ceased to do business therein after May 18, 1899, it was still liable to be sued in the courts of the state "in any action or local proceeding of every nature of which the courts of North Carolina had jurisdiction," and that the insurance commissioner was its agent to receive service of process. This contention is based on the provision of the statute which continues the authority of the commissioner "in force and irrevocable so long as any *liability of said com- [583 pany remains outstanding in said state."

If the situation of defendant, regarding what it had done and its obligations, was exactly expressed by the contentions of plaintiff, they might be irresistible. But not only the Willard act, but the Craig act, must be considered in determining defendant's conduct. It had done business in the state, and the former act became a part of its obligations to its policy holders. The latter act imposed new conditions upon it, and as an alternative to compliance with them, required it to remove from the state. An evasion of the requirement was, as we have seen, severely penalized. Money penalties, one of \$200 and one of \$500, for every day it should do business after the 1st of June, 1899, were imposed upon it, and no contract it should make or had made could

be enforced in the courts of the state. Such were the alternatives presented by the Craig act. In other words, defendant was given the choice to become a domestic corporation or go out of the state. It chose to go out of the state, and adopted the only way it could to do so. We think such course was open to it, and we see no reason to question its good faith.

It is, however, contended that defendant "persisted in doing business in the state, and was so found at the time of the service of process in question." Four instances are adduced to sustain the contention, two of which occurred in 1899 and two in 1902. These instances have no relation to one another, and no relation to the transactions upon which the judgments were based. Between the first two and the last two there was an interval of three years, and yet it is insisted that there was such connection between them that they constituted doing business continuously in the state, and the defendant was hence precluded from revoking its power of attorney to the insurance commissioner. The contention of plaintiff, so [584] far as based on the *instances adduced, encounters a great difficulty. They were not new business. They related to old transactions, and were intended only to fulfil their obligations. This was the plain duty of defendant,—a duty which it could not evade, nor could the state even prevent it. *Bedford v. Eastern Bldg. & L. Asso.* 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597. Between doing business for such purposes and doing business generally there is quite a difference. If not, the consequences are somewhat serious. The Craig act, as we have seen, imposes a penalty of \$700 a day for each day after the 1st day of June, 1899, that a foreign corporation shall do business in the state without conforming to the provisions of the act.

Plaintiff, however, presses with earnestness, in support of his contention, the following cases: *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Mutual Reserve Fund Life Asso. v. Phelps*, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; *Mutual Reserve L. Ins. Co. v. Birch*, 200 U. S. 612, 50 L. ed. 620, 26 Sup. Ct. Rep. 752; *Commercial Mut. Acci. Co. v. Davis*, 213 U. S. 245, 53 L. ed. 782, 29 Sup. Ct. Rep. 445.

In the *Spratley* Case the life insurance policy which was the subject of the suit was issued by the insurance company when it was concededly present and doing business in the state of Tennessee. The service was upon an agent by the name of Chaffee, sent to investigate into the circumstances of the death of *Spratley* and the claims of his

widow. These facts distinguish the case from the one at bar. But certain language of the court is quoted to establish, not only was the insurance company so doing business in the state as to justify service of process upon the agent appointed by the company, but doing business generally. The court, through Mr. Justice Peckham, said:

"We think the evidence in this case shows that the company was doing business within the state at the time of this service of process. From 1870 until 1894 it had done an active business throughout the state by its agents therein, and had issued poli- [585] cies of insurance upon the lives of citizens of the state. How many policies it had so issued does not appear. Its action in July, 1894, in assuming to withdraw from the state, was simply a recall of its agents doing business therein, the giving of a notice to the state insurance commissioner, and a refusal to take any new risks or to issue any new policies within the state. Its outstanding policies were not affected thereby, and it continued to collect the premiums upon them and to pay the losses arising thereunder, and it was doing so at the time of the service of process upon its agent."

And further:

"It cannot be said with truth, as we think, that an insurance company does no business within a state unless it have agents therein who are continuously seeking new risks, and it is continuing to issue new policies upon such risks. Having succeeded in taking risks in the state through a number of years, it cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force and the premiums thereon are continuously paid by the policy holders to an agent residing in another state, and who was once the agent in the state where the policy holders resided. This action on the part of the company constitutes doing business within the state, so far as is necessary, within the meaning of the law upon this subject. And this business was continuing at the time of the service of process on Mr. Chaffee in Memphis."

This reference to the law in the state must be considered. A statute of the state provided that process might be served upon any agent of a corporation doing business in the state, found within the county where the suit was brought, no matter what character of agent such person might be, and in the absence of such an agent it *should [586] be sufficient to serve process upon any person found in the county who represented the corporation at the time of the transaction out of which the suit arose took place.

It was under this statute that service was made upon Chaffee. This service was held good, this court saying, in addition to what has been quoted above: "Even though we might be unprepared to say that a service of process upon 'any agent' found within the county, as provided in the statute, would be sufficient in the case of a foreign corporation, the question for us to decide is whether, upon the facts of this case, the service of process upon the person named was a sufficient service to give jurisdiction to the court over this corporation."

Further explanation of the language of the court is contained in the following passage:

"A vast mass of business is now done throughout the country by corporations which are chartered by states other than those in which they are transacting part of their business, and justice requires that some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the state where the business was done, *out of which the dispute arises.*" (Italics ours.)

Mutual Reserve Fund Life Asso. v. Phelps is distinguished from the case at bar by the same features that distinguish the Spratley Case from it. The suit was brought by a citizen of the state of Kentucky upon a policy issued when the association was doing a general business in the state through regular agents, under a license from the state. The commissioner subsequently canceled its license, and it withdrew its agents from the state. The service of process in the action was nevertheless made upon the commissioner and sustained. It was stipulated by the parties that outstanding policies were continued in force after the action of the commissioner, on which the association had collected and was collecting dues, premiums, and assessments, and this court held, on the authority 587] *of the Spratley Case, that the association was doing business in the state. These general words must be qualified, as we have seen, like words in the cited case should be qualified, to protect transactions which had been entered into, and to give them the benefit of the law in view of which they were made. This court said: "The plaintiff was a citizen of Kentucky, and the cause of action arose out of transactions had between the plaintiff and defendant while the latter was carrying on business in the state of Kentucky, under license from the state." And it was said of the statute that it and "other kindred statutes enacted in various states indicate the purpose of the state that foreign corporations engaging in business within its limits shall submit the contro-

versies growing out of that business to its courts, and not compel a citizen for such a controversy to seek, for the purpose of enforcing his claims, the state in which the corporation had its home."

Mutual Reserve L. Ins. Co. v. Birch was a like case. Certain judgments which were sued on in New York were obtained in actions upon policies issued when the insurance company was doing its regular business in the state of North Carolina, and antedated its resolution to withdraw from the state. The case was rested in the court of appeals of New York on Woodward v. Mutual Reserve L. Ins. Co. 178 N. Y. 490, 102 Am. St. Rep. 519, 71 N. E. 10. It was said in that case that the stipulation of the company in regard to service of process became an obligation of the company precisely as though it "had been incorporated in the policies; and thereafter, whether the company continued to do business in the state or not, policy holders could commence action by service upon the secretary of state," subsequently changed to the insurance commissioner. Woodward v. Mutual Reserve L. Ins. Co. was cited by this court in its opinion sustaining the judgment in the Birch Case.

Commercial Mut. Acci. Co. v. Davis has the same characteristics as the cases [588] which we have reviewed, and needs no other comment than that it repeated the doctrine of the other cases.

The first contention of plaintiff is therefore untenable. The next contention is that, even if defendant did withdraw from the state in good faith, the authority to the insurance commissioner to receive service of process continued as long as the company had outstanding liabilities in the state. And this, it is insisted, constituted the duration of the authority not only for causes of action arising in the state, but for causes of action arising in other states. In other words, that the language of the statute is not limited by its purpose to protect the resident policy holders of the company, but for the benefit of every litigant upon any cause of action; and, to use the graphic language of the court of appeals, to "perpetuate a local forum to which, under guise of an assignment to some resident, nonresidents of far distant states might flock for the purpose of instituting litigation upon contracts issued to them at their homes, against a corporation there readily subject to service, and which long before had attempted in good faith to withdraw from the jurisdiction thus hunted out." [184 N. Y. 144, — L.R.A. (N.S.) —, 76 N. E. 1074, 6 A. & E. Ann. Cas. 294.]

This is certainly the logical consequence.

of plaintiff's contention, and to sustain it he relies upon *Johnston v. Trade Ins. Co.* 132 Mass. 432; *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* 149 Mass. 24, 20 N. E. 318; *Biggs v. Mutual Reserve Fund Life Assn.* 128 N. C. 5, 37 S. E. 955. A statute like that of North Carolina was construed in the Massachusetts cases, and therefore the construction given to it is instructive. In all of the cases the corporation had "a domicile of business in the commonwealth," to use the language of the supreme judicial court of Massachusetts, and the court recognized that the right to sue upon cause of action arising in another state was not within "the main purpose" of the statute passed on; indeed, that it "was not framed for that purpose," but decided 589] that "the words 'all lawful processes in any action or proceeding' must be held to include all actions which might lawfully be brought against a company thus having a domicile of business in this commonwealth." In *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* the contract sued on was made in the state, and was to be performed there.

In *Biggs v. Mutual Reserve Fund Life Assn.* the policy on which the action was based was issued to a resident of the state. The language of the court was quite general. The court did not discuss whether it was "ceasing to do business in the state" to transact that business through agents located outside of the state, by means of the mail," though it may be said that the court expressed doubt of it by referring to the *Spratley Case*. It was said:

"It is sufficient to point out that the statute requires the power of attorney to be irrevocable, not 'as long as the company continues to do business' in this state, but as long as 'any liability of the company remains outstanding' in this state, and the contract with the state, as expressed in the power of attorney filed by the company, so specifies. No amount of authorities having a more or less fancied analogy can overcome these plain words of the statute, and of the power of attorney drawn and filed in conformity thereto. *Green v. Equitable Mut. Life & Endowment Assn.* 105 Iowa, 628, 75 N. W. 635; *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 213."

This general language must be considered in reference to the case,—a conclusion which is justified by the decision of the court in *Moore v. Mutual Reserve Fund Life Assn.* 129 N. C. 31, 39 S. E. 637, where it is said that the state, having the right to prescribe the terms upon which the insurance company might carry on its business in the state, and the company, "being permitted, proceeded to make contracts with citizens

of the state, and became liable to them under these contracts. One of the provisions upon which defendant was allowed to do business here was that James R. Young, insurance commissioner, and his successors in office, "should be constituted its [590 agent, upon whom service of process might be made, and that said agency should continue so long as the defendant had any liabilities remaining unsatisfied in this state, arising from or out of its said business of insurance." As to the revocation of the authority of the commissioner, the court said:

"It is conceded that, as a general rule, a principal has the right to revoke a power of attorney at any time, whether it is in terms irrevocable or not. But to this general rule there are well-established exceptions, as to where it is coupled with an interest, or where it is contractual in its nature, given for a consideration and for the protection of someone or some interest. In our opinion this power falls under this exception to the general rule. It was contractual in its nature, was given upon consideration that defendant should have the right to carry on its business in this state, and for the protection of those who should deal with the defendant."

Manifestly, this means who should deal with the defendant in the state. The facts in the case at bar are different from the cited cases. The policies upon which the four judgments were recovered were not issued in North Carolina, and, not having been issued under the faith of its laws, are not entitled to their remedial sanction. The facts in this case are also different from those in the Massachusetts cases. Defendant did not have "a domicile of business" in the state, nor were the contracts to be performed there. It in good faith withdrew from the state,—withdrew, indeed, under the compulsion of law. We say "under compulsion of law," for clearly the Craig act required that as an alternative to compliance with its provisions. It presented a choice to defendant of one of two courses. Defendant accepted one of them, that is, withdrew from the state, and revoked the power which it had given to the insurance commissioner to accept service for it. Revoked it as far as it could do so. It "could not [591 revoke it as to any "interest or right founded or created upon faith thereof," and which "required its perpetuation and continuance," as the court of appeals has correctly said, and we think with that learned court, that it would be extremely inequitable to regard it as irrevocable to plaintiff and these in his situation. Indeed, it is not within the contemplation of the statute that the

authority to the commissioner is to be available to those in the situation of plaintiff.

Judgment affirmed.

JOHN F. CALDER, David A. Crow, John E. More, Thomas H. Keogh, and Willard Kingsley, Plffs. in Err.,
v.

PEOPLE OF THE STATE OF MICHIGAN,
BY THE ATTORNEY GENERAL, AT
THE RELATION OF GEORGE E. ELLIS, Moses Taggart, and Samuel A. Freshney.

(See S. C. Reporter's ed. 591-601.)

Courts — relation to legislative department — mode and policy of legislation.

1. The knowledge, negligence, methods, or motives of the legislature will not be inquired into by the courts in determining the validity of a statute repealing a corporate charter, if the statute is passed in due form. [For other cases, see Courts, 127-137, in Digest Sup. Ct. 1908.]

Statutes — who may assail validity.

2. The directors of a corporation do not represent the bondholders, so as to urge the invalidity as to them of a statute repealing the corporate charter.

[For other cases, see Statutes, 53-60, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — repeal of corporate charter.

3. The bonded indebtedness of a corporation is subject, not paramount, to the reservation in the corporate charter of the power to repeal.

[For other cases, see Constitutional Law, 1386-1412, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — repeal of corporate charter.

4. The existence of an unexpired franchise granted by a municipality to a waterworks company, which is included in the company's bonded debt, did not prevent the exercise, by Mich. Local Acts 1905, act No. 492, of the state's reserved right to repeal the company's charter, under which the corporate directors may be ousted from acting as a body corporate, under the corporate name.

[For other cases, see Constitutional Law, 1386-1412, in Digest Sup. Ct. 1908.]

[No. 58.]

Argued November 29 and 30, 1910. Decided December 12, 1910.

NOTE.—As to reserved power to alter, amend, or repeal corporate charter—see notes to *Greenwood v. Union Freight R. Co.* 26 L. ed. U. S. 961; and *Omaha Water Co. v. Omaha*, 77 C. C. A. 281.
54 L. ed.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which affirmed a judgment of the Circuit Court of Kent County, in that state, ousting the directors of a corporation whose charter had been repealed from acting as a body corporate, under the corporate name. Affirmed.

See same case below, 153 Mich. 724, 126 Am. St. Rep. 550, 117 N. W. 314.

The facts are stated in the opinion.

Mr. Willard Kingley argued the cause, and, with Mr. John E. More, filed a brief for plaintiffs in error:

The distinction between a reserved power to alter or repeal, "at the pleasure of the legislature," as in *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961, and the general reserved right to alter, amend, or repeal, without any qualifying words, is well illustrated by comparing this *Greenwood* Case with the case of *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

Another illustration showing the difference between a special pleasure clause and a general clause will be found in the case of *Berger v. United States Steel Corp.* 63 N. J. Eq. 809, 53 Atl. 68.

The usual reserved power to amend or repeal private charters, no matter in what language expressed, is not an unlimited one, but, on the contrary, is encircled by constitutional limitations.

Shields v. Ohio, 95 U. S. 319, 324, 325, 24 L. ed. 357, 359; *Sinking Fund Cases*, 99 U. S. 700, 721, 25 L. ed. 496, 502; *Stearns v. Minnesota*, 179 U. S. 223, 259, 45 L. ed. 162, 180, 21 Sup. Ct. Rep. 73; *Cooley, Const. Lim.* 7th ed. p. 394, note 1; *San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County*, 113 Fed. 930; *McKee v. Chautauqua Assembly*, 65 C. C. A. 8, 130 Fed. 536; *Delaware R. Co. v. Tharp*, 5 Harr. (Del.) 456; *New York v. Twenty-Third Street R. Co.* 113 N. Y. 317, 21 N. E. 60; *Berger v. United States Steel Corp.* supra; *Portland & R. R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784, 2 Atl. 670; *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140, 5 N. W. 275.

Where an act of the legislature on its face repeals the charter of a private corporation, and it is specifically charged that the legislative body acted arbitrarily or capriciously, we think that this court will examine into the facts back of the face of a repealing act, and also consider whether the mode adopted by the legislature was suitable to the nature of the case. The court will make all reasonable, but not violent, presumptions in favor of the validity of such a state statute. The killing of the

corporation by the legislature is not a trivial action.

People v. North River Sugar Ref. Co. 121 N. Y. 608, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834.

The pretended repeal must be regarded in this court as valid unless it can be clearly shown to be in conflict with the Federal Constitution. It is a well-settled rule of constitutional exposition that if the statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed.

Greenwood v. Union Freight R. Co. 105 U. S. 13, 22, 26 L. ed. 961, 965; *Sweet v. Rechel*, 159 U. S. 380, 392, 393, 40 L. ed. 188, 193, 194, 16 Sup. Ct. Rep. 43; *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 201. 15 A. & E. Ann. Cas. 1034; *Fletcher v. Peck*, 6 Cranch, 87, 128, 3 L. ed. 162, 175; *Sinking Fund Cases*, 99 U. S. 700, 718, 25 L. ed. 496, 501.

The legislative journals are not conclusive.

New Jersey v. Yard, 95 U. S. 104, 113, 24 L. ed. 352, 354; *State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co.* 18 Ohio St. 262; *Cronise v. Cronise*, 54 Pa. 255.

If incorrect and defective legislative journals are made conclusive, in some cases they would have the direct effect of nullifying a Federal power granted to the Supreme Court of the United States. They would constitute an oblique invasion not only of the powers of this court to nullify a statute repugnant to the Constitution, but also an oblique invasion of the inhibitions and restrictions in that document against a state impairing the obligations of contracts, or depriving one of property without due process of law.

Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Fairbank v. United States*, 181 U. S. 283, 294, 45 L. ed. 862, 867, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 698, 39 L. ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *Smith v. St. Louis & S. W. R. Co.* 181 U. S. 248, 257, 45 L. ed. 847, 850, 21 Sup. Ct. Rep. 603; *Marbury v. Madison*, 1 Cranch, 137, 178, 2 L. ed. 60, 73.

A charter which was subject to be repealed by the legislature under a reserved power to do so did not constitute a limitation upon the estate granted, nor upon the perpetual franchise to operate a surface railroad.

People v. O'Brien, 111 N. Y. 2, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

Mr. Henry A. Forster argued the cause and filed a brief for plaintiff in error Thomas H. Keogh:

The franchise of a public corporation to operate its plant or works is separate and distinct from its franchise to be a corporation, and is transferable as such, independently of the life of the original corporation.

Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 394, 395, 46 L. ed. 592, 610, 611, 22 Sup. Ct. Rep. 410; *Minneapolis v. Minneapolis Street R. Co.* 215 U. S. 417, 430, 54 L. ed. 259, 269, 30 Sup. Ct. Rep. 118; *People v. O'Brien*, 111 N. Y. 36, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; *Suburban Rapid Transit Co. v. New York*, 128 N. Y. 520, 28 N. E. 525; *Miner v. New York C. & H. R. R. Co.* 123 N. Y. 250, 25 N. E. 339; *Detroit Citizens' Street R. Co. v. Detroit*, 26 L.R.A. 667, 12 C. C. A. 370, 22 U. S. App. 570, 64 Fed. 633; *Lord v. Equitable Life Assur. Soc.* 194 N. Y. 225, 22 L.R.A.(N.S.) 420, 87 N. E. 443.

A corporate franchise cannot be separated from the lands or works essential to its enjoyment by the sale of the latter; because to separate its tangible property from its intangible property would impair its creditors' rights.

Gue v. Tide Water Canal Co. 24 How. 257, 263, 16 L. ed. 635, 636; *Hammock v. Farmers' Loan & T. Co.* 105 U. S. 77, 89, 90, 26 L. ed. 1111, 1115, 1116; *People v. O'Brien*, 111 N. Y. 47, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

Upon the dissolution of a corporation, its property becomes a trust fund for the benefit of its creditors.

Citizens' Sav. & T. Co. v. Illinois C. R. Co. 205 U. S. 46, 55, 51 L. ed. 703, 706, 27 Sup. Ct. Rep. 425; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 366, 367, 33 L. ed. 178, 182, 183, 9 Sup. Ct. Rep. 781.

Under the law of Michigan, public-service corporations are authorized to mortgage their franchises, hydrants, pipes, poles, wires, and rails in the public streets. The purchaser of the franchise may operate it in accordance with its provisions.

Michigan Teleph. Co. v. St. Joseph, 121 Mich. 508, 47 L.R.A. 87, 80 Am. St. Rep. 520, 80 N. W. 383; *Detroit v. Mutual Gas Co.* 43 Mich. 599, 5 N. W. 1039; *Joy v. Jackson & M. Pl. Road Co.* 11 Mich. 165.

The right of a public-service corporation to mortgage its franchises and privileges (though not its right to be a corporation) necessarily includes the power to bring the franchise and privileges to sale, to make the mortgage effectual. The purchaser at the sale acquires a good and valid title to

the franchise, although the corporate right to exist may not be sold.

Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 464, 50 L. ed. 1102, 1109, 26 Sup. Ct. Rep. 660, 6 A. & E. Ann. Cas. 253; *Julian v. Central Trust Co.* 193 U. S. 93, 106, 48 L. ed. 629, 636, 24 Sup. Ct. Rep. 399; *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 507, 29 L. ed. 244, 246, 5 Sup. Ct. Rep. 1009; *Memphis & L. R. R. Co. v. Railroad Comrs.* (*Memphis & L. R. R. Co. v. Berry*) 112 U. S. 610, 619, 28 L. ed. 838, 841, 5 Sup. Ct. Rep. 299.

Franchises of public-service corporations are property, and cannot be taken or used by others without compensation.

Willecox v. Consolidated Gas Co. 212 U. S. 22, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 A. & E. Ann. Cas. 1034; *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 268, 20 L. ed. 568, 570.

A statute separating the tangible property of a corporation from its franchise, and taking the former for public use, while forbidding any compensation for the latter, is unconstitutional. The legislature may determine what private property is needed for public use, but the question of compensation is a judicial one. The legislature may neither say what compensation shall be made, nor fix the rule of compensation.

Mónongahela Nav. Co. v. United States, 148 U. S. 312, 327, 328, 37 L. ed. 463, 468, 469, 13 Sup. Ct. Rep. 622; *Vanhome v. Dorrance*, 2 Dall. 315, 316, 1 L. ed. 396, 397, Fed. Cas. No. 16,857; *Re New York*, 190 N. Y. 352, 16 L.R.A.(N.S.) 335, 83 N. E. 299, 13 A. & E. Ann. Cas. 598.

The dissolution of a corporation cannot impair the obligation of its contracts or the claims of its creditors; they still remain in full force, and unimpaired by virtue of the Constitution.

Mumma v. Potomac Co. 8 Pet. 281, 285, 286, 8 L. ed. 945, 947, 948; *People v. O'Brien*, *supra*.

A reserved power to repeal or amend the charter of a corporation does not permit the invalidation or annulment of a lawfully executed mortgage, or of coupon bonds issued thereunder, or of any other valid debt incurred or lawful contract made before the passage of the repealing act.

Sinking Fund Cases, 99 U. S. 700, 721, 25 L. ed. 496, 502; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 558, 566, 567, 41 L. ed. 1115, 1117, 1118, 17 Sup. Ct. Rep. 653; *Com. v. Essex Co.* 13 Gray, 252; *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 147, 5 N. W. 275; *People v. O'Brien and Lord v. Equitable Life Assur. Soc.* *supra*.

An act repealing or amending the char-

ter or powers of a corporation in order to abolish valid pre-existing debts, or to abrogate lawful prior contracts, is unconstitutional, because, as to the holders of those debts or contracts, it is a denial of due process of law, and a deprivation of the equal protection of the laws.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 690, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Fletcher v. Peek*, 6 Cranch, 87, 135, 3 L. ed. 162, 177.

To take private property for public use without making just compensation therefor is a denial of due process of law.

United States v. Lynch, 188 U. S. 446, 470-474, 47 L. ed. 539, 548-550, 23 Sup. Ct. Rep. 349; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 593, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *People ex rel. Harvey v. Loew*, 102 N. Y. 471, 7 N. E. 297.

Suppose the hydraulic company had been advised to "elect to present a claim against the said city," under and pursuant to the repealing acts. By the very terms of these acts, its election to "present a claim" thereunder would have estopped it from setting up that the prohibition of any compensation for its franchise was unconstitutional.

Daniels v. Tearney, 102 U. S. 415, 421, 26 L. ed. 187, 189; *Grand Rapids & I. R. Co. v. Osborn*, 193 U. S. 17, 29, 48 L. ed. 598, 604, 24 Sup. Ct. Rep. 310; *New York v. Manhattan R. Co.* 143 N. Y. 26, 37 N. E. 494; *Re Cooper*, 93 N. Y. 507; *Embury v. Conner*, 3 N. Y. 516, 53 Am. Dec. 325; 1 Lewis, Em. Dom. 3d ed. § 311.

Messrs. *Moses Taggart and Ganson Taggart* argued the cause, and, with Mr. Franz Kuhn, filed a brief for defendants in error:

Legislative journals are conclusive.

Sutherland, Staf. Constr. §§ 30, 47, 50, 85; *Chesapeake & P. Teleph. Co. v. Manning*, 186 U. S. 245, 46 L. ed. 1147, 22 Sup. Ct. Rep. 881; *Brewer v. Blougher*, 14 Pet. 178, 10 L. ed. 408; *Burrows v. Delta Transp. Co.* 106 Mich. 603, 29 L.R.A. 468, 64 N. W. 501; *Cooley*, Const. Lim. 7th ed. §§ 193, 240, 257; *American Coal Co. v. Consolidation Coal Co.* 46 Md. 15; *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; *Flint & F. Pl. Road Co. v. Woodhull*, 25 Mich. 99, 12 Am. Rep. 233; *State v. Gerhardt*, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469; *Speer v. Athens*, 95 Ga. 49, 9 L.R.A. 402, 11 S. E. 802; *Ritchie v. Richards*, 14 Utah, 371, 47 Pac. 670; *People v. Dettenthaler*, 118 Mich. 599, 44 L.R.A. 164, 77 N. W. 450; *Auditor General v. Menominee County*, 89 Mich. 552, 51 N. W. 483; *People ex rel. Hart v. McElroy*, 72 Mich. 446, 2 L.R.A. 609, 40 N.

W. 750; *State ex rel. Reed v. Jones*, 6 Wash. 452, 23 L.R.A. 340, 34 Pac. 201; *Atty. Gen. v. Rice*, 64 Mich. 385, 31 N. W. 203; *Stevenson v. Colgan*, 91 Cal. 649, 14 L.R.A. 459, 25 Am. St. Rep. 230, 27 Pac. 1089; *People ex rel. Drake v. Mahaney*, 13 Mich. 481; *People v. Gardner*, 143 Mich. 108, 106 N. W. 541.

We do not see how it can reasonably be asserted that an absolute authority to repeal is not as broad as an authority to repeal "at the pleasure of the legislature."

Smith v. Lake Shore & M. S. R. Co. 114 Mich. 460, 72 N. W. 328.

The right is not claimed to destroy vested interests, but if the act under which the corporation is organized is repealed as to the body corporate, or its franchise as a corporation has ceased, any person who has dealt with the corporation has knowledge of exactly what may happen under such an express reservation.

Morawetz, Priv. Corp. § 1096; *Zabriskie v. Hackensack & N. Y. R. Co.* 18 N. J. Eq. 192, 90 Am. Dec. 617; *Yeaton v. Bank of Old Dominion*, 21 Gratt. 593; 24 Am. & Eng. Enc. Law, p. 173, note 3; *Black River Improv. Co. v. Holway*, 87 Wis. 590, 59 N. W. 126; *Davenport v. Magoon*, 13 Or. 7, 57 Am. Rep. 1, 4 Pac. 299; *People v. Sassovich*, 29 Cal. 484.

A company, by changing its organization, cannot evade or avoid the terms or conditions of its fundamental law, or the fundamental law of the state. If it cannot do it by consolidation, it cannot do it by mortgaging or creating liens, and thereby giving to such parties any greater rights than by it possessed.

Smith v. Lake Shore & M. S. R. Co. *supra*.

The idea or argument that a company can avoid the reserved right of repeal under its franchise by mortgage or otherwise, so as to destroy the reservation, has the merit of novelty at least. It can no more do so than a landowner can add to his title of which he may be seised by a conveyance of a larger interest than that actually owned, or the transfer of the same to another party. Some of the following cases have been cited, and they clearly sustain this position:

Cooley, Const. Lim. 7th ed. pp. 285, 391, 398; *Atty. Gen. v. Dusenbury* (Maynard *ex rel.* *Dusenbury v. Looker*) 111 Mich. 498, 56 L.R.A. 947, 69 N. W. 929; *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140, 5 N. W. 275; *Portland & R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784, 2 Atl. 670; *Railroad Comrs. v. Grand Rapids & I. R. Co.* 130 Mich. 248, 89 N. W. 967; *Highland Park v. Detroit & B Pl. Road Co.* 95 Mich. 490, 55 N. W. 382;

Smith v. Lake Shore & M. S. R. Co. 114 Mich. 472, 72 N. W. 328; *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585; *Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 610, 33 N. W. 749; *Com. v. Essex Co.* 13 Gray, 239; *Gardner v. Hope Ins. Co.* 9 R. I. 194, 11 Am. Rep. 238; *Parker v. Metropolitan R. Co.* 109 Mass. 506; *Inland Fisheries Comrs. v. Holyoke Water Power Co.* 104 Mass. 446, 6 Am. Rep. 247; *State v. Maine C. R. Co.* 66 Me. 488; *Sprigg v. Western U. Teleg. Co.* 46 Md. 67; *Union Improv. Co. v. Com.* 69 Pa. 140; *State, Morris & E. R. Co. Prosecutors, v. Railroad Taxation Commissioner*, 37 N. J. L. 228; *Illinois C. R. Co. v. People*, 95 Ill. 313; *Rodemacher v. Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 592; *Yeaton v. Bank of Old Dominion*, 21 Gratt. 593; *Enterprise Ditch Co. v. Mollitt*, 58 Neb. 642, 45 L.R.A. 647, 76 Am. St. Rep. 122, 79 N. W. 560; *Ashuelot R. Co. v. Elliot*, 58 N. H. 451; 1 *Thomp. Corp.* § 89; *Henley v. State*, 98 Tenn. 665, 39 L.R.A. 126, 41 S. W. 352, 1104; *Market Street R. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *State v. Northern C. R. Co.* 44 Md. 165; *People v. O'Brien*, 111 N. Y. 52, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; *West Wisconsin R. Co. v. Trempealeau County*, 35 Wis. 257; *Gorman v. Pacific R. Co.* 26 Mo. 441, 72 Am. Dec. 220.

And the Federal courts recognize the same rule and the same right on the part of the state legislatures to repeal charters of companies, where the right is reserved in the original franchise granted.

Tomlinson v. Jessup, 15 Wall. 454, 21 L. ed. 204; *Maine C. R. Co. v. Maine*, 96 U. S. 499-511, 24 L. ed. 836-841; *Miller v. New York*, 15 Wall. 478, 21 L. ed. 98; *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Hamilton Gas-light & Coke Co. v. Hamilton*, 146 U. S. 258-270, 36 L. ed. 963-968, 13 Sup. Ct. Rep. 90; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185; *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Merriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Grand Rapids & I. R. Co. v. Osborn*, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310.

We have made no claim and the court has not held that we can take property without compensation, but at all times we have insisted that the right of repeal existing could not be impaired, although its exer-

eise might incidentally affect the value of the property of the company.

Railroad Comrs. v. Grand Rapids & I. R. Co. 130 Mich. 248, 89 N. W. 967.

A state has a right, acting within the provisions of the Constitution, to impose its own conditions upon its grants and concessions.

Rogers v. Port Huron & L. M. R. Co. 45 Mich. 460, 8 N. W. 46.

The stockholders, when they entered such a corporation, reserving the right to the legislature to amend, alter, or repeal, are as much bound by this constitutional provision as though it were contained in the articles of incorporation.

1 Thomp. Corp. § 189; Re Gibson, 21 N. Y. 9.

A legislative grant to a corporation of special privileges not forbidden by the Constitution may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect of altering or revoking, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of contracts, whatever may be the motive of the legislature, or however harshly such legislation may operate in any particular case upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation.

Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 270, 36 L. ed. 968, 13 Sup. Ct. Rep. 90; State v. Maine C. R. Co. and West Wisconsin R. Co. v. Trempealeau County, *supra*; Roxbury v. Boston & P. R. Corp. 6 Cnsh. 424; Holyoke Water-Power Co. v. Lyman; Sprigg v. Western U. Teleg. Co.; Gardner v. Hope Ins. Co.; Greenwood v. Union Freight R. Co.; Miller v. New York; Tomlinson v. Jessup,—*supra*.

The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state.

Maine C. R. Co. v. Maine, 96 U. S. 499, 24 L. ed. 836; Tomlinson v. Jessup, *supra*.

Questions not directly involved in an appeal, and not necessary to the final administration of the case, will not be considered by the court.

3 Cyc. Law & Proc. p. 223; Grant v. Dreyfus (Cal.) 52 Pac. 1074; Re Pearsons, 98 Cal. 603, 33 Pac. 451; Phillips v. Kalamazoo, 53 Mich. 33, 18 N. W. 547; Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485.

54 L. ed.

Mr. Justice Holmes delivered the opinion of the court:

The judgment upon which this writ of error is based ousts the defendants (plaintiffs in error) from acting as a body corporate under the name of the Grand Rapids *Hydraulic Company. It was rendered, upon an information in the nature of quo warranto, by a county court, and was affirmed by the supreme court of the state. 153 Mich. 724, 126 Am. St. Rep. 550, 117 N. W. 314. The case was heard on demurrer. The defendants pleaded that in 1849 the legislature incorporated the Grand Rapids Hydraulic Company, and that they were directors of the company; that the company had constructed and was maintaining an elaborate system of water supply; that in 1905 the legislature purported to repeal this charter, but that, owing to the manner in which the repeal was passed, as well as to the contents of the act purporting to effect it the repeal was void under article 1, § 10, and the 14th Amendment of the Constitution of the United States. Seemingly in aid of this contention, the defendants alleged the issue of bonds and a mortgage of the company's plant, including its franchise to own and operate the same, that still are outstanding. To this plea the state demurred.

As to the manner in which the repeal was obtained and passed, the plea alleged that the city of Grand Rapids was a rival of the company in furnishing water, and that the mayor and city authorities carried out an unfair scheme for getting the repeal hurried through the legislature without notice to the company. It set out the particulars with much detail. The defendants now, on the ground that there are limits even to the operation of a reserved power to repeal, argue that we should consider these allegations. But we do not inquire into the knowledge, negligence, methods, or motives of the legislature if, as in this case, the repeal was passed in due form. United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 544, 35 L. ed. 1099, 1109, 12 Sup. Ct. Rep. 308. The only question that we can consider is whether there is anything relevant to the present case in the terms or effect of the repeal that goes beyond the power that the charter expressly reserves.

The charter provides that "the legislature may, at any *time hereafter, amend [599 or repeal this act." Laws of 1849, act No. 223, § 11. Now, in the first place, with regard to the reference in argument to the bondholders, it is enough to say that they are not before the court. The defendants do not represent them; the defendants represent the debtors, not the creditors. By making a contract or incurring a debt, the de-

defendants, so far as they are concerned, could not get rid of an infirmity inherent in the corporation. They contracted subject, not paramount, to the proviso for repeal, as is shown by a long line of cases. *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Newport & C. Bridge Co. v. United States*, 105 U. S. 470, 26 L. ed. 1143; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Monongahela Nav. Co. v. United States*, 148 U. S. 313, 338, 340, 37 L. ed. 463, 472, 473, 13 Sup. Ct. Rep. 622; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 353, 354, 46 L. ed. 936, 944, 945, 22 Sup. Ct. Rep. 691; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 437, 438, 47 L. ed. 887, 891, 892, 23 Sup. Ct. Rep. 531; *Manigault v. Springs*, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127. It would be a waste of words to try to make clearer than it is on its face the meaning and effect of this reservation of the power to repeal.

But the legislature did not content itself with a bare repeal, and leave the consequences to the law. Act No. 492 of the Local Acts of 1905, after repealing the charter, provides that the company, at any time before January, 1906, may present a claim to the city of Grand Rapids for the value of its real and tangible estate, 'not including franchise,' and transfer the property to the city. If the parties do not agree, an action of assumpsit may be brought, with the usual incidents, and the amount of the final judgment is made a claim against the city, to be paid like other claims. If the company does not elect this course, it may remove the property, first giving bond, to be approved by the common council, to protect the city for any damages caused thereby, and is to leave the streets in as good condition as before. It is argued that these provisions are void, and the argument may 600] perhaps be abridged *as follows: Corporations with existence limited in time may take a fee simple or a franchise of longer duration than themselves. *Minneapolis v. Minneapolis Street R. Co.* 215 U. S. 417, 430, 54 L. ed. 259, 269, 30 Sup. Ct. Rep. 118; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 394, 395, 46 L. ed. 592, 610, 611, 22 Sup. Ct. Rep. 410. There is a distinction between the franchise to be a corporation and that to operate its plant. *Vicksburg v. Vicksburg Waterworks Co.* 202 U. S. 453, 464, 50 L. ed. 1102, 1109, 26 Sup. Ct. Rep. 660, 6 A. & E. Ann. Cas. 253. As the corporation had been authorized to lay its pipes, and lawfully had mortgaged not only its pipes, but its franchise to own and operate them, it must be taken to have

given a security not limited or terminable by anything short of payment. The attempt to extinguish the corporation, if successful, would render the security and continuing franchise unavailable, and is void. It is argued further that the exclusion of "franchise" (assumed to embrace the supposed franchise to operate the works) from the valuation is unconstitutional.

We express no opinion as to whether the premises of the foregoing argument are justified by anything appearing in the present record. In any event, the conclusion cannot be maintained. If the city gave the privilege of using the streets to the corporation forever, it could not enlarge the right of the corporation to continue in existence as against the sovereign power, as sufficiently appears from the cases already cited. See also *Arkansas Southern R. Co. v. Louisiana & A. R. Co.* 218 U. S. 431, ante, 1097, 31 Sup. Ct. Rep. 56 (November 28, 1910.) The only question before us now is the validity of the judgment ousting the defendants from "assuming to act as a body corporate, and particularly under the name and style of the Grand Rapids Hydraulic Company." This really is too plain to require the argument that we have spent upon it. We may add that it is a matter upon which the bondholders have nothing to say. Moreover, the question of parties is not open here. *New Orleans Waterworks Co. v. Louisiana*, supra; *Com. v. Tenth Massachusetts Turnp. Corp.* 5 *Cush. 509, 511. [601 Also, whether the provisions as to valuation do the bondholders or members of the corporation wrong is not before the court.

Judgment affirmed.

UNITED STATES, Plff. in Err.,
v.

GUSTAV E. KISSEL and Thomas B. Har-
ned.

(See S. C. Reporter's ed. 601-610.)

Appeal — by government in criminal
case — scope of review.

1. The only question before the Federal

NOTE.—On review by government in criminal case under the act of March 2, 1907—see note to *United States v. Stevenson*, ante, 153.

As to the commencement of the period of limitations against prosecutions for continuing offenses—see note to *Ware v. United States*, 84 C. C. A. 519.

On the effect of overt act within limitation period, where the conspiracy was originally formed and the first act committed beyond the period of limitation—see note to *Ware v. United States*, 12 L.R.A. (N.S.) 1053.

Supreme Court on an appeal taken under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1909, p. 220), from a judgment sustaining a special plea in bar when the defendant has not been put in jeopardy, is whether such plea in bar can be sustained.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

Limitation of actions — continuing offense — conspiracy.

2. A conspiracy to restrain or monopolize trade, in violation of the Sherman act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), by obtaining control of a competitor through a pledge of the majority of its stock to secure a loan to a stockholder, and then voting to suspend business until further order of the board of directors, continues, so far as the statute of limitations is concerned, so long as any further action is taken in furtherance of the conspiracy.

[Limitation of criminal prosecution, see Limitation of Actions, III. l, in Digest Sup. Ct. 1908.]

Criminal law — pleading statute of limitations.

3. A special plea of the statute of limitations is not good as against an indictment charging a conspiracy to restrain or monopolize trade, in violation of the Sherman act of July 2, 1890, by improperly excluding a competitor from business, although the conspiracy is alleged to have been formed on a specified date, which was more than three years before the finding of the indictment, where such indictment, consistently with the other facts, alleges that the conspiracy continued to the date of its presentment.

[For other cases, see Criminal Law, III. d, in Digest Sup. Ct. 1908.]

[No. 390.]

Argued November 10 and 11, 1910. Decided December 12, 1910.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment sustaining pleas in bar of the statute of limitations to an indictment for a conspiracy in restraint of trade. Reversed.

See same case below, 173 Fed. 823.

The facts are stated in the opinion.

Assistant Attorney General Fowler argued the cause and filed a brief for plaintiff in error:

The defense of the statute of limitations cannot be made by demurrer.

United States v. Cook, 17 Wall. 168, 179, 21 L. ed. 538, 541.

The offense charged is a continuing one.

12 Cyc. Law & Proc. p. 256; Wharton, Crim. Pl. & Pr. 9th ed. §§ 321, 474; State v. Long, 94 N. C. 901; State v. Gilbert, 73 Mo. 21; State v. Dry Fork R. Co. 50 W. 54 L. ed.

Va. 238, 40 S. E. 447; Nashville & D. R. Co. v. State, 1 Baxt. 55; 1 Bishop, New Crim. Law, §§ 435, 889; 2 Bishop, New Crim. Law, § 1286; Smith v. State, 79 Ala. 257; R. v. Firth, L. R. 1 C. C. 176; 11 Cox, C. C. 234; Re Snow, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; Armour Packing Co. v. United States, 209 U. S. 56, 73, 76, 77, 52 L. ed. 681, 691-693, 28 Sup. Ct. Rep. 428; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815.

If the offenses here under consideration are continuing ones, they are properly charged in the several counts of the indictment as having been committed on December 30, 1903, "and continuously and at all times during said period of six years; to wit, from that day until and on the day of the finding and presentation of the indictment."

Wharton, Crim. Pl. & Pr. 9th ed. § 125.

The construction of a statute in a civil proceeding is authority for a like construction in a criminal prosecution.

United States v. Keitel, 211 U. S. 370, 392, 53 L. ed. 230, 242, 29 Sup. Ct. Rep. 123; United States v. MacAndrews & F. Co. 149 Fed. 830.

When one intentionally puts in motion an unlawful force, he is liable for all the consequences resulting directly therefrom, regardless of the length of time such force may continue to operate.

1 Bishop, New Crim. Law, § 641.

It is unnecessary to assign reasons why the conspiracy and each of the various acts alleged aided and altogether brought about and perpetuated the monopoly, that being a matter for the consideration of the jury upon the trial of the case.

United States v. Corbett, 215 U. S. 233, ante, 173, 30 Sup. Ct. Rep. 81.

Where the act itself does not require that an overt act be committed before the offender can be prosecuted, it is unnecessary to set forth in the indictment any overt act; and in case such acts are alleged, it is equally unnecessary that they be proved, and they may be treated as mere surplusage.

2 Bishop, New Crim. Proc. 4th ed. § 205; State v. Straw, 42 N. H. 394; Com. v. Judd, 2 Mass. 336, 3 Am. Dec. 54; Archbold, Crim. Pl. Ev. & Pr. 1215; Com. v. Shedd, 7 Cush. 514; Com. v. Fuller, 132 Mass. 566; People v. Richards, 1 Mich. 224, 51 Am. Dec. 75; People v. Dyer, 79 Mich. 481, 44 N. W. 937; State v. Keach, 40 Vt. 118.

The act of one conspirator is the act of them all.

United States v. Gooding, 12 Wheat. 469, 6 L. ed. 696; Lineoln v. Claflin, 7 Wall. 132, 138, 19 L. ed. 106, 109; Bannon v. United States, 156 U. S. 464-469, 39 L. ed. 494-497, 15 Sup. Ct. Rep. 467, 9 Am. Crim. Rep. 328.

The late Solicitor General Bowers had also filed a brief for plaintiff in error:

The plea of not guilty embraces a defense of the statute of limitations in a criminal proceeding.

Re Sidney, 9 How. St. Tr. 821; Streep v. United States, 160 U. S. 128, 40 L. ed. 365, 16 Sup. Ct. Rep. 244; United States v. Brown, 2 Low. Dec. 267, Fed. Cas. No. 14,665; Hatwood v. State, 18 Ind. 492; Wharton, Crim. Pl. & Pr. 1889, 9th ed., § 317; 1 Bishop, Crim. Proc. § 799.

A special plea of the statute of limitations has never been known in English criminal procedure.

Chitty, Crim. Law, 1847, 5th Am. ed. pp. 445, 480; Archbold, Crim. Proc. 1880, 8th ed., Pomeroy, pp. 336-354; Stephen's Digest, Crim. Proc. art. 263, p. 173; 2 Russell, Crimes, 1910, 7th Eng. ed. pp. 1981 et seq.

Modern legislation in the states excludes the plea.

State v. Whalen, 98 Iowa, 669, 68 N. W. 554.

In the states generally, pleas in bar to indictments are now seldom used, the general issue taking their place.

Naner v. Thomas, 13 Allen, 579.

Federal authority leaves the question quite open, unless the cases of the United States v. Norton, 91 U. S. 566, 23 L. ed. 454, and United States v. Hirsch, 100 U. S. 33, 25 L. ed. 539, give the plea a general sanction.

If the special plea be allowable at all, its use certainly must be restricted so as to act as a demurrer to the indictment, or as a traverse of nothing more than such allegation as may be in the indictment in mere anticipation of a defense of the statute of limitations; such as an allegation that defendant has been a fugitive from justice.

United States v. Norton, *supra*; United States v. Irvine, 98 U. S. 450, 25 L. ed. 193, 3 Am. Crim. Rep. 334; United States v. Hirsch, *supra*; United States v. Slaeum, 1 Cranch, C. C. 485, Fed. Cas. No. 16,311; United States v. Wright, Fed. Cas. No. 16,770; United States v. Comstock, 162 Fed. 416; United States v. Braec, 149 Fed. 874.

The use of the special plea as a traverse of any allegations concerning the fact or time of committing the offense charged

would lead to confusion, difficulty, and delay.

1 Chitty, Crim. Law, Perkins's 5th Am. ed. **434, 435; Wharton, Crim. Pl. & Pr. 9th ed. § 419; United States v. Shorey, Fed. Cas. No. 16,280; State v. Ward, 49 Conn. 429.

It is involved in the very nature of any special plea in bar that it admits everything that the indictment alleges in reference to the commission of the offense. It does not dispute the indictment, but shows that defendant ought not to be required to respond to it at all.

Chitty, Crim. Law, 5th Am. ed. 451; Bishop, Directions & Forms, 2d ed. § 1046, note on p. 598.

Further, it has been held several times that even in a civil case, a plea of the statute of limitations in defense of plaintiff's cause of action, if any such there be, is bad.

1 Chitty, Pl. 1876, 16th Am. ed. *551; Margetts v. Bays, 4 Ad. & El. 489; Marchant v. Valley Falls Baptist Church, 6 R. I. 24; Conger v. Johnston, 2 Denio, 96.

Other cases, while holding the form of plea last described good, place their decision on the ground that such words—"if any such there be"—are not a traverse, and the plea admits the merits.

Fish v. Farwell, 160 Ill. 241, 43 N. E. 367; Bartalott v. International Bank, 14 Ill. App. 162.

Union of both matter in confession and avoidance and a traverse in the same plea is duplicitous.

Stephens, Pl. Heard's 9th Am. ed. 258.

At common law the existence of the conspiracy agreement or confederation constituted the crime, without even a single overt act in pursuance of it.

R. v. Gill, 2 Barn. & Ald. 204; Bannon v. United States, 156 U. S. 464-469, 39 L. ed. 494-497, 15 Sup. Ct. Rep. 467, 9 Am. Crim. Rep. 328; Wright, Crim. Conspiracies, 1887, Carson's Am. ed. 124.

The gist of the offense is therefore the fact of confederating.

People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501.

After the commission of a single overt act, the law conspiracy is unaffected by U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676.

United States v. Britton, 108 U. S. 199, 27 L. ed. 698, 2 Sup. Ct. Rep. 531; Pettibone v. United States, 148 U. S. 197, 202, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; Dealy v. United States, 152 U. S. 539, 543, 38 L. ed. 545, 546, 14 Sup. Ct. Rep. 680, 9 Am. Crim. Rep. 161; Bannon v. United States, 156 U. S. 464, 469, 39 L. ed. 494, 496, 15 Sup. Ct. Rep. 467, 9 Am. Crim. Rep.

328; Hyde v. Shine, 199 U. S. 62, 76, 50 L. ed. 90, 94, 25 Sup. Ct. Rep. 760; Williamson v. United States, 207 U. S. 425, 447, 52 L. ed. 278, 290, 28 Sup. Ct. Rep. 163.

Even when the single overt act required by this section, before prosecution, occurs outside of the jurisdiction of the court where the indictment is found, prosecution in that court is proper if the conspiracy agreement was there formed or has there existed.

Dealy v. United States, 152 U. S. 539, 38 L. ed. 545, 14 Sup. Ct. Rep. 680, 9 Am. Crim. Rep. 161.

Practically all the cases hold that prosecution is not barred if an overt act has occurred within three years.

United States v. Raley, 173 Fed. 166; United States v. Breese, 173 Fed. 411; Jones v. United States, 89 C. C. A. 303, 162 Fed. 427; United States v. Lonabaugh, 158 Fed. 319; United States v. Barber, 157 Fed. 889; Bradford v. United States, 81 C. C. A. 606, 152 Fed. 616, 81 C. C. A. 607, 152 Fed. 617; United States v. Brace, supra; United States v. Bradford, 148 Fed. 413; United States v. Greene, 115 Fed. 345; Lorenz v. United States, 24 App. D. C. 388; Fire Ins. Cos. v. State, 75 Miss. 38, 22 So. 99; Ochs v. People, 124 Ill. 429, 16 N. E. 662; People v. Willis, 23 Misc. 573, 52 N. Y. Supp. 808.

Certain decisions of the court illustrate the continuity of offenses under the Sherman act.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815.

Messrs. Joseph H. Choate and William D. Guthrie argued the cause, and, with Messrs. Howard S. Gaus and William C. Osborn, filed a brief for defendant Kissel:

It was at first the practice in the lower Federal courts to permit a defendant to raise the defense of the limitation preliminarily by demurrer and thereby avoid further prosecution and trial, although it was recognized that it could also be set up by special plea.

United States v. Watkins, 3 Cranch, C. C. 551, Fed. Cas. No. 16,649; United States v. Six Fermenting Tubs, 1 Abb. (U. S.) 271, Fed. Cas. No. 16,296; United States v. Dustin, Fed. Cas. No. 15,012; United States v. Shorey, Fed. Cas. Nos. 16,281 & 16,282; United States v. Coggin, 3 Fed. 492.

This practice was overruled, and the rule of Federal procedure applicable in criminal

cases was settled by this court at the December term, 1872, in United States v. Cook, 17 Wall. 168, 21 L. ed. 538.

This authoritative declaration of the proper rule of procedure has never been qualified or limited by the court. On the contrary, the practice has been repeatedly sanctioned.

United States v. Norton, 91 U. S. 566, 22 L. ed. 454; United States v. Hirsch, 109 U. S. 33, 25 L. ed. 539; United States v. Irvine, 98 U. S. 450, 25 L. ed. 193, 3 Am. Crim. Rep. 334; United States v. Hewecker, 79 Fed. 60, 164 U. S. 46, 41 L. ed. 345, 17 Sup. Ct. Rep. 18; United States v. Brace, 149 Fed. 876; 1 Bishop, New Crim. Proc. § 799, subd. 5; Adams v. Woods, 2 Cranch, 336, 2 L. ed. 297; United States v. Wells, 163 Fed. 314; United States v. Comstock, 162 Fed. 416; Ex parte Townsend, 133 Fed. 75; McGlinchey v. United States, 4 Cliff. 314, Fed. Cas. No. 8,803; Perkins v. United States, 4 Cliff. 321, Fed. Cas. No. 10,990; United States v. Maillard, 4 Ben. 460, Fed. Cas. No. 15,709; United States v. Wright, 3 Pittsb. 192, Fed. Cas. No. 16,770; United States v. Shorey, Fed. Cas. No. 16,280; Stimpson v. Pond, 2 Curt. C. C. 503, Fed. Cas. No. 13,455; United States v. Platt, Fed. Cas. No. 16,054a; United States v. Mayo, 1 Gall. 397, Fed. Cas. No. 15,755; United States v. Slacum, 1 Cranch, C. C. 485, Fed. Cas. No. 16,311.

The suggestion in the government's brief that, under the English practice, at common law there are no precedents to be found of pleas in bar setting up the defense of the statute of limitations, is entirely immaterial, for the reason that there was in England, prior to the nineteenth century, no limitation of prosecutions in criminal cases except under the treason act of 1695.

Wood, Limitations, Gould's 3d ed. § 28; Banning, Limitations of Actions, Brown's 3d ed. p. 253; 2 Stephen, History of Crim. Law, Eng. pp. 1, 2.

Had the statute of 4 Anne, chap. 16, §§ 4, 5, which permitted double pleading in civil cases, not expressly excluded criminal cases, double pleading would have been allowable at common law in criminal cases.

United States v. Shorey, Fed. Cas. No. 16,280.

The defense of the statute of limitations is, on principle, of the same general character and nature as the plea of former jeopardy or immunity or pardon. It is essentially a plea in bar of further prosecution. It confesses the crime, but relies on a statutory or constitutional exemption in avoidance. The settled rule at common law was that the defense of former jeopardy, *i. e.*, *autrefois acquit* or *autrefois convict*, had to,

be specially pleaded, and could not be availed of under the general issue or by motion in arrest of judgment.

Wharton, *Crim. Pl. & Pr.* 9th ed. § 477; 1 *Bishop, New Crim. Proc.* §§ 742, 799, subd. 3, 806.

Special pleas were especially dangerous at the common law, because of the refusal of the courts to permit an accused to plead over if he failed to maintain his plea. As criminal procedure became more and more humane, the courts, therefore, allowed defendants to avail themselves, under the general issue, of defenses which should more properly or logically be presented by special pleas in bar. Thus, the defense of immunity was held to be available under the plea of not guilty. *R. v. Skeen*, 8 Cox, C. C. 153. This indulgence, however, was not intended in any way to affect the substantial right of an accused to plead specially, and thereby bar further prosecution and jeopardy.

Section 1044 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 725) should be liberally construed in favor of individual rights; and in that light such procedure should be favored as will tend to save an accused person from prosecution and trial if he duly claims the statutory amnesty.

Wharton, *Crim. Pl. & Pr.* 9th ed. § 316; Bassett, *Crim. Pl. & Pr.* 2d ed. § 184; *Beattie v. People*, 33 Ill. App. 651; *Lamkin v. People*, 94 Ill. 501; *Bishop, Statutory Crimes*, 3d ed. § 259; *Com. v. Haas*, 57 Pa. 443; *People v. Lord*, 12 Hun, 282; *People v. Austin*, 63 App. Div. 382, 71 N. Y. Supp. 601; *Moore v. State*, 43 N. J. L. 203, 39 Am. Rep. 558; *State v. Asbury*, 26 Tex. 82; *Gillett, Crim. Law*, 2d ed. § 52; *Ware v. United States*, 12 L.R.A.(N.S.) 1053, 84 C. C. A. 503, 154 Fed. 593, 12 A. & E. Ann. Cas. 233; *Bell v. Morrison*, 1 Pet. 351, 360, 7 L. ed. 174, 178.

An act which, according to authoritative decisions, was not criminal when done, ought not to be rendered criminal years afterwards by reason of a change of decision.

State v. O'Neil (Iowa)—L.R.A.(N.S.)—, 126 N. W. 454.

All through the argument of the government—and necessary to uphold it—is the assertion in one form or another that the question is as to the continued existence of the conspiracy, and that this is to be determined not by any present criminal act on the part of the accused, but solely by the antecedent intention or antecedent mutual understanding or the object of the original conspiracy: in other words, the contention is that if the original conspiracy

was indefinite as to time, or if the conspirators contemplated a continuing effect or object, then they would remain liable to criminal prosecution indefinitely unless they could show an actual abandonment of their intent. Persons would then be punishable not because they had done any criminal act, or had actually committed any criminal offense within the three years, but because their antecedent intention contemplated future acts or consequences or effects. Under this theory, men would be liable criminally for past intentions, or as long as the consequences or effect of the antecedent acts continued to endure. It is submitted that no such doctrine exists in our system of criminal jurisprudence. The government fails to cite a single authority to sustain this extraordinary proposition, and we believe it is correct to say that there is no case anywhere which supports this contention of the government. On the contrary, every case where this question has been considered proceeds upon the assumption that, of course, a criminal act must be shown to have been done within the period of the limitation.

United States v. Owen, 32 Fed. 534; *United States v. McCord*, 72 Fed. 159; *United States v. Greene*, 100 Fed. 941, 115 Fed. 343; *United States v. Greene*, 146 Fed. 803, affirmed in 85 C. C. A. 251, 154 Fed. 401; *Ex parte Black*, 147 Fed. 832, 87 C. C. A. 383, 160 Fed. 431; *United States v. Bradford*, 148 Fed. 413, affirmed in 81 C. C. A. 607, 152 Fed. 616; *Ware v. United States*, 12 L.R.A.(N.S.) 1053, 84 C. C. A. 503, 154 Fed. 577, 12 A. & E. Ann. Cas. 233, certiorari denied in 207 U. S. 588, 52 L. ed. 353, 28 Sup. Ct. Rep. 255; *United States v. Biggs*, 157 Fed. 264, affirmed in 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 181; *United States v. Barber*, 157 Fed. 889; *Jones v. United States*, 89 C. C. A. 303, 162 Fed. 417, certiorari denied in 212 U. S. 576, 53 L. ed. 657, 29 Sup. Ct. Rep. 685; *Jones v. United States*, 179 Fed. 584; *United States v. Breese*, 173 Fed. 402; *Lonabaugh v. United States*, 179 Fed. 476; *Lorenz v. United States*, 24 App. D. C. 337, certiorari denied in 196 U. S. 640, 49 L. ed. 631, 25 Sup. Ct. Rep. 796; *Com. v. Bartilson*, 85 Pa. 482; *Ochs v. People*, 25 Ill. App. 379, affirmed in 124 Ill. 399, 16 N. E. 662; *Fire Ins. Cos. v. State*, 75 Miss. 24, 22 So. 99; *State v. Langdon*, 159 Ind. 377, 65 N. E. 1; *State v. Mason*, 108 Ind. 48, 8 N. E. 716.

As to crimes which are not essentially continuous, the statute of limitations begins to run as against each renewal of the crime upon the commission of the act which constitutes the gist of the offense; and where an indictment charges such an of-

fense as continuing, that allegation will be disregarded as surplusage, and the indictment construed to charge the crime only at the earliest date at which it avers the crime to have been completed.

United States v. Irvine, 98 U. S. 450, 25 L. ed. 193.

Where an indictment charges a crime which is not essentially continuous, with a *continuando*, the *continuando* may be disregarded, and the indictment treated as charging no more than the commission of the offense on the first day.

Wharton, Crim. Pl. & Pr. 9th ed. § 125; 1 Bishop, New Crim. Proc. § 388; Starkie, Crim. Pl. 1st Am. ed. pp. 60, 61; R. v. Dixon, 10 Mod. 337; United States v. La Coste, 2 Mason, 129, Fed. Cas. No. 15,548; People v. Adams, 17 Wend. 476; Wells v. Com. 12 Gray, 326; State v. Nichols, 58 N. H. 41; Cook v. State, 11 Ga. 56, 56 Am. Dec. 410; State v. Briggs, 68 Iowa, 416, 27 N. W. 358; State v. Thompson, 31 Utah, 228, 87 Pac. 709; State v. Jasper, 15 N. C. (4 Dev. L.) 323.

An analysis of the nature of the crime of conspiracy will readily show the soundness of the proposition that the offense is noncontinuing, since the essential element of the offense is the act of confederating or plotting, which is inherently a non-continuing act, and not acts which may be done in pursuance of the conspiracy or to effect its object.

Archbold, Crim. Pl. 22d ed. p. 1209; 2 Bishop, New Crim. Law, §§ 171, 172; United States v. Hirsch, 100 U. S. 33, 34, 25 L. ed. 539, 540; United States v. Britton, 108 U. S. 199-204, 27 L. ed. 698-700, 2 Sup. Ct. Rep. 531; McKenna v. United States, 62 C. C. A. 88, 127 Fed. 90; Pettibone v. United States, 148 U. S. 197-202, 37 L. ed. 419-422, 13 Sup. Ct. Rep. 542; Dealy v. United States, 152 U. S. 539-547, 38 L. ed. 545-548, 14 Sup. Ct. Rep. 680, 9 Am. Crim. Rep. 161; Bannon v. United States, 156 U. S. 464, 468, 39 L. ed. 494, 496, 15 Sup. Ct. Rep. 467, 9 Am. Crim. Rep. 338; Williamson v. United States, 207 U. S. 425, 447, 52 L. ed. 278, 290, 28 Sup. Ct. Rep. 163; United States v. Donan, 11 Blatchf. 169, Fed. Cas. No. 14,983; State v. Buchanan, 5 Harr. & J. 355, 9 Am. Dec. 534; People v. Mather, 4 Wend. 264, 21 Am. Dec. 122; O'Connell v. R. 11 Clark & F. 233; Mulcahy v. R. L. R. 3 H. L. 317; Com. v. Judd, 2 Mass. 329, 3 Am. Dec. 54; People v. Flack, 125 N. Y. 332, 11 L.R.A. 807, 26 N. E. 267.

The true criterion of continuity is to be found in the nature of the act or condition which constitutes the essence of the offense, as distinguished from the purpose

that animates it, or the results, consequences, or effects that flow from it.

Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Davis v. United States, 43 C. C. A. 448, 104 Fed. 136; State v. Poyner, 134 N. C. 609, 46 S. E. 500; 1 Wharton, Crim. Law, 10th ed. § 27; State v. Prescott, 33 N. H. 214; State v. Thompson, 31 Utah, 231, 87 Pac. 709; State v. Briggs, 68 Iowa, 419, 27 N. W. 358; Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; Gise v. Com. 81 Pa. 428; Cook v. State, 11 Ga. 56, 56 Am. Dec. 410; People v. Flaherty, 162 N. Y. 538, 57 N. E. 73.

It is not only settled that the acts done in furtherance of the crime are no part of the crime itself, and that their performance is immaterial to the criminality under the conspiracy, but a compact which does not contain within itself all the elements of wrong will not be rendered indictable by the criminality of acts done in furtherance of it.

United States v. Britton, 108 U. S. 199-205, 27 L. ed. 698-700, 2 Sup. Ct. Rep. 531; McKenna v. United States, supra; Salla v. United States, 44 C. C. A. 26, 104 Fed. 545; Conrad v. United States, 62 C. C. A. 478, 127 Fed. 801.

Indeed, the acts done pursuant to a conspiracy, and in furtherance of it, are so far from being a part of the offense, that if they be criminal, they constitute separate crimes, and a conviction or acquittal on either the conspiracy or the separate crime is no bar to a prosecution for the offense.

Berkowitz v. United States, 35 C. C. A. 379, 93 Fed. 457; Davis v. People, 22 Colo. 3, 43 Pac. 122; State v. Sias, 17 N. H. 558; Bailey v. State, 42 Tex. Crim. Rep. 291, 59 S. W. 900; Whitford v. State, 24 Tex. App. 489, 5 Am. St. Rep. 896, 6 S. W. 537; Wallace v. State, 41 Fla. 557, 26 So. 713; Wilcox v. United States, 7 Ind. App. 86, 103 S. W. 776.

Manifestly, these principles are incompatible with the theory that conspiracy is rendered continuing through its results; for it is one of the attributes of a continuing crime that all the acts which enter into it form but a single offense, and that that offense embraces all acts which enter into the commission of the crime throughout its entire period of performance.

Re Nielsen, 131 U. S. 176, 186, 33 L. ed. 118, 121, 9 Sup. Ct. Rep. 672.

All the well-considered cases will be found to have been decided upon the theory that the offense is renewable, and not continuing.

Ware v. United States, 12 L.R.A. (N.S.) 1053, 84 C. C. A. 503, 154 Fed. 577, 12 A. & E. Ann. Cas. 233, certiorari denied in 207

U. S. 588, 52 L. ed. 353, 28 Sup. Ct. Rep. 255; *Jones v. United States*, 89 C. C. A. 303, 162 Fed. 417; *Jones v. United States*, 179 Fed. 610; *United States v. Biggs*, 157 Fed. 264; *United States v. Bradford*, 148 Fed. 413, 81 C. C. A. 607, 152 Fed. 616; *United States v. Greene*, 115 Fed. 349, affirmed in 85 C. C. A. 251, 154 Fed. 401; *Lorenz v. United States*, 24 App. D. C. 337, 387, certiorari denied, 196 U. S. 640, 49 L. ed. 631, 25 Sup. Ct. Rep. 796; *Arnold v. Weil*, 157 Fed. 430; *Ex parte Black*, 147 Fed. 838, affirmed in 87 C. C. A. 383, 160 Fed. 431; *United States v. Greene*, 100 Fed. 946; *United States v. Barber*, 157 Fed. 890; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *Noyes v. State*, 41 N. J. L. 418; *Com. v. Bartilson*, 85 Pa. 486.

It is to be always remembered that among the most fundamental of the rules of criminal pleading are those that require (1) that all the material facts and circumstances embraced in the definition of the offense must be stated, and, that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication (*Pettibone v. United States*, 148 U. S. 197, 202, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; *United States v. Hess*, 124 U. S. 483, 486, 31 L. ed. 516, 517, 8 Sup. Ct. Rep. 571); (2) that facts must be pleaded, and that conclusions are of no avail (*United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. ed. 588, 593; *Re Greene*, 52 Fed. 111); (3) that the charging part of an indictment for conspiracy must be sufficient in itself, without recourse to the allegations of overt acts (*United States v. Britton*, 108 U. S. 199, 205, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531); and (4) that where the facts alleged are susceptible of two interpretations, in one of which they lead to a conclusion of guilt, and in the other to a conclusion of innocence, a court of justice has no alternative; it must pronounce in favor of innocence (*The Botluca*, 2 Wheat. 169, 177, 4 L. ed. 211, 213; *Coffin v. United States*, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394).

A mere statement of the pleader's conclusion, unless supported by allegations of fact, cannot avail as a charge of the actual commission of the crime within that period.

United States v. Cruikshank, supra; *Pettibone v. United States*, 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542.

Where it is essential to criminality that particular acts shall have been done at a particular time, the allegation that they were done at that time must be so distinct as to preclude the possibility that they were done at some other time.

United States v. Simmons, 96 U. S. 360, 363, 24 L. ed. 819, 820.

It may ordinarily be true that when the commission of the offense of conspiracy has been duly charged in the indictment within the period of limitation, allegations of overt acts which do not of themselves suffice to constitute the offense or show its commission will be sufficient. In that case, the allegations of overt acts are inserted by way of aggravation, or merely to satisfy a statutory requirement that some overt act in addition to the act of agreeing be alleged, or as a bill of particulars of the claim of the prosecution. Even in that case, the acts must be such as clearly tend to effect the object of the conspiracy.

United States v. McLaughlin, 169 Fed. 307; *Lonabaugh v. United States*, 179 Fed. 481.

The mere writing of a letter by Kissel to the American Company, asking payment of past disbursements, could not constitute, in and of itself, an overt act tending to effect the object of the conspiracy of 1903, or be evidence of the continuance of a criminal intent.

United States v. Black, 87 C. C. A. 383, 160 Fed. 435; *United States v. Biggs*, 157 Fed. 264; *United States v. McLaughlin*, supra; *Lonabaugh v. United States*, 179 Fed. 479.

The special pleas in bar were sufficient in form, and did not in substance or effect constitute pleas of not guilty.

Patcher v. Sprague, 2 Johns. 466; *United States v. Hirsch*, 100 U. S. 33, 25 L. ed. 539; *United States v. Potter*, 56 Fed. 95; *Elliott v. State*, 26 Ala. 81.

It is the settled rule in this court that it is not necessary to the validity of an indictment that it should aver the commission of the offense within the statutory period (*United States v. Cook*, 17 Wall. 168, 21 L. ed. 538), and it is also a settled rule of criminal procedure that the averment of time is not ordinarily material (1 *Bishop*, New Crim. Proc. § 386; *Lorenz v. United States*, 24 App. D. C. 387; *Ledbetter v. United States*, 170 U. S. 606-612, 42 L. ed. 1162-1164, 18 Sup. Ct. Rep. 774).

A demurrer for duplicity lies only where the pleading unites two sufficient pleas.

22 *Cye. Law & Proc.* p. 387; 10 *Enc. Pl. & Pr.* p. 535; 1 *Bishop*, New Crim. Proc. § 440; *Wharton*, Crim. Pl. & Pr. § 243; *United States v. Patty*, 9 Biss. 429, 2 Fed. 664, 667; *State v. Thompson*, 31 Utah, 232, 87 Pac. 709; *Com. v. Simpson*, 9 Met. 141; *Com. v. Stowell*, 9 Met. 569; *Polinsky v. People*, 73 N. Y. 72; *People v. Kane*, 43 App. Div. 472, 474, note, 61 N. Y. Supp. 195, 632; affirmed in 161 N. Y. 380, 55 N. E. 946; *Rosekrans v. People*, 3 Hun. 294.

The objection that the plea is duplicitous is a technical one, which must be specifically urged in order to be available.

Pooler v. United States, 62 C. C. A. 307, 127 Fed. 509; *Kilbourn v. State*, 9 Conn. 563; 1 Bishop, New Crim. Proc. § 777, sub. 1; 7 Enc. Pl. & Pr. p. 243.

Mr. Leavitt J. Hunt also argued the cause, and, with Mr. George Whitefield Betts, Jr., filed a brief for defendant Harned:

The defense of the statute of limitations was actually set up by a special plea in bar.

United States v. Cook, 17 Wall. 168, 21 L. ed. 538; *United States v. Norton*, 91 U. S. 566, 23 L. ed. 454; *United States v. Hirsch*, 100 U. S. 33, 25 L. ed. 539; *United States v. Irvine*, 98 U. S. 450, 25 L. ed. 193, 3 Am. Crim. Rep. 334; *United States v. Hewecker*, 79 Fed. 59; *United States v. Brace*, 143 Fed. 703; 1 Bishop, New Crim. Proc. § 799.

The charging part of the indictment for conspiracy must be sufficient in itself, without regard to the purposes or intents, or overt acts, especially under the Sherman act, and where it is not claimed they constitute a renewal.

Com. v. Bartilson, 85 Pa. 482.

The overt acts set forth do not constitute the offense. They are the evidence of it, and are sometimes said to be the aggravation of it.

United States v. Britton, 108 U. S. 199, 204, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531.

The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus poenitentiae*, so that before the acts done, either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that, in an indictment for conspiracy under § 5440 (U. S. Comp. Stat. 1901, p. 3676), the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.

R. v. King, 7 Q. B. 782; *Com. v. Shedd*, 7 Cush. 514.

It is not a mental offense; it does not consist in intents and imaginations. It exists where there are no overt acts other than the agreement.

People v. Mather, 4 Wend. 264, 21 Am. Dec. 122; *Dealy v. United States*, 152 U. S. 539, 547, 38 L. ed. 545, 548, 14 Sup. Ct. 54 L. ed.

Rep. 680, 9 Am. Crim. Rep. 161; *Pettibone v. United States*, 148 U. S. 197, 202, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; *United States v. Hess*, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; *Ledbetter v. United States*, 170 U. S. 606, 42 L. ed. 1162, 18 Sup. Ct. Rep. 774; *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. ed. 588, 593.

The Sherman act is not directed against a state of minds, but against a state of facts.

United States v. MacAndrews & F. Co. 149 Fed. 825.

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself.

Mulcahy v. R. L. R. 3 H. L. 317.

There is no question involved in the present case as to whether the statute runs from the first or last overt act; it is not even claimed that they show any renewal, and as it is conclusively shown above that the offense charged could not be a continuing one, but was complete on December 30th, 1903, necessarily the statute commenced to run on that day. In fact, in the present case, inasmuch as admittedly overt acts are unnecessary under the Sherman act, and it is not claimed that they constitute a renewal, or that any renewal is charged, they amount to mere surplusage.

Hazen v. Com. 23 Pa. 366; *Daly v. United States*, 152 U. S. 539, 38 L. ed. 545, 14 Sup. Ct. Rep. 680, 9 Am. Crim. Rep. 161; *United States v. Britton*, 108 U. S. 199, 205, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531.

Where a special plea setting up the statute of limitations is demurred to by the government, and the special plea is sustained, the whole proceeding is, as a rule, terminated.

United States v. Hewecker, 79 Fed. 59; *United States v. Norton*, 91 U. S. 566, 23 L. ed. 454; *United States v. Hirsch*, 100 U. S. 33, 26 L. ed. 539.

Messrs. Joseph H. Choate, William D. Guthrie, Howard S. Gans, William C. Osborn, and Leavitt J. Hunt also filed a supplemental brief for defendants in error:

Since the law does not punish intent, it is obvious that this indictment must fail unless there can be found in it some allegation, in addition to the *continuando*, of an act done within the three years; and this allegation must be found in the charging

part of the indictment, for nothing is better settled than that recourse cannot be had to the overt acts to eke out or supplement otherwise inadequate averments descriptive of the conspiracy intended to be charged.

United States v. Britton, 108 U. S. 199, 205, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531.

It seems almost preposterous to urge that this offense could be committed and continued six years by simply engaging in a conspiracy and then doing nothing, or the trivial and colorless acts alleged to have been done in 1907 and 1909.

Northern Securities Co. v. United States, 193 U. S. 409, 48 L. ed. 729, 24 Sup. Ct. Rep. 436.

The pleader's conclusion lends no additional force to the facts directly averred, and unless those facts establish the commission of the offense, and include every element of the offense, the indictment will not be permitted to stand.

Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542.

The offense of monopolizing within three years prior to the finding of the indictment cannot be spelled out of this indictment, for that offense is not properly averred in any count.

Re Greene, 52 Fed. 111.

The verb "to conspire" frequently has been used by Congress in defining offenses of conspiracy, and it is firmly established that this consists of the agreement or plot or meeting of minds, and not of any acts done in pursuance of the conspiracy.

McKenna v. United States, 62 C. C. A. 88, 127 Fed. 90; Wright, *Crim. Conspiracies*, p. 124.

An indictment for crime should lay the offense as actually committed within the limitation, and in conspiracy cases should allege the conspiracy as having been found or entered into within the limitation. It involves a misconception of the law, and, hence, it is bad pleading, to charge in an omnibus indictment a number of different conspiracies, committed at different times, under the guise of a single continuing offense.

Com. v. Bartilson, 85 Pa. 486; United States v. Biggs, 157 Fed. 264.

A conspiracy is indictable where an overt act is performed, not upon the ground that the overt act was in furtherance of an antecedent conspiracy, but solely on the ground that the overt act is evidence of the commission of the crime of conspiring within the jurisdiction. The authorities are quite clear that it is the crime actually committed in the new jurisdiction that is the subject of prosecution, and not the antecedent crime of conspiracy committed else-

where, and transferred to that jurisdiction through the performance of an overt act.

Noyes v. State, 41 N. J. L. 418; Com. v. Corlies, 3 Brewst. (Pa.) 577; R. v. Brisac, 4 East, 164, 8 Eng. Rul. Cas. 138; People v. Mather, 4 Wend. 229, 21 Am. Dec. 122; Hyde v. Shine, 199 U. S. 62, 76, 50 L. ed. 90, 94, 25 Sup. Ct. Rep. 760.

As the special pleas in bar presented the single issue and the single defense of the limitation, they are sufficient in law for that purpose, and are not vitiated or rendered equivalent to the general issue by the additional averments.

Patcher v. Sprague, 2 Johns. 466.

Messrs. Joseph H. Choate, De Lancey Nicoll, John M. Bowers, and John D. Lindsay also filed a brief on behalf of others joined as defendants below:

If a crime is noncontinuous, a *continunando* will not extend its duration (United States v. Irvine, 98 U. S. 450, 25 L. ed. 193), and is to be rejected as "insensible and surplusage."

United States v. La Coste, 2 Mason, 140, Fed. Cas. No. 15,548.

A charge of crime must be made directly, and not by implication. Every ingredient must be stated with certainty and precision. Nothing can be taken by inference or intendment.

United States v. Hess, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; Ledbetter v. United States, 170 U. S. 606, 42 L. ed. 1162, 18 Sup. Ct. Rep. 774.

Omissions, however morally reprehensible, unless they constitute a defect in the discharge of a legal obligation, cannot be made the basis of penal action without unduly enlarging the range of the criminal law.

Wharton, *Crim. Law*, 10th ed. § 130.

There cannot be a "negligent conspiracy."

Wharton, *Crim. Law*, 10th ed. § 1341.

An accused person can only be tried upon the indictment as found by the grand jury, and especially upon all its language found in the charging part of that indictment. If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.

Ex parte Bain, 121 U. S. 1, 10, 30 L. ed. 849, 852, 7 Sup. Ct. Rep. 781, 6 Am. *Crim. Rep.* 122.

To enable the court to determine that a conspiracy existed within a given period, it must appear from the indictment, without going further, that the unlawful agreement contemplated the commission of acts within that period.

United States v. Cruikshank, 92 U. S. 542, 559, 23 L. ed. 588, 593.

It is not enough that the conspiracy might have been extended into that period. If it is consistent with the averments that there was no such purpose at the time of the agreement, it must be assumed that no such purpose then existed.

United States v. Simmons, 96 U. S. 360, 363, 24 L. ed. 819, 820.

Subsequent acts being no part of the offense (Dealy v. United States, 152 U. S. 539, 546, 38 L. ed. 545, 547, 14 Sup. Ct. Rep. 680, 9 Am. Crim. Rep. 161; United States v. Britton, 108 U. S. 199, 205, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531), the averments by which they are unnecessarily set forth are but surplusage (Hazen v. Com. 23 Pa. 363), and hence cannot be resorted to for the purpose of determining when the offense, if any, was in fact committed, or for any other purpose.

Acts and deeds are the subject of human laws, not thoughts and intents, unless accompanied by acts. The state does not suffer from the mere imaginings of men. To entitle it to complain, therefore, some act must have followed the unlawful thought.

Bishop, New Crim. Law, § 204.

An act and evil intent must combine to constitute in law a crime.

Bishop, New Crim. Law, § 206.

The law of conspiracy forms no exception to the rule, which is universal, and applies to all crimes of every grade and character. It is the intent to conspire, coupled with the act of conspiracy, which constitutes the offense.

United States v. Hirsch, 100 U. S. 33, 34, 25 L. ed. 539, 540.

It is not a mental offense; it does not consist in intents and imaginings. It exists where there are no overt acts other than the agreement.

People v. Mather, 4 Wend. 264, 21 Am. Dec. 122.

A conspiracy consists not merely in the intention of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being en-

forced, if lawful, punishable, if for a criminal object or for the use of criminal means.

Mulcahy v. R. L. R. 3 H. L. 317.

Therefore, to punish a conspiracy where the end is not accomplished is not to punish a mere intention. The law strikes at the first manifestation of the intent.

United States v. Cole, 5 McLean, 516, Fed. Cas. No. 14,832.

It is not the bare intention that the law punishes, but the act of conspiring, which is made a substantive offense by the nature of the object intended to be effected. And in that respect, conspiracies are analogous to unlawful assemblies. In that case it is not the bare unexecuted intention which the law punishes, but the act of meeting, connected with the object of that meeting, which constitutes the offense; and for that act of meeting alone, though it should be to do what, if actually done by one (as the pulling down of another's enclosures), would be but a civil trespass, the parties are liable to be punished by fine and imprisonment.

State v. Buchanan, 5 Harr. & J. 355, 9 Am. Dec. 534.

The Sherman act is not directed against a state of mind, but against a state of facts.

United States v. MacAndrews & F. Co. 149 Fed. 831.

Where the criminal agreement remains in force, an indictment may nevertheless be sustained as to any joint act done in its furtherance within the statutory period, although three years have elapsed since the formation of the conspiracy, because, by the commission of such joint act, the parties to it repeat and enter anew into the original agreement. But the parties who participate in such acts are punishable for the new agreement only, not for the old one, the prosecution of which is barred by the statute as completely as though it had never existed. Indeed, in such a case, the proper practice requires the time of the offense to be laid on a specific day within the statute.

Ware v. United States, 12 L.R.A. (N.S.) 1053, 84 C. C. A. 503, 154 Fed. 578, 12 A. & E. Ann. Cas. 233; Jones v. United States, 89 C. C. A. 303, 162 Fed. 417; Jones v. United States, 179 Fed. 584; United States v. Greene, 100 Fed. 946, 115 Fed. 350, 146 Fed. 888; Ex parte Black, 147 Fed. 838, affirmed in 87 C. C. A. 383, 160 Fed. 431; Lorenz v. United States, 24 App. D. C. 337; United States v. Barber, 157 Fed. 890; Oels v. People, 25 Ill. App. 379, affirmed in 124 Ill. 399, 16 N. E. 662; Com. v. Bartilson, 85 Pa. 486.

Mr. Justice Holmes delivered the opinion of the court:

This is a writ of error brought by the United States to reverse a judgment of the circuit court, sustaining pleas in bar, pleaded to an indictment by the defendants in error. 173 Fed. 823. The first count of the indictment alleges that the defendants in error and others named, on December 30, 1903, and from that day until the day of presenting the indictment (July 1, 1909), have engaged in an unlawful conspiracy in restraint of trade in refined sugar among the several states of the Union; that is to say, to eliminate free competition and prevent all competition with the American Sugar **606**] Refining Company, *one of the defendants, by a would-be competitor, the Pennsylvania Sugar Refining Company. It then sets forth, at length, the means by which the alleged purpose was to be accomplished, and what are put forward as overt acts done in pursuance of the plan. In other counts, referring to the first, the defendants are alleged to have conspired to monopolize the trade in refined sugar among the states. There are similar counts as to the trade in raw sugar and molasses, and as to trade with foreign nations. The offenses aimed at, of course, are the conspiracies punished by the act of July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200, commonly known as the Sherman act.

There are other counts in the indictment, but the argument was devoted mainly to these. The defendants severally pleaded to all of them the limitation of three years fixed by Rev. Stat. § 1044, U. S. Comp. Stat. 1901, p. 725, alleging that for more than three years before the finding of the indictment on July 1, 1909, they did not engage in, or do any act in aid of, such conspiracies. The defendant Kissel added averments that all the overt acts alleged to have been done within three years before July 1, 1909, were done without his participation, consent, or knowledge. He also pleaded that since October 6, 1906, the Pennsylvania Sugar Refining Company had been in the hands of a duly appointed receiver.

We deem it unnecessary to state the pleadings with more particularity, because the only question before us under the act of March 2, 1907, chap. 2564, 34 Stat. at L. 1246, U. S. Comp. Stat. Supp. 1909, p. 220, is whether the plea in bar can be sustained. That this court is confined to a consideration of the grounds of decision mentioned in the statute when an indictment is quashed was decided in *United States v. Keitel*, 211 U. S. 370, 399, 53 L. ed. 230, 245, 29 Sup. Ct. Rep. 123. We think that there is a similar limit when the case comes

up under the other clause of the act, from a "judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." This being so, we are not concerned with the technical sufficiency or redundancy of the *indictment, or even, in the **607** view that we presently shall express, with any consideration of the nature of the overt acts alleged. The indictment charges a conspiracy beginning in 1903, but continuing down to the date of filing. It pretty nearly was conceded that if a conspiracy of this kind can be continuous, then the pleas in bar are bad. Therefore we first will consider whether a conspiracy can have continuance in time.

The defendants argue that a conspiracy is a completed crime as soon as formed, that it is simply a case of unlawful agreement, and that therefore the *continuando* may be disregarded, and a plea is proper to show that the statute of limitations has run. Subsequent acts in pursuance of the agreement may renew the conspiracy or be evidence of a renewal, but do not change the nature of the original offense. So also, it is said, the fact that an unlawful contract contemplates future acts, or that the results of a successful conspiracy endure to a much later date, does not affect the character of the crime.

The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States v. Irvine*, 98 U. S. 450, 25 L. ed. 193, 3 Am. Crim. Rep. 334. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates *that the conspirators will remain in **608** business, and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is consti-

tuted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act.

The means contemplated for the exclusion of the Pennsylvania Sugar Refining Company were the making of a large loan by the American Sugar Refining Company through Kissel to one Segal, and the receiving from him of more than half the stock of the Pennsylvania Company, with a power of attorney to vote upon it, Segal not knowing that the American Company was behind Kissel. The loan was to be for a year, but the American Company was to use the power of voting to prevent the Pennsylvania Company from going on with its business, and, as Segal was dependent largely upon the returns from that company for means of repaying the loan, he was to be prevented from repaying it, and the control of the Pennsylvania Company retained until it should be ruined and finally driven from business. It is alleged that the loan was made, and that a vote was passed that the Pennsylvania Company refrain from business until further order of the board of directors. Now, of course, it well may be that the object was so far accomplished by this 609] vote that *the conspiracy was at an end; but a vote upon pledged stock that might be redeemed was not necessarily lasting, and further action might be necessary to reach the desired result. The allegation that the conspiracy continued down to the date of the indictment is not contradicted by the vote. Furthermore, as we have said, the only question here is whether the plea of the statute of limitations is good.

Taking it that the conspiracies made criminal by the act of July 2, 1890, may have continuance, we are of opinion that the pleas are bad. To be sure, it still might be argued that the general rule that time need not be proved as laid applies to continuing offenses, that therefore the allegation in the indictment, so far as it specifies the time in which the conspiracy was maintained, is immaterial, and that a plea traversing only that is, in substance, a plea in confession and avoidance, and good. Whether, in a charge of a continuing offense, even such specific earmarks of time as those in this indictment make it enter

into the essence of the offense, we shall not discuss. Time is held to be of the essence in Massachusetts and some other states (Com. v. Pray, 13 Pick. 359, 364; Com. v. Briggs, 11 Met. 573; State v. Small, 80 Me. 452, 14 Atl. 942; Fleming v. State, 28 Tex. App. 234, 12 S. W. 605); while this has been thought to be a local peculiarity, and the contrary has been decided elsewhere (State v. Reno, 41 Kan. 674, 682, 683, 21 Pac. 770; State v. Arnold, 98 Iowa, 253, 67 N. W. 252; Bishop, New Crim. Proc. §§ 397, 402). However this may be, if the plea of the statute of limitations is good where it confesses and avoids all that the indictment avers, still, as was pointed out in an able brief by the late lamented Solicitor General, it is open to too many objections and difficulties to be encouraged or allowed except in clear cases. Apart from technical rules, the averments of time in the indictment are expected and intended to be proved as laid. The overt acts relied upon coming down *to within three years[610 of the indictment are alleged to have been done in pursuance of the conspiracy, and the pleas must be taken to deny that allegation, unless they rely upon the supposed impossibility of the acts having the character alleged. It is only by an artificial rule, if at all, that the plea can be treated as not traversing the indictment, and we are not prepared to give that supposed rule such an effect.

The discussion at the bar took a wider range than is open at this stage. It hardly is necessary to explain that we have nothing to say as to what evidence would be sufficient to prove the continuation of the conspiracy, or where the burden of pleading or proof as to abandonment would be. We deal only with a naked and highly technical question, when once the possibility of continuation is established, and as to that we cannot bring ourselves to doubt.

To sum up and repeat: The indictment charges a continuing conspiracy. Whether it does so with technical sufficiency is not before us. All that we decide is that a conspiracy may have continuance in time, and that where, as here, the indictment, consistently with the other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue, and not by a special plea. Under the general issue all defenses, including the defense that the conspiracy was ended by success, abandonment, or otherwise, more than three years before July 1, 1909, will be open and unaffected by what we now decide.

Judgment reversed.

611] *JESSIE E. THOMPSON, Plff. in
Err.,
v.
CHARLES N. THOMPSON.

(See S. C. Reporter's ed. 611-624.)

**Husband and wife — actions between
— assault.**

The common-law relation between husband and wife was not so far modified as to give the wife a right of action to recover damages from her husband for an assault and battery committed by him upon her person, by D. C. Code, § 1155, authorizing married women "to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried."

[For other cases, see Husband and Wife, III., in Digest Sup. Ct. 1908.]

[No. 17.]

Argued and submitted October 27, 1910.
Decided December 12, 1910.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, dismissing an action brought by a wife against her husband, to recover damages for an assault and battery. Affirmed.

See same case below, 31 App. D. C. 557, 14 A. & E. Ann. Cas. 879.

The facts are stated in the opinion.

Mr. William M. Lewin argued the cause and filed a brief for plaintiff in error:

Prior to the enactment of the District of Columbia Code, it was essentially and in its nature a tort for a man to assault his wife. The effect of the provisions of the Code with respect to her right to sue is to remove a common-law obstacle to the remedy.

Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 448, 42 L. ed. 537, 538, 18 Sup. Ct. Rep. 105.

These provisions will be liberally construed, for it is the duty of every state to provide, in the administration of justice, for the redress of private wrongs; if there be a civil right, there must be a legal remedy.

Missouri P. R. Co. v. Humes, 115 U. S. 512, 521, 29 L. ed. 463, 466, 6 Sup. Ct. Rep. 110; Bank of United States v. Owens, 2 Pet. 527, 539, 7 L. ed. 508, 512.

NOTE.—On the right of a wife to sue husband for personal torts—see note to Strom v. Strom, 6 L.R.A.(N.S.) 191.

On actions between husband and wife—see note to Decker v. Keddy, 79 C. C. A. 306.

And protection against tort is as necessary as the enforcement of contract.

Wills v. Jones, 13 App. D. C. 497.

As redress cannot be obtained in equity, because of the essential character of the case, the rule is settled that the remedy must be by a suit at law.

Van Norden v. Marton, 99 U. S. 378, 380, 25 L. ed. 453, 454.

The reasoning of the New York case upon which the court of appeals relies has long since been repudiated.

Freethy v. Freethy, 42 Barb. 641; Bronson v. Brady, 28 App. D. C. 262; Stickney v. Stickney, 131 U. S. 227, 237, 33 L. ed. 136, 142, 9 Sup. Ct. Rep. 677; Baltimore & P. R. Co. v. Sixth Presby. Church, 19 Wall. 62, 65, 22 L. ed. 97, 98; Bryan v. Kennett, 113 U. S. 179, 196, 28 L. ed. 908, 914, 5 Sup. Ct. Rep. 407; Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 116, 25 L. ed. 782, 783, 784; Luhrs v. Hancock, 181 U. S. 567, 571, 45 L. ed. 1005, 1007, 21 Sup. Ct. Rep. 726.

A change in phraseology creates a presumption of a change in intent; and no word of the change should be held insignificant.

Crawford v. Burke, 195 U. S. 176, 190, 49 L. ed. 147, 152, 25 Sup. Ct. Rep. 9; Washington Market Co. v. Hoffman, 101 U. S. 115, 116, 25 L. ed. 783, 784.

Even under the act of 1869 a wife could contract with her husband.

Sykes v. Chadwick, 18 Wall. 141, 143, 148, 21 L. ed. 824, 825, 826.

And now she may sue him, even in tort, for that construction will be followed which commends itself to the judgment of the court.

May v. May, 9 Neb. 25, 31 Am. Rep. 399, 2 N. W. 221; Rice, S. & Co. v. Sally, 176 Mo. 130, 79 S. W. 398; Coulam v. Doull, 133 U. S. 216, 233, 33 L. ed. 596, 601, 10 Sup. Ct. Rep. 253.

The right to her earnings necessarily implies the right to maintain her capacity to earn. The right to sue anyone (the husband not excepted) for impairment of that capacity is incidental thereto.

Traer v. Clews, 115 U. S. 528, 540, 29 L. ed. 467, 471, 6 Sup. Ct. Rep. 155; Seybert v. Pittsburg, 1 Wall. 272, 17 L. ed. 553.

This would follow from the construction of D. C. Code, § 1151 [31 Stat. at L. 1373, chap. 854], *in pari materia* with § 1155.

Western U. Teleg. Co. v. Lipscomb, 22 App. D. C. 113; Washington Asphalt Block & Tile Co. v. Mackey, 15 App. D. C. 417; Stickney v. Stickney, 131 U. S. 227, 237, 33 L. ed. 136, 142, 9 Sup. Ct. Rep. 677.

218 U. S.

Messrs. A. E. L. Leckie, Creed M. Fulton, Joseph W. Cox, and John A. Kratz, Jr., submitted the cause for defendant in error:

Statutes enabling the wife to sue and be sued as a *feme sole* do not authorize either husband or wife to bring an action against the other.

21 Cyc. Law & Proc. pp. 1517, 1518; Alward v. Alward, 15 N. Y. Civ. Proc. Rep. 151, 2 N. Y. Supp. 42; Smith v. Gorman, 41 Me. 408; Small v. Small, 129 Pa. 372, 18 Atl. 497.

In some of the states, actions are allowed by the wife against the husband in cases of wrongs done her property, but it is believed that in most such instance where such actions have been allowed, they are expressly authorized by the statute.

21 Cyc. Law & Proc. pp. 1517-1519.

The following will serve as illustrations of the class of cases in which such actions have been allowed:

Larison v. Larison, 9 Ill. App. 31; Re Deaner, 126 Iowa, 701, 106 Am. St. Rep. 374, 102 N. W. 825; Jones v. Jones, 19 Iowa, 236; Greer v. Greer, 24 Kan. 101; Manning v. Manning, 79 N. C. 293, 28 Am. Rep. 324.

Coming to the specific question involved in the case at bar, *viz.*: Whether a husband or a wife may maintain an action for tort committed by either against the other during coverture, an examination of the authorities discloses, we believe, that no court of last resort has held that such an action may be maintained under any statute in force in any of the states of this country.

Peters v. Peters, 42 Iowa, 182; Heacock v. Heacock, 108 Iowa, 540, 75 Am. St. Rep. 273, 79 N. W. 353; Decker v. Keddy, 148 Fed. 681; Main v. Main, 46 Ill. App. 106; Libby v. Berry, 74 Me. 286, 43 Am. Rep. 589; Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27; Bandfield v. Bandfield, 117 Mich. 80, 40 L.R.A. 757, 72 Am. St. Rep. 550, 75 N. W. 287; Schultz v. Schultz, 27 Hun, 26, reversed in 89 N. Y. 644; Abbe v. Abbe, 22 App. Div. 483, 48 N. Y. Supp. 25; Strom v. Strom, 98 Minn. 427, 6 L.R.A.(N.S.) 192, 116 Am. St. Rep. 387, 107 N. W. 1047.

Mr. Justice Day delivered the opinion of the court:

This case presents a single question, which is involved in the construction of the statutes governing the District of Columbia. That question is, Under that statute may a wife bring an action to recover damages for an assault and battery upon her person by the husband?

The declaration of the plaintiff is in the ordinary form, and in seven counts charges divers assaults upon her person by her hus-

band, the defendant, for which the wife seeks to recover damages in the sum of \$70,000. An issue of law being made by demurrer to the defendant's pleas, the supreme court of the District of Columbia held that such action would not lie under the statute. Upon writ of error to the court of appeals of the District of Columbia, the judgment of the supreme court was affirmed. 31 App. D. C. 557, 14 A. & E. Ann. Cas. 879.

At the common law the husband and wife were regarded as one,—the legal existence of the wife during coverture being merged in that of the husband; and, generally speaking, the wife was incapable of making contracts, of acquiring *property or [615 disposing of the same without her husband's consent. They could not enter into contracts with each other, nor were they liable for torts committed by one against the other. In pursuance of a more liberal policy in favor of the wife, statutes have been passed in many of the states looking to the relief of a married woman from the disabilities imposed upon her as a *feme covert* by the common law. Under these laws she has been empowered to control and dispose of her own property free from the constraint of the husband, in many instances to carry on trade and business, and to deal with third persons as though she were a single woman. The wife has further been enabled by the passage of such statutes to sue for trespass upon her rights in property, and to protect the security of her person against the wrongs and assaults of other.

It is unnecessary to review these statutes in detail. Their obvious purpose is, in some respects, to treat the wife as a *feme sole*, and to a large extent to alter the common-law theory of the unity of husband and wife. These statutes, passed in pursuance of the general policy of emancipation of the wife from the husband's control, differ in terms, and are to be construed with a view to effectuate the legislative purpose which led to their enactment.

It is insisted that the Code of the District of Columbia has gone so far in the direction of modifying the common-law relation of husband and wife as to give to her an action against him for torts committed by him upon her person or property. The answer to this contention depends upon a construction of § 1155 of the District of Columbia Code. [31 Stat. at L. 1374, chap. 854.] That section provides:

"Sec. 1155. Power of wife to trade and to sue and be sued.—Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue separately upon their contracts, and also *to sue separately for [616 the recovery, security, or protection of their

property, and for torts committed against them, as fully and freely as if they were unmarried; contracts may also be made with them, and they may also be sued separately upon their contracts, whether made before or during marriage, and for wrongs independent of contract, committed by them before or during their marriage, as fully as if they were unmarried; and upon judgments recovered against them execution may be issued as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name and upon her own responsibility, nor for any tort committed separately by her out of his presence, without his participation or sanction: Provided, That no married woman shall have power to make any contract as surety or guarantor, or as accommodation drawer, acceptor, maker, or indorser."

In construing a statute the courts are to have in mind the old law and the change intended to be effected by the passage of the new. Reading this section, it is apparent that its purposes, among others, were to enable a married woman to engage in business and to make contracts free from the intervention or control of the husband, and to maintain actions separately for the recovery, security, and protection of her property. At the common law, with certain exceptions, not necessary to notice in this connection, the wife could not maintain an action at law except she be joined by her husband. *Barber v. Barber*, 21 How. 582, 589, 16 L. ed. 226, 228. For injuries suffered by the wife in her person or property, such as would give rise to a cause of action in favor of a *feme sole*, a suit could be instituted only in the joint name of herself and husband. 1 Cooley, Torts, 3d ed. 472, and cases cited in the note.

By this District of Columbia statute the common law was changed, and, in view of the additional rights conferred upon married women in § 1155 and other sections of the Code, she is given the right to sue *separately* for "redress of wrongs concerning the same. That this was the purpose of the statute, when attention is given to the very question under consideration, is apparent from the consideration of its terms. Married women are authorized to sue separately for "the recovery, security, or protection of their property, and for torts committed against them as fully and freely as if they were unmarried." That is, the limitation upon her right of action imposed in the requirement of the common law that the husband should join her was removed by the statute, and she was permitted to recover separately for such torts, as freely as if she were still unmarried. The statute was not intended to give a right of action as

against the husband, but to allow the wife, in her own name, to maintain actions of tort which, at common law, must be brought in the joint names of herself and husband.

This construction we think is obvious from a reading of the statute in the light of the purpose sought to be accomplished. It gives a reasonable effect to the terms used, and accomplishes, as we believe, the legislative intent, which is the primary object of all construction of statutes.

It is suggested that the liberal construction insisted for in behalf of the plaintiff in error in this case might well be given, in view of the legislative intent to provide remedies for grievous wrongs to the wife; and an instance is suggested in the wrong to a wife rendered unable to follow the avocation of a seamstress by a cruel assault which might destroy the use of hand or arm; and the justice is suggested of giving a remedy to an artist who might be maimed and suffer great pecuniary damages as the result of injuries inflicted by a brutal husband.

Apart from the consideration that the perpetration of such atrocious wrongs affords adequate grounds for relief under the statutes of divorce and alimony, this construction would, at the same time, open the doors of the courts to accusations of all sorts of one spouse against the other, *and [618 bring into public notice complaints for assault, slander, and libel, and alleged injuries to property of the one or the other, by husband against wife, or wife against husband. Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question. The possible evils of such legislation might well make the law-making power hesitate to enact it. But these and kindred considerations are addressed to the legislative, not the judicial, branch of the government. In cases like the present, interpretation of the law is the only function of the courts.

An examination of this class of legislation will show that it has gone much further in the direction of giving rights to the wife in the management and control of her separate property than it has in giving rights of action directly against the husband. In no act called to our attention has the right of the wife been carried to the extent of opening the courts to complaints of the character of the one here involved.

It must be presumed that the legislators who enacted this statute were familiar with the long-established policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about. Conceding it to be within the

power of the legislature to make this alteration in the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention. Had it been the legislative purpose not only to permit the wife to bring suits free from her husband's participation and control, but to bring actions against him also for injuries to person or property as though they were strangers, thus emphasizing and publishing differences which otherwise might not be serious, it would have been easy to have expressed that intent in terms of irresistible clearness.

619] *We can but regard this case as another of many attempts which have failed, to obtain by construction radical and far-reaching changes in the policy of the common law, not declared in the terms of the legislation under consideration.

Some of the cases of that character are: *Bandfield v. Bandfield*, 117 Mich. 80, 40 L.R.A. 757, 72 Am. St. Rep. 550, 75 N. W. 287; *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Schultz v. Schultz*, 89 N. Y. 644; *Freethy v. Freethy*, 42 Barb. 641; *Peters v. Peters*, 42 Iowa, 182.

Nor is the wife left without remedy for such wrongs. She may resort to the criminal courts, which, it is to be presumed, will inflict punishment commensurate with the offense committed. She may sue for divorce or separation and for alimony. The court, in protecting her rights and awarding relief in such cases, may consider, and, so far as possible, redress her wrongs and protect her rights.

She may resort to the chancery court for the protection of her separate property rights. 21 How. 582, 590. Whether the wife alone may now bring actions against the husband to protect her separate property, such as are cognizable in a suit in equity when brought through the medium of a next friend (21 How. *supra*), is a question not made or decided in this case.

We do not believe it was the intention of Congress, in the enactment of the District of Columbia Code, to revolutionize the law governing the relation of husband and wife as between themselves. We think the construction we have given the statute is in harmony with its language, and is the only one consistent with its purpose.

The judgment of the Court of Appeals of the District of Columbia will be affirmed.

Mr. Justice Harlan, dissenting:

This is an action by a wife against her husband to recover damages for assault and **620]** battery. The declaration *contains seven counts. The first, second, and third

charge assault by the husband upon the wife on three several days. The remaining counts charge assaults by him upon her on different days named,—she being at the time pregnant, as the husband then well knew.

The defendant filed two pleas,—the first that he was not guilty, the second that, at the time of the causes of action mentioned, the plaintiff and defendant were husband and wife, and living together as such.

The plaintiff demurred to the second plea, and the demurrer was overruled. She stood by the demurrer, and the action was dismissed.

The action is based upon §§ 1151 and 1155 of the Code of the District [31 Stat. at L. 1373, 1374, chap. 854], which are as follows:

"Sec. 1151. All the property, real, personal, and mixed, belonging to a woman at the time of her marriage, and all such property which she may acquire or receive after her marriage from any person whomsoever, by purchase, gift, grant, devise, bequest, descent, in the course of distribution, by her own skill, labor, or personal exertions, or as proceeds of a judgment at law or decree in equity, or in any other manner, shall be *her own property as absolutely as if she were unmarried*, and shall be protected from the debts of the husband, and shall not in any way be liable for the payment thereof: Provided, That no acquisition of property passing to the wife from the husband after coverture shall be valid if the same has been made or granted to her in prejudice of the rights of his subsisting creditors."

"Sec. 1155. Married women shall have power to engage in *any* business, and to contract, whether engaged in business or not, and to sue separately upon their contracts, and *also* to sue separately for the recovery, security, or protection of their property, *and* for torts committed against them, *as fully and freely as if they were unmarried*; contracts may also be made with them, and they may **also* be sued [**621** separately upon their contracts, whether made before or during marriage, and for wrongs independent of contract, committed by them before or during their marriage, as fully as if they were unmarried; and upon judgments recovered against them execution may be issued as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name and upon her own responsibility, nor for any tort committed separately by her out of his presence without his participation or sanction: Provided, That no married woman shall have power to make any contract as surety or as guarantor, or as accommodation drawer, acceptor, maker, or indorser."

The court below held that these provisions did not authorize an action for *tort* committed by the husband against the wife.

In my opinion these statutory provisions, properly construed, embrace such a case as the present one. If the words used by Congress lead to such a result, and if, as suggested, that result be undesirable on grounds of public policy, it is not within the functions of the court to ward off the dangers feared or the evils threatened simply by a judicial construction that will defeat the plainly-expressed will of the legislative department. With the mere policy, expediency, or justice of legislation the courts, in our system of government, have no rightful concern. Their duty is only to declare what the law is, not what, in their judgment, it ought to be, leaving the responsibility for legislation where it exclusively belongs; that is, with the legislative department, so long as it keeps within constitutional limits. Now, there is not here, as I think, any room whatever for mere construction, so explicit are the words of Congress. Let us follow the clauses of the statute in their order. The statute enables the married woman to take, as her own, property of any kind, no matter how acquired by her, as well as the avails of [622] *her skill, labor, or personal exertions, "as absolutely as if she were unmarried." It then confers upon married women the power to engage in any business, no matter what, and to enter into contracts, whether engaged in business or not, and to sue separately upon those contracts. If the statute stopped here, there would be ground for holding that it did not authorize this suit. But the statute goes much farther. It proceeds to authorize married women "also" to sue separately for the recovery, security, or protection of their property; still more, they may sue separately "for *torts* committed against them, as fully and freely as if they were unmarried." No discrimination is made, in either case, between the persons charged with committing the tort. No exception is made in reference to the husband, if he happens to be the party charged with transgressing the rights conferred upon the wife by the statute. In other words, Congress, by these statutory provisions, destroys the unity of the marriage association as it had previously existed. It makes a radical change in the relations of man and wife as those relations were at common law in this District. In respect of business and property, the married woman is given absolute control; in respect of the recovery, security, and protection of her property, she may sue separately in *tort*, as if she were unmarried; and in respect of her-

self, that is, of her person, she may sue separately as fully and freely as if she were unmarried, "for *torts* committed against her." So the statute expressly reads. But my brethren think that, notwithstanding the destruction by the statute of the unity of the married relation, it could not have been intended to open the doors of the courts to accusations of all sorts by husband and wife against each other; and therefore they are moved to add, by construction, to the provision that married women may "sue separately. . . . for *torts* committed against them, as fully and freely as if they were unmarried," these words: "Provided, however, that *the [623] wife shall not be entitled, in any case, to sue her husband separately for a tort committed against her person." If the husband violently takes possession of his wife's property and withholds it from her, she may, under the statute, sue him, separately, for its recovery. But such a civil action will be one in tort. If he injures or destroys her property, she may, under the statute, sue him, separately, for damages. That action would also be one in tort. If these propositions are disputed, what becomes of the words in the statute to the effect that she may "sue separately for the recovery, security, and protection" of her property? But if they are conceded,—as I think they must be,—then Congress, under the construction now placed by the court on the statute, is put in the anomalous position of allowing a married woman to sue her husband separately, in tort, for the recovery of her property, but denying her the right or privilege to sue him separately, in tort, for damages arising from his brutal assaults upon her person. I will not assume that Congress intended to bring about any such result. I cannot believe that it intended to permit the wife to sue the husband separately, in tort, for the recovery, including damages for the detention, of her property, and at the same time deny her the right to sue him, separately, for a tort committed against her person.

I repeat that with the policy, wisdom, or justice of the legislation in question this court can have no rightful concern. It must take the law as it has been established by competent legislative authority. It cannot, in any legal sense, make law, but only declare what the law is, as established by competent authority.

My brethren feel constrained to say that the present case illustrates the attempt, often made, to effect radical changes in the common law by mere construction. On the contrary, the judgment just rendered will have, as I think, the effect to defeat the clearly expressed will of *the legis- [624

lature by a construction of its words that cannot be reconciled with their ordinary meaning.

I dissent from the opinion and judgment of the court, and am authorized to say that Mr. Justice Holmes and Mr. Justice Hughes concur in this dissent.

CITY OF MEMPHIS, Appt.,
v.
CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.

(See S. C. Reporter's ed. 624-644.)

Appeal — from circuit court — question of Federal law.

A suit to enjoin the enforcement of a municipal ordinance regulating telephone rates is not one in which the Constitution or law of a state is "claimed" to violate the Federal Constitution, within the meaning of the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550), § 5, governing direct review in the Federal Supreme Court of decrees of circuit or district courts, where the first and only reference to the Federal Constitution is in the opinion of the circuit judge, on final hearing, holding that the rates are confiscatory and destructive of the telephone company's rights under that Constitution, the case as made by the bill being that the ordinance was passed without legislative authority, and its further allegations as to the confiscatory character of the ordinance being referable only, if consistency with its other provisions is to be observed, to the state Constitution, which would be violated if such allegations were true.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

[No. 42.]

Argued November 8 and 9, 1910. Decided December 12, 1910.

A PPEAL from the Circuit Court of the United States for the Western District of Tennessee to review a decree enjoining the enforcement of a municipal ordinance regulating telephone rates. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. Charles M. Bryan argued the cause, and, with Mr. Marion G. Evans, filed a brief for appellant.

Mr. William L. Granbery argued the cause, and, with Messrs. Eldridge E. Wright and Luke E. Wright, filed a brief for appellee.

NOTE.—On direct review in Federal Supreme Court of district or circuit court judgments, see note to *Gwin v. United States*, 46 L. ed. U. S. 741.
54 L. ed.

Mr. Justice Day delivered the opinion of the court:

We are met at the threshold of this case with a challenge of the appellate jurisdiction of this court. The case was begun in the circuit court of the United States for the western district of Tennessee by a bill filed by the Cumberland Telephone & Telegraph Company against the city of Memphis, seeking to enjoin the enforcement of the provisions of an ordinance of that city, passed September 24, 1907, regulating charges by telephone companies in the city.

The bill averred that the complainant was a corporation organized and existing under the laws of the state of Kentucky, and that the respondent, the city of Memphis, was a municipal corporation, created and existing under the laws of Tennessee. The jurisdiction of the circuit court, therefore, might rest upon diverse citizenship. Concerning the ordinance regulating the charges of telephone rates, the enforcement of which it was the object of the suit to enjoin, it was averred to be null and void, for the [626] reason that the city of Memphis was incorporated under a legislative act of the state of Tennessee, with certain powers and authority which nowhere included, either by express terms or necessary implication, a power to fix and regulate telephone charges, and that the attempt to do so was an abuse of power, and an attempt to exercise a power which the city wholly lacked.

The bill also charged that the ordinance was null and void because it was unjust, inequitable, and unreasonable, because the tariff rates were fixed so low that complainant could not operate its exchange without actual loss of money; that said ordinance was, in truth and effect, confiscatory; and that it totally destroyed the value of the complainant's plant in the city of Memphis for profitable use as a telephone exchange. The prayer of the bill was for an injunction against the enforcement of the ordinance in question.

A preliminary injunction was granted, the judge holding the circuit court at that time delivering an opinion announcing the conclusion that the ordinance in question was passed by the city without legislative authority, the court saying that was all which was necessary to decide at that time, but beyond that, he thought the city estopped by a certain contract which was set up in the bill from adopting the ordinance in question, and a preliminary injunction was granted.

The answer took issue upon the allegations of the bill, a considerable amount of testimony was taken as to the reasonable-

ness of the rates fixed in the ordinance, and the judge who heard the case upon the merits reached the conclusion that the rates fixed in the ordinance were confiscatory, and said: "That result seems to us to be destructive of the complainant's rights under the Constitution of the United States."

Adverting to the opinion delivered upon the granting of the temporary injunction, [627] the court rendering the final decree stated that the former decision was based upon a want of authority in the city to pass the ordinance, and the estoppel of the contract set up in the bill, adding: "We are not to be considered as dissenting from either of these views. We have not had time to examine either proposition, or inclination to do so, because we are entirely content to decide the case upon final hearing upon the one ground herein discussed."

As was said by Mr. Justice Moody, speaking for the court in *MacFadden v. United States*, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490, a right to review the judgments of the circuit courts of appeals and of the circuit and district courts of the United States rests upon different grounds, and that unless this fact is borne in mind, confusion is liable to result. The appellate jurisdiction from the circuit court of appeals to this court, as Mr. Justice Moody pointed out, is determined by the sources of jurisdiction of the trial court, and depends upon the finality of the judgment of the circuit court of appeals, as under § 6 of the court of appeals act in all other cases there is a right of review in this court if the amount in controversy exceeds \$1,000. [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550.] The right to come directly to this court by appeal or writ of error from the district or circuit courts of the United States arises under § 5 of the court of appeals act, and so far as the case now under consideration is concerned, depends upon the case being within the class of cases mentioned in that section; namely, "in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

The right to take jurisdiction of a case in the circuit court of the United States, arising under the Constitution or laws of the United States, must appear in the allegations of the bill or petition with such distinct averments as to show that it is such. Under § 5 of the court of appeals act, the right to come to this court by direct [628] appeal is given in any case in which it is "claimed" that a Constitution or law of a state is in contravention of the Constitution of the United States. It is thus apparent that the claim, to give a right of appeal under this section, need not nec-

essarily be in the pleading of the party invoking the jurisdiction of the court. It is sufficient if such right is duly claimed in the case. The statute is silent as to how this claim shall be made. The subject was under consideration in *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174, and the distinctions between the requirements of jurisdiction in an appeal to the circuit court of appeals and an appeal direct to this court were pointed out. In that case it was held that where the defendant brought the constitutional question into the record by demurrer, and the opinion of the circuit court showed that it had considered and determined that question, the proper basis for jurisdiction by direct appeal to this court was shown.

In saying that the opinion of the circuit court might be looked to when annexed and transmitted as part of the record, to ascertain whether either party claimed that a state statute was in contravention of the Constitution of the United States, this court, in the *Loeb Case*, added: "By this [view], however, we must not be understood as saying that the opinion below may be examined in order to ascertain that which, under proper practice, should be made to appear in a bill of exceptions, or by an agreed statement of facts, or by the pleadings."

In *Lampasas v. Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368, a suit was brought against the city of Lampasas to recover upon certain bonds, and the jurisdiction rested upon diverse citizenship. The defendant sought to introduce a constitutional question into the record in the contention set up in the answer, that the residents of certain territory incorporated into the city had not been given an opportunity to be heard as to whether they should be included in and be subject to taxation [629] in the proposed incorporation. It was therefore contended that the bonds were void, and an attempt to levy and collect taxes to pay them was in violation of § 1 of the 14th Amendment of the Constitution of the United States. This court dismissed the writ of error, saying:

"This court has only jurisdiction by appeal or writ of error directly from the circuit court in certain cases, one of which is when 'the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States.' Sec. 5 of the judiciary act of March 3, 1891, chap. 517, 26 Stat. at L. 826, 828, U. S. Comp. Stat. 1901, pp. 488, 549. But the claim must be real and substantial. A mere claim in words is not enough. We said by the chief justice in *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct.

Rep. 867: "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground. *Little York Goldwashing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; 20 Mor. Min. Rep. 358."

In this case a perusal of the bill, answer, and testimony in the case makes it apparent that if brought into the record at all, the alleged claim of a violation of the Federal Constitution by a state law must be found in the bill itself. It appears from an examination of the bill that it is distinctly charged therein that the ordinance was passed without authority of the state, [630] and its attempted passage, "it is alleged, was an abuse of power by the city. There is no reference in the bill to any provision of the Federal Constitution. If any can be said to be violated, it must be the 14th Amendment. It is hardly necessary to say that that Amendment is aimed at state action, in the provision that no state shall deprive any person of life, liberty, or property without due process of law. The bill, therefore, so far from charging a violation of the 14th Amendment by an authorized action of the state, distinctly and in terms avers that the ordinance was passed without state authority. That such municipal legislation does not lay the foundation of Federal jurisdiction has been repeatedly held in this court. *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90, in which many of the previous cases in this court are cited. In that case Mr. Justice Harland, speaking for the court, said of an ordinance passed without legislative authority: "A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the Constitution of the United States."

In *Barney v. New York*, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502, the bill invoked the jurisdiction of the circuit court of the United States upon the ground that the plaintiff was deprived of his property without due process of law; other allegations of the bill showed that the matters

complained of were not only not authorized, but were forbidden by the legislation of the state; hence, the action did not invoke the protection of the 14th Amendment because of action by the state of New York, and therefore it was held the bill was properly dismissed for want of jurisdiction. In that case some of the previous cases in this court, to the same effect, are reviewed by Mr. Chief Justice Fuller, who delivered the opinion of the court.

A question closely analogous to the one at bar came before the court of appeals of the sixth circuit, Judge Lurton delivering the opinion of the court. *Louisville v. *Cumberland Teleph. & Teleg. Co.* [631 84 C. C. A. 151, 155 Fed. 725, 12 A. & E. Ann. Cas. 500. In that case the jurisdiction of the circuit court was invoked on the ground that the ordinance of the city of Louisville regulating rates was in violation of a contract between the complainant and the city; also on the ground that the rates were unreasonable, unjust, and confiscatory, depriving the complainant of property without due process of law, in violation of the 14th Amendment of the Constitution. In that case the bill was dismissed upon the ground that the allegations of the complaint showed that the case was not one arising under the Constitution and laws of the United States. This was held to be so because of other statements of the bill, which was held negated state action, which alone could lay the foundation of jurisdiction, in that it averred that no power to regulate the rates charged by the complainant had been granted by the state of Kentucky to the municipality which had undertaken to pass the regulating ordinance, and that the attempt to pass such ordinance was an unwarranted and unfounded assumption of power upon the part of the city.

The claim that the jurisdiction should be sustained because the common council of the city of Louisville had assumed to act under authority of the legislature of the commonwealth of Kentucky, which was averred in the bill, was answered by the court saying that the existence of such regulating power was distinctly negated by the allegation of the bill that the city had acted in the premises wholly without authority.

So, in the present case, the statements of the bill are clear and distinct that the passage of the ordinance was without power, and a usurpation on the part of the city; and the allegations of the bill as to the confiscatory character of the ordinance can, consistently with the other averments of the bill, be referred only to the state Constitution, which, as well as the Federal Constitution, inhibits *attempts to [632

take property without due process of law. *Harbinson v. Knoxville Iron Co.* 103 Tenn. 421, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955.

It is suggested that the bill, when properly construed, may have a twofold aspect, one of which charges that the city acted without authority of law, and the other that, conceding the city to act with authority, the rates fixed were confiscatory, in violation of the Federal Constitution. Assuming that a bill might be framed in this manner, it is sufficient to say of the present bill that it is not one of that character. There is nothing in it qualifying the allegation as to the action of the city without authority of the state, and, as we have said, the allegations as to the confiscatory character of the ordinance are to be referred, as they can be, consistently with the other allegations of the bill, to the state Constitution, which would be violated if such allegations were true. This construction harmonizes the bill and does violence to none of its averments.

The case, then, is this: The first and only reference to the Federal Constitution is in the final opinion of the circuit judge who heard the case upon the merits, in the part of the opinion above quoted, to the effect that the rates fixed are in violation of the complainant's rights under the Federal Constitution. This observation was doubtless made by the learned judge as the equivalent of saying that the rates were confiscatory, and therefore unlawful; but whether so or not, so far as it makes the 14th Amendment a ground of decision, it is inconsistent with the position taken in the bill, and as there is no basis for a claim of denial of rights under that Amendment in the case, it cannot be made the ground of direct appeal to this court under the 5th section of the court of appeals act.

We are of opinion that this case must be dismissed for want of jurisdiction in this court, and it is so ordered.

633] *Mr. Justice White, with whom concur Mr. Justice McKenna and Mr. Justice Hughes, dissenting:

As I cannot concur in the judgment of dismissal, in view of what seems to me to be the importance of the subject, the reasons for my dissent are expressed.

Let me restate the case. In September, 1907, the city of Memphis passed an ordinance fixing maximum telephone rates. The telephone company filed its bill to enjoin the enforcement of the ordinance. Diversity of citizenship was alleged. The relief prayed was based upon substantially the following grounds: (a) that, as the legislature of Tennessee had conferred no power upon the city of Memphis to fix rates, the city was wholly

lacking in authority to pass the ordinance, and the same was therefore void; (b) that the ordinance was void "because it is unjust, inequitable, and unreasonable, in that it fixes the maximum tariff or rate of charges beyond which your orator is forbidden to go, under severe penalties which is so low that your orator could not operate its exchange without actual loss of money to it; and, indeed, is in truth and effect confiscatory, in that it totally destroys the value of your orator's plant in the city of Memphis for profitable use as a telephone exchange." The paragraph of the bill containing the foregoing concluded as follows: "Your orator further states that said ordinance was passed by the legislative council of said city, not only without making any investigation whatever, but in ignorance of what was a reasonable rate (assuming that it had the power to deal with the subject at all, which is denied), and without the least regard to the vested rights of your orator, or to equity and justice, and it is, for the reasons set forth in this paragraph, null and void;" (c) that the ordinance was moreover void because it was unequal and discriminatory in consequence of a proviso to the 1st section, exempting from its operation telephone companies *whose rates were fixed by contract [634 with the city of Memphis.

By its answer, the city asserted the power to pass the ordinance, and traversed the averments of the bill as to confiscation and discrimination. A final decree was awarded, adjudging the ordinance to be null and void, and permanently enjoining its enforcement. The court, premising by "assuming that the city of Memphis, notwithstanding any contract it may have with the complainant, has the right and power to fix the rates which the latter may charge its customers in Memphis," came to consider the constitutional limitations to which the exertion of that power was subjected. Dealing with that subject, it was pointed out that the power to fix rates could not be so unreasonably exerted as to amount to confiscation, and, examining the proof as to the operation and effect of the rates established by the ordinance, it was found that they were of that character. The court said:

"The holders of stock in the complainant company are entitled to a fair return upon their investment if the company can earn it, but the testimony leaves no doubt that the rates prescribed by the ordinance would leave practically nothing to the stockholders.

"If to large taxation and other enforced expenditures already properly exacted, the city (now that complainant's plant is fully

installed) can add the burden of rates fixed arbitrarily that would so diminish earnings (though not expenses) as to leave no dividends whatever for stockholders, manifestly the money invested by them would be used for the benefit alone of the people of Memphis, and not at all for the profit of those who made the investment under inducements offered by the city.

"That result seems to us to be destructive of complainant's rights under the Constitution of the United States.

635] *"In Judge Clark's opinion upon the motion for the temporary injunction it is clearly indicated that that learned and lamented judge thought that the city had no power or authority to enact the ordinance for two reasons, *viz.*: 1st, because the state had never given the city such authority, and, 2d, because the city had a contract with the complainant which could not be thus impaired.

"We are not to be considered as dissenting from either of these views. We have not had time to examine either proposition, nor inclination to do so, because we are entirely content to decide the case on final hearing upon the one ground herein discussed."

The city appealed directly to this court upon the ground that the case is one where a constitutional right was claimed below, and hence is susceptible of being directly reviewed here under § 5 of the judiciary act of 1891. [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549.] On the hearing at bar it was suggested on behalf of the telephone company that the record did not disclose that the protection of the Constitution of the United States was claimed by the telephone company, and therefore the bill should be dismissed, and the court gives effect to that suggestion by its decree of dismissal.

Before ascertaining whether the record establishes that there is a claim of Federal right authorizing a direct review, it is necessary to fix definitely what constitutes the record. The contention on this subject involves the inquiry whether the opinion of the court below is part of the record, and if it is a part of the record, and it be conceded that a question of Federal right was decided below, does that fact establish the existence of a claim of constitutional right, justifying the direct review within the meaning of the act of 1891? To my mind an affirmative answer to both these propositions is required if previous decisions of this court be now applied.

In *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174, the case was this: Loeb, a citizen of Indiana, sued

the *trustees of Columbia township in [636 Hamilton county, Ohio, in a circuit court of the United States, to recover the amount of certain bonds issued by the township. The defendant filed a general demurrer. This demurrer was sustained, and the plaintiff electing not to plead further, judgment was rendered for the defendant. The court, in the opinion by it delivered, declared that it had sustained the demurrer because it had concluded, as claimed by the defendant on the argument of the demurrer, that the law under which the bonds were issued was repugnant to the Constitution of the United States. A writ of error having been prosecuted directly from this court, the right to prosecute the same was challenged, and came to be disposed of when the case was considered. The court said (p. 477): "The petition shows that the parties are citizens of different states. It states no other ground of Federal jurisdiction. If nothing more appeared, bearing upon the question of jurisdiction, then it would be held that this court was without authority to review the judgment of the circuit court." The court then proceeded to consider whether it was "sufficiently informed by the record that the defendant township, under its general demurrer, 'claimed' in the circuit court that the statute of Ohio, by the authority of which the bonds were issued, was in contravention of the Constitution of the United States." It was held (p. 481) that although the demurrer was general, and did not make reference to any claim of the protection of the Constitution of the United States, "it was certainly competent for the township to claim at the hearing of the demurrer" that the state enactment under which the bonds were issued "upon its face was repugnant to the Constitution of the United States, and therefore void." The court, after pointing out that there was nothing in the record outside of the opinion of the court, showing that a claim of Federal right had been made and decided, was brought to consider whether it had a right to look *at and was [637 controlled by the result of the opinion showing that the Federal right had been claimed. The previous decisions of this court, relating to that subject, were then fully and carefully reviewed. The difficulty which had existed in ascertaining whether a Federal question had been specially set up or claimed on writs of error to state courts during the prevalence of the conception that the opinion of the state court formed no part of the record, and could not be looked at, was adverted to, the rule adopted by this court to correct that situation, and by which it had become established that the opinion of the state court could be referred to in order to ascertain whether a Federal right

had been specially set up and claimed was stated, and it was observed (p. 483):

"The rule of our court referred to does not apply alone to cases brought here from the highest court of a state. It applies, in terms, to all cases brought to this court by writ of error or appeal. What, therefore, was said in the above cases as to the object and effect of the rule, applies to records from a circuit court of the United States."

Applying the rule settled in the *Loeb* Case, and hence treating the opinion in this case as a part of the record, it is not subject to question that it affirmatively shows that the decree rendered in favor of the telephone company, adjudging the ordinance to be null and void, was placed upon the express conclusion that the ordinance was repugnant to the Constitution of the United States. Is this, then, sufficient to establish for the purposes of the jurisdiction of this court that a Federal question was claimed? This is to be determined, as held in the *Loeb* Case, by the principles applied by this court in testing its jurisdiction to review the judgments or decrees of a state court under § 709 of the Revised Statutes (U. S. Comp. Stat. 1901. p. 575). That is to say, the fact that the court below expressly decided a Federal question must be given the same weight as would be given the express determination by a state **638** court in its opinion of a Federal question for the purpose of ascertaining whether a Federal right was specially set up and claimed in the state court. The rule upon this latter subject was thus stated in *Misouri, K. & T. R. Co. v. Elliott*, 184 U. S. 531, 533, 46 L. ed. 673, 674, 22 Sup. Ct. Rep. 446, 448, as follows:

"The general rule undoubtedly is that those Federal questions which are required to be specially set up and claimed must be so distinctly asserted below as to place it beyond question that the party bringing the case here from the state court intended to and did assert such a Federal right in the state court. But it is equally true that even although the allegations of Federal right made in the state court were so general and ambiguous in their character that they would not, in and of themselves, necessitate the conclusion that a right of a Federal nature was brought to the attention of the state court, yet if the state court, in deciding the case, has actually considered and determined a Federal question, although arising on ambiguous averments, then, a Federal controversy having been actually decided, the right of this court to review obtains. *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 660, 41 L. ed. 1149, 1153, 17 Sup. Ct. Rep. 709. All that is **1190**

essential is that the Federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. And of course, where it is shown by the record that the state court considered and decided the Federal question, the purpose of the statute is subserved. And so controlling as to the existence of the Federal question is the fact that it was actually considered and decided by the state court, that it has been held, although the general rule is that the raising of a Federal question in a petition for rehearing in the highest court of the state is too late, yet, when a question is thus raised, and it is actually considered and decided by the state court, the right to review exists. *Mallett v. North Carolina*, 181 U. S. 589, 592, 45 L. ed. 1015, 1017, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241."

*And the *Elliott* Case has been repeatedly approvingly referred to, and the doctrine which it announced expressly reiterated. *Burt v. Smith*, 203 U. S. 129, 134, 51 L. ed. 121, 126, 27 Sup. Ct. Rep. 37; *Smithsonian Institution v. St. John*, 214 U. S. 19, 28, 53 L. ed. 892, 897, 29 Sup. Ct. Rep. 601, and cases cited.

Consistently with these rulings I am unable to conclude that the case made upon the record does not affirmatively establish a claim of constitutional right authorizing the direct review of the action of the court below in deciding a question of that character.

Even at the risk of repetition, let me briefly consider the grounds by which it insisted that this case is not controlled by the authorities above referred to. They may be thus resumed: First, because the bill, it is insisted, did not complain of any action by the state of Tennessee against the rights of complainant, but simply alleged that the city of Memphis had, without authority, attempted to destroy the complainant's rights, thus, it is urged, excluding power in the court to decide that a violation of the Constitution of the United States had been brought about. Second, because even if the complaint did not in express terms exclude all claim of Federal right, nevertheless there was no right in the court to decide a constitutional question, since, taking the complaint as a whole, it clearly appears that its purpose was to assert only rights under the laws of the state of Tennessee, and to exclusively invoke protection of the state Constitution. Aside from the abnormal limitation on the judicial function which must arise from holding that, without the consent of a litigant, a judge, in a case over which he has

jurisdiction, may not apply and enforce the Constitution if he deems the facts justify or require him to do so, the propositions, it seems to me, misconceive the averments of the bill. I say this, since thy disregard the fact that, in substance, while denying the want of power to pass the ordinance, the bill moreover proceeded upon the alternative that if there was power, the ordinance was void because of the confiscatory 640] character *of the rates fixed. In any event, in view of the fact that the court below expressly considered and decided the constitutional question, the case is brought directly within the statement in the Elliott Case, which I again quote, that "it is equally true that even although the allegations of Federal right made in the state court were so general and ambiguous in their character that they would not, in and of themselves, necessitate the conclusion that a right of a Federal nature was brought to the attention of the state court, yet, if the state court, in deciding the case, has actually considered and determined a Federal question, although arising on ambiguous averments, then, a Federal controversy having been actually decided, the right of this court to review obtains." Passing, however, further consideration of the correctness of these propositions as applied to the case made by the record, and conceding them only for sake of argument to be sound, they are irrelevant to the question of dismissal, since they address themselves to the merits of the cause. In other words, if the propositions be accepted as sound, they only demonstrate that error was committed by the court below in undertaking to decide a question of constitutional right. But error in this particular, if found to exist, requires a correction of the wrong done, that is, a reversal, and not in substance the upholding of the wrong committed by refusing to review. If it be true, as announced in the previous decisions of this court, that the requirement of the statute as to the existence of a claim of Federal right for the purpose of review is subserved where the court below has expressly decided the question of Federal right, it must also be true that, in such a case, the duty exists to review and correct the error committed by the court below, whether such error arose from a mistake committed by the court in undertaking to decide a Federal question, or from a mistake committed in deciding the question which was expressly passed upon. In other words, where the court 641] *below has expressly decided a question of Federal right, and made it the basis of its decree, such decision, for the

purpose of review of the merits, in the very nature of things, engenders a conclusive presumption as to the making below of a claim of Federal right. The necessity of this rule cannot be more clearly demonstrated than by the case on this record, as it persuasively appears that the telephone company, since the decree below, has continuously claimed and enjoyed the right to be relieved from the charges fixed in the ordinance of the city of Memphis,—a right possessed as the result of accepting the benefits of the decree and the relief awarded by the injunction therein issued. That is to say, it being certain that the telephone company has, up to this very moment, claimed the rights awarded to it by the decree, it, in my opinion, ought not now to be allowed to successfully assert that it made no claim to the constitutional right upon the existence of which alone the decree went in its favor. To claim the benefits of the decree amounts necessarily to claiming the existence of the constitutional right upon which alone the decree was based.

The misconception which underlies the theory upon which the judgment of dismissal now rendered is said to be sustained seems to me to be destructive of the power to directly review a decision passing on a claim of constitutional right for which the statute expressly provides. I say this because, in my opinion, the propositions relied on in reason come to this: that the authority which is conferred upon this court to directly review the actions of trial courts in deciding constitutional questions will not be exerted wherever it is found that a trial court has erroneously undertaken to decide such a question. That is to say, that the right to directly review only authorizes the correction of the lesser wrong resulting from having decided a Federal question mistakenly, and does not embrace the greater, of having expressly decided a constitutional *question when there was no power to [642 do so. The duty to review by direct appeal, provided by the act of 1891, to be made efficacious, in the very nature of things must embrace not only the case where the court has erroneously decided a constitutional question, but also must extend to the case where a court has undertaken to expressly decide a constitutional question which it had no right to pass upon.

Considered from another point of view, the confusion which is involved in the propositions upon which the decree of dismissal must rest, if I correctly understand them, is equally demonstrable. As I have said, the denial of authority to review by

direct appeal the action of the trial court in expressly deciding a constitutional question, and awarding rights to the complainants solely upon the theory that they were guaranteed by the Constitution of the United States, can only rest upon the assumption that, although the court had general jurisdiction of the cause, it had not power, under the circumstances, to decide the constitutional questions which it did decide. But, if this premise be true, then there is presented by the direct appeal a question which, in its essence, is embraced within the power which the statute confers to review by direct appeal decisions involving the jurisdiction of trial courts. The distribution of appellate jurisdiction which the act of 1891 effected was stated, and the apparent conflict between some of the adjudged cases on that subject was cleared up, in *MacFadden v. United States*, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490. It was reindubitably established that where the jurisdiction of a trial court was invoked on the ground of diversity of citizenship, and during the trial a question of constitutional or Federal right arose or emerged and was decided, the parties were put to the election of determining whether they would prosecute error from or appeal to the proper circuit court of appeals, or pursue the same course directly to or from this court. If the [643] former course was *adopted, it was declared the right to come directly to this court was waived and the judgment or decree of the circuit court of appeals on the constitutional question would be final. As the result of the ruling now made, it must follow that the right of election under the circumstances here disclosed would be difficult, if not impossible, of exercise, since, if the election were made to bring the case directly to this court, the right to review might be lost upon the theory that the lower court wrongfully undertook to decide the constitutional question which it expressly passed upon. If, on the other hand, the party elected to seek a review in the circuit court of appeals, and the conclusion of that court was that the trial court not only had power to decide the Federal question which it had passed upon, but had rightfully decided it, the right to review in this court would be lost.

Let me come, then, to the question of authority; that is, the cases relied upon to sustain the decree of dismissal. As it is given me to understand them, none of them sustain the proposition in support of which they are cited. In view of the statement which I have previously made as to the ruling in the *Loeb Case* and the matter in

that case decided, it is unnecessary to extendedly notice a reference to a general expression found in the opinion in that case as to the duty of bringing into a record, by way of a formal bill of exceptions, agreed facts, etc., since the expressions relied upon cannot be given the effect now attributed to them without virtually holding that the *Loeb Case* overruled itself. This is also true of certain general expressions found in the opinion in *Lampasas v. Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368, decided at the same term as the *Loeb Case*, and which directly affirmed the ruling there made. Of course, nothing I have said in the slightest degree is intended to controvert the elementary doctrine that where the existence of a Federal question is essential to confer jurisdiction upon a trial court over a cause, *the jurisdictional facts must [644 be clearly and unambiguously alleged, and not be left to surmise or conjecture. And this is all, I submit, that can rightfully be said to have been decided in *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Barney v. New York*, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502; *Louisville v. Cumberland Teleph. & Teleg. Co.* 84 C. C. A. 151, 155 Fed. 725, 12 A. & E. Ann. Cas. 500. But that doctrine has no application here, since the jurisdiction of the court below existed, as diversity of citizenship was alleged. This being true, it is apparent that the cases cited can only be made here applicable by failing to distinguish between the test for determining whether sufficient foundation has been laid to justify the bringing of the powers of a trial court into play, and the duty of an appellate tribunal to review the action of the trial court, had in a case within its jurisdiction and authority. After patient research I am of the opinion that it is accurate to say that no case can be found in the books holding that where a trial court has expressly considered and passed upon a question of constitutional rights, and awarded affirmative relief to a party before it, upon the theory that such right was involved in the cause which was within its jurisdiction, that the right to review by this court has been denied because there was no claim of right under the Constitution, since the court, in passing upon the case before it, erroneously based its conclusion upon the mistaken conception that stated propositions of constitutional law were claimed to be applicable.

I am authorized to say that Mr. Justice McKenna and Mr. Justice Hughes join in this dissent.

**645] *CITY OF COLUMBUS, Appt.,
v.**

MERCANTILE TRUST & DEPOSIT COMPANY OF BALTIMORE, Trustee, and the Columbus Water Works Company and W. S. Greene, as Receiver thereof.

(See S. C. Reporter's ed. 645-663.)

Waters — public water supply — obligation to furnish adequate supply.

1. The continuing character of a waterworks company's contract obligation to furnish an adequate supply of wholesome water is not met by showing that such a supply has been furnished at times, or that, at the time of completion of the works, the company was able to carry out its contract, nor is nonperformance excused by the occurrence of conditions which are likely to happen in a climate of long, dry summers. [For other cases, see *Waters*, III., in Digest Sup. Ct. 1908.]

Estoppel — to rescind water supply contract — accepting improved conditions.

2. The acceptance by a municipality and its people of improved conditions in a waterworks system, resulting from complaints, does not estop the municipality to rescind the contract with the waterworks company for a breach of its contract obligation to furnish an adequate supply of wholesome water, unless such improved conditions result in the continuous maintenance thereafter of such a supply.

[For other cases, see *Estoppel*, III. b, 6, in Digest Sup. Ct. 1908.]

Equity — doing or offering equity — imposing conditions.

3. The maxim that "he who seeks equity must do equity" does not justify a court in denying to a municipality rescission under its cross bill of a contract with a waterworks company which the latter has broken by failing to maintain a continuous and adequate supply of wholesome water, and in affirmatively restraining the municipality from establishing its own system unless it shall do equity to the bondholders of the waterworks company by purchasing the usable parts of the waterworks system.

[For other cases, see *Equity*, 301-310, in Digest Sup. Ct. 1908.]

Equity — rescission of contract — adequate remedy at law.

4. A municipality has the right to treat a contract with a waterworks company as terminated by the latter's breach of its contract obligation to furnish a continuous adequate supply of wholesome water, and to invoke the aid of a court of equity

to enforce its rescission, since the remedy at law by an action for damage is wholly inadequate.

[For other cases, see *Equity*, I. d, 11; *Contracts*, VI. d, in Digest Sup. Ct. 1908.]

[No. 41.]

Argued November 7, 8, 1910. Decided December 12, 1910.

A PPEAL from the Circuit Court of the United States for the Northern District of Georgia to review a decree which enjoined a municipality from constructing and operating its own waterworks system unless it should purchase the usable parts of an existing private plant, and denied any relief to the municipality under its cross bill, seeking rescission of its contract with the waterworks company. Reversed and remanded, with directions to dismiss the bill, and grant the relief as prayed in the cross bill.

See same case below, 161 Fed. 135.

The facts are stated in the opinion.

Messrs. **William A. Wimbish** and **T. T. Miller** argued the cause, and, with Mr. **J. H. Martin**, filed a brief for appellant:

Under conditions existing at the time, the city not only had the right, but was under the imperative duty, in the exercise of its police power, to make provision for an adequate supply of wholesome water.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 12, 43 L. ed. 341, 347, 19 Sup. Ct. Rep. 77; *Boston Beer Co. v. Massachusetts*, 97 U. S. 28, 24 L. ed. 989; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341.

The opinion and order of the court that a decree in favor of the city should be made conditional upon the purchase of any part of the present water system is not founded upon the pleadings, and is beyond the jurisdiction of the court, as being in violation of the right of private contract.

Burke v. Davis, 26 C. C. A. 675, 53 U. S. App. 414, 81 Fed. 907; *Rejall v. Greenhood*, 35 C. C. A. 97, 92 Fed. 945; *Woodruff v. North Bloomfield Gravel Min. Co.* 9 Sawy. 441, 18 Fed. 753; *Atty. Gen. v. Birmingham*, 4 Kay & J. 539; *Weaver v. Eureka Lake County*, 15 Cal. 274, 1 Mor. Min. Rep. 642; *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Re Brooklyn*, 143 N. Y. 596, 26 L.R.A. 270, 38 N. E. 983, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718.

It is only when the relief sought is discretionary that the court may impose conditions.

NOTE.—On the establishment and regulation of municipal water supply—see note to *State ex rel. Hallauer v. Gosnell*, 61 L.R.A. 33.

On the jurisdiction of equity where remedy at law exists—see notes to *Meldrum v. Meldrum*, 11 L.R.A. 65; *Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co.* 6 L.R.A. 855; and *Tyler v. Savage*, 36 L. ed. U. S. 83.

54 L. ed.

Fosdick v. Sehall, 99 U. S. 235, 25 L. ed. 339; Kneeland v. American Loan & T. Co. 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950.

If the city had the legal right to a rescission of the contract as against the water company, in what does the superior equity of the bondholders consist?

Farmers' Loan & T. Co. v. Galesburg, 133 U. S. 159, 33 L. ed. 575, 10 Sup. Ct. Rep. 316.

Mr. Joseph Packard argued the cause, and, with Mr. A. Morris Tyson, filed a brief for appellees:

A court of equity may so mold its decree as to grant relief upon such terms as, in its judgment, satisfy the equities of the particular case.

Walden v. Bodley, 14 Pet. 164, 10 L. ed. 401; Buchannon v. Upshaw, 1 How. 56, 84, 11 L. ed. 46, 56; Fosdick v. Sehall, 99 U. S. 235, 25 L. ed. 339; Kneeland v. American Loan & T. Co. 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950; Thomas v. Brownville, Ft. K. & P. R. Co. 109 U. S. 522, 27 L. ed. 1018, 3 Sup. Ct. Rep. 315; Bourke v. Hefter, 202 Ill. 321, 66 N. E. 1084; Lockhart v. Leeds, 195 U. S. 437, 49 L. ed. 269, 25 Sup. Ct. Rep. 76.

Mr. Justice Lurton delivered the opinion of the court:

This is a bill by the trustee under a mortgage made by the Columbus Water Works Company upon its plant and franchise to secure an issue of bonds, to enjoin the municipal authorities of Columbus, Georgia, from constructing and operating a municipal water system, thereby impairing the obligation of a contract between the city and the waterworks company, granting to the latter for a term of thirty years an exclusive right to maintain a waterworks system in the streets of the city.

The bill, in substance, avers, and the answer admits, that the city has procured from the legislature of Georgia authority to construct and operate a municipal water plant, and to issue the bonds of the city for that purpose, and that, in pursuance of this legislative authority, ordinances have been passed providing for the construction 650] *of such waterworks, and for the issuance of bonds to provide the means, and that notice of that purpose, and that the city no longer regards the contract with the Columbus Water Works Company as binding or obligatory, has been given.

The material defenses are, first, that the city had no power to make an exclusive contract; second, that the contract for rental of hydrants created an aggregate indebtedness prohibited by the Constitution of the

state; and, third, that the waterworks company had not kept its contract in respect of the character or capacity of the plant it was to provide and maintain, and has failed in its obligation to furnish an abundant and constant supply of pure and wholesome water, thus compelling the municipality to construct a system of its own for the protection of the health and property of its inhabitants.

These defenses were relied upon in the answer of the city as a defense against the injunction sought by the complainant, and were made the subject of a cross bill against the complainant and the waterworks company, praying relief against the contract as having been first broken by the company.

Prior to the filing of this bill, the same complainant had filed its original bill in the same court against the Columbus Water Works Company, praying a foreclosure of its mortgage, a default having occurred. The bill referred to was filed December 22, 1902. The present bill was not filed until July 30, 1903. One of the allegations of the foreclosure bill was "that during the continuance of this deed in trust, the said party of the first part will not do or suffer to be done any act or acts whereby the security of the said bondholders shall be in any way or manner or in any amount impaired, and that the said party of the first part will at all times preserve, maintain, and keep its waterworks, pumps, machinery, reservoirs, piping, hydrants, and equipments in good repair, working order, and condition, *and supplied with all the 651 machinery, equipments, and appliances for providing water to the city of Columbus and vicinity, and shall and will, from time to time, make all needful and proper repairs, renewals, and replacements, and useful and proper alterations, additions, betterments, and improvements.

"3. That your orator is informed that for more than six months last past the Columbus Water Works Company has suffered the security of the bondholders to become impaired by not maintaining and keeping its water works supplied with all the machinery, equipments, and appliances for providing water to the city of Columbus and vicinity, and by not making useful and proper additions, betterments, and improvements to said waterworks. Further explaining the foregoing allegation, your orator states that, owing to an unprecedented and protracted drought, the sources of supply of water for the said waterworks have to a large extent failed for the time being; that it is within the power of the said waterworks company to provide for such a contingency by seeking and availing itself of other sources of supply, but that, as your

orator is informed, owing to the attitude of the City of Columbus, which now is taking steps to provide a water supply of its own, the Columbus Water Works Company is unable to sell its bonds reserved in its treasury for such purposes, and which could have been sold except for the attitude of the said city, and therefore is unable to carry out the betterments and improvements in its water supply above mentioned."

Under that bill, which was unopposed, a receiver was appointed, who has ever since been in possession and is still operating said works. Upon application of the mortgage trustee, and by consent of the bondholders and of the company, receiver's certificates have been issued to the extent of \$50,000, and expended in repairing and improving the supply of water and the dis-
652]tributing system. *There has never been any consolidation of the two suits, but by an amended bill in the present case, filed October 15, 1903, the fact of the pendency of the aforementioned foreclosure bill and the action had thereunder was stated. It was also averred in this amendment that by means of the receiver's certificates issued in the foreclosure case, such improvements and enlargements had been made in the plant of the company that the receiver was then supplying an abundance of wholesome water, and that the trustee, by direction of the bondholders, was willing to expend such other sums as should be found necessary to enable the mortgagor company to carry out its contract.

Upon the bill as thus amended, the answer and cross bill and the answer thereto, and upon *ex parte* affidavits, the court heard a motion for an injunction *pendente lite*. Upon that hearing the court disposed of two legal defenses arising upon the face of the contract; namely, whether a contract extending over thirty years for the rental of hydrants was the creation of an indebtedness for the aggregate of the rental, and second, whether the city had power to make an exclusive contract. Both of these questions were decided by Judge Newman against the city. On November 19, 1903, an injunction pending the suit was allowed, and the cause referred to a special master to take proof and report his findings of law and fact in respect to the issues with reference to the failure of the waterworks company to comply with its contract. See 130 Fed. 180.

On January 23, 1904, the city filed its petition praying a dissolution of this injunction, alleging that a great amount of evidence had been taken by the special master, and that the reservoir had again failed, and that water was now being taken from the Chattahoochee river, and that the water

at the intake was polluted by reason of the fact that one of the city's sewers emptied into the stream *a short distance [653 above the intake, and also that a polluted branch which drained a suburb of the city emptied into the river a short distance above the river intake. Thereupon, on January 25, 1904, the preliminary injunction was dissolved.

The special master, on November 19, 1904, filed a full, elaborate, and able report, with findings of fact and law. Upon the material questions he found in favor of the contentions of the city in respect to both fact and law. His findings of fact, as condensed by him, which are material to be here set out, are as follows:

"I have found that acceptance by the city was based on statement of the water company that the system had been completed in compliance with the contract, and upon assurances by the company that the water would be wholesome, abundant, and lasting.

"I have found that the system as accepted by the city in 1882 had not met the general requirements of the contract, and that on complaints to the company the system had been improved to such an extent that in 1889 the service was at that time accepted as satisfactory to the city.

"That from 1889 to May, 1900, there was dissatisfaction and complaints on the part of the city because of insufficiency of water supply, and especially with the unsupplied needs of the city for water in its newly acquired territory; that the company had notice of this, and recognized the necessity of increased water supply; that during this period the city, through its council, twice made an effort to repudiate the contract, but were not sustained by the requisite popular vote on submission of the question to the people; that the company in good faith endeavored to adjust the differences by offer to arbitrate, and the city declined the offer; and that finally the city accepted the existing conditions, and concluded a supplemental agreement by which the company was given an opportunity to test its ability to carry out the requirements of the contract; that *the company failed in this, and that [654 in 1902 both the council and the people determined to no longer depend upon the water company.

"That the water company has at no time complied with § 3, requiring a reservoir of 125 million gallons available supply, and from 1884 it has failed to comply with the requirements of § 12 as to the construction and maintenance of the reservoir.

"That paragraph 11 as to filtration has not been complied with on the part of the company.

"That the company has failed to comply with § 5 of the contract as to distribution in not connecting together the ends of its system, and placing mains sufficiently large to at all times give full supply of water.

"With reference to the supply of water, I have found that the company has failed to comply with §§ 1 and 10, in that sufficient supply of wholesome, constant, and ample water has not and cannot be furnished from the source of supply as selected, nor is the same sufficient to meet the wants of the city and private consumers for present and future requirements.

"I have found that the company has not complied with § 4 as to supply main.

"That as to pressure from 1893 to 1902, the pressure was variable and uncertain; that the gravity plan could not sustain it to the requirements of the contract, and that the standpipe and pumping devices adopted to assist it, while practically beneficial, were not at all times satisfactory; that the company has not met the requirements of § 27 in maintaining pressure at 32 pounds, nor supplemental contract requirement of 40 pounds, and that in fires of any magnitude the pressure and water supply is insufficient, and that the supply is not ample for fire protection, as required by § 9, and that the receiver, by improvement of the pumping station, has greatly bettered conditions.

655] *"With reference to the wholesomeness of the water, as required by § 10, I have found that the reservoir water, when available, is, under normal conditions, a wholesome water, but when the water is low it is not wholesome; that prior to July, 1902, the water furnished by the company was, with few exceptions, within the requirements of the contract, and in these exceptions the city has not availed itself of the provisions of § 13 of the contract to correct impurities; that since July, 1902, the company has not furnished a constant supply of wholesome water, nor has the receiver been able to do so; that the Chattahoochee river cannot be relied on as a constant source of supply for wholesome water, but only so when, on a normal flow of the river, water is taken from points above all possibility of contamination, and properly filtered.

"That the company has not been able, for want of available funds, to maintain and improve its system as the growth of the city demanded, and that extensions since 1891 have, from time to time, been, with the exception of a small amount, paid for by a necessary increase of a bonded indebtedness originally out of all proportion to the earning capacity of the system, and constantly growing further beyond the ability of the system to maintain; that the sys-

tem has not been reinforced and strengthened as its needs require, and that the owners of the bonds of the company recognized this fact.

"That the actual amount expended by the receiver to January, 1904, on betterments, is \$42,220.85."

To the findings of fact the complainant excepted.

Upon a final hearing, the court, while not fully agreeing with the master as to the effect of the original acceptance of the works as constructed, and as to the effect of subsequent acceptance of enlargements, repairs, and improvements made by the company, from time to time, to meet complaints as to quantity and quality of water, concurred fully in the master's report that the company had not *complied with its ob- [656 ligation to construct and maintain adequate means for continuously furnishing an ample and wholesome supply of water for public and domestic purposes. Among other things, upon this vital aspect of the case, Judge Newman said:

"In my judgment, the facts in evidence were sufficient to justify the master in finding that there was a failure on the part of the company to furnish an abundant supply of pure and wholesome water, as provided in the contract, and finding the company at fault in this respect. It is a serious matter to undertake to supply the inhabitants of a city with an ample supply of good and wholesome water, and persons entering into a contract to do this necessarily must do so with an understanding of the important character of the undertaking. This is particularly true of a growing city. Taking this whole record together, and considering all the evidence, the master, as has been stated, was justified in reaching the conclusion that there was a failure to comply with the contract in this respect." [161 Fed. 147.]

Although there was a consensus of finding by master and court that there was an obligation upon the water works company to furnish an adequate and continuous supply of pure water, and that the waterworks company had therefore broken this vital part of its agreement, yet the court ruled that the city should be denied rescission under its cross bill, and affirmatively restrained from establishing its own system, unless it "should do equity to the bondholders," by whose money the plant had been constructed, by purchasing "so much of the waterworks plant as may be hereafter determined, at a fair valuation, as a condition of and before entering a decree in its favor finally denying an injunction in the case against the issuance by the city of its waterworks bonds." Time was given

the city to determine whether it would accept the conditions imposed by purchasing 657] at a fair valuation *such parts of the system as the court should determine were usable by the city, at a price to be fixed by a subsequent decree. The city declining to assent to such a condition, an injunction was granted permanently restraining the city from the construction of its own plant, and dismissing the cross bill, and taxing all of the costs to the city.

Premitting any opinion as to whether the contract for rental of hydrants for a term of thirty years constituted an aggregate indebtedness prohibited by the Constitution of the state of Georgia, as well as the question of the power of the city to obligate itself by a contract excluding it from constructing and operating its own waterworks, and assuming, for the purposes of this case, that the contract between the city and the waterworks company was perfectly valid, we come at once to the question of whether the court below was right in denying relief under the cross bill, and in granting the relief prayed by the original bill, because the city declined to purchase at a price fixed by the court or by arbitration the usable parts of the waterworks system.

The primary and vital obligation of the company was to furnish an adequate and constant supply of water for both public and private use, which should be pure and wholesome. By the first and second clauses of the contract the company obligated itself to provide "all the real estate, rights of way, water rights, and water that shall be found requisite for the successful prosecution and operation of the waterworks," and to supply "dams and embankments of ample size and strength, good and durable quality, that may be required for the works." By the third clause it bound itself to construct "a storage reservoir having an available capacity for the storage and supply of not less than 125 million gallons." This, in passing, we may observe, was never done, and the insufficiency of the reservoir capacity 658] it was one of the factors *in the subsequent failure to furnish at all times an adequate supply of water. By the tenth clause of the contract it was provided that "the source of water supply shall be determined by Thos. R. White (who assigned to the Columbus Water Works Company), he guaranteeing, however, that the supply of water, both in quality and amount, shall be wholesome, constant, and amply sufficient to meet the wants of the city and private consumers for future and present requirements." The eleventh and twelfth clauses related to the construction and maintenance of a filter, and to the maintenance of wholesome conditions at the storage reservoir.

54 L. ed.

The single object of the agreement was to obtain a constant and adequate supply of wholesome water. This was guaranteed in express terms, to say nothing of the necessary implication from the character of the contract. This guaranty was a continuing one, and dominated every other detail of the agreement. The company selected its own source of supply, and was under the highest obligation to continuously furnish an ample supply for all purposes of water which should be wholesome; that is, clean, pure, and fit for domestic use. This supply was to be adequate not only for the demands of the present, but ample to meet the demands of the future.

No higher police duty rests upon municipal authority than that of furnishing an ample supply of pure and wholesome water for public and domestic uses. The preservation of the health of the community is best obtained by the discharge of this duty, to say nothing of the preservation of property from fire, so constant an attendant upon crowded conditions of municipal life. If a municipality elect to contract with another for the discharge of this function, it is under the greatest obligation to require that the contractor shall engage to construct and maintain adequate means and furnish an adequate supply, in quality and quantity, to at all times meet the public necessity. *So, too, the contractor [659 must satisfy himself as to the sufficiency and quality of the source of supply, and maintain adequate storage and distributing instrumentalities to meet conditions. That his source of supply is at times adequate and wholesome is not enough. The wants of the public must, under all conditions, be supplied. We do not take account of temporary and unusual conditions which cannot be reasonably foreseen. But that which can be and should be foreseen must be taken into account by a private contractor who undertakes so vital a function as that of supplying water to a growing community.

The continuing character of the obligation to furnish an adequate supply of wholesome water, as we have before suggested, is not met by showing that such a supply has been furnished at times, nor is the nonperformance of the agreement excused by the occurrence of conditions which are likely to occur in a climate of long, dry summers. Nor is such a contract fulfilled by showing that, at the time of completion of the works, the company was able to carry out the contract. Ability to carry out the agreement must be maintained. From time to time during the operation of the works, specific complaints were made by the city in consequence of the failure of the water com-

pany to furnish an adequate supply of water, or on account of the quality of the water or insufficient pressure. These complaints generally resulted in an effort to remedy the matter, and more than one change and improvement made seemed to produce good results, leading the municipality to accept for the time the repair, or enlargement, or change as meeting the necessities of the particular exigency, and giving promises of ability to carry out the contract. In consequence of such efforts to improve the service in quantity and quality of water supplied, the electorate of the municipality twice voted against a bond issue to construct a municipal plant, manifesting thereby *a willingness that further opportunity should be given the company to show its ability to bring its plant up to the requirements of the contract. Indeed, the attitude of the city and its people toward the water company, as shown by the record, seems to have been forbearing and generous. This acceptance of improved conditions resulting from complaints has been relied upon as estopping the city. But no such result may rightfully follow, unless such improved conditions resulted in the maintenance thereafter of a continuous, adequate supply of wholesome water. This was not the case. Want of capital may have been the cause for adoption by the company of expedients to meet a particular exigency which were inadequate to permanently overcome a radically insufficient source of supply, as well as insufficient storage and filtration instrumentalities. The relief resulting from all that was done by the company or its receiver was not abiding nor the character of the water permanently improved. That the works were not able to come up to the requirements of the contract, and not able to meet the reasonable necessities of the city, was a question of fact, upon which the master and the court have agreed. The contract to furnish an adequate supply of water of good, usable quality was, as we have already said, a continuing and vital part of the contract. Touching a similar contract, this court, in *Farmers' Loan & T. Co. v. Galesburg*, 133 U. S. 156, 170, 33 L. ed. 573, 579, 10 Sup. Ct. Rep. 316, 321, said:

"Whether or not the water company was able to furnish the required quantity of water every twenty-four hours, and whether or not its quality as to purity and goodness for domestic and other uses was in compliance with the ordinance, must rest upon facts as proved to exist. Moreover, the estoppel, so far as it did exist, was not a continuing one. The obligation of the water company to furnish the quantity and

quality of water required by the contract was a continuing obligation, and was not *met once for all by a compliance with [661 the fire test of December 6, 1883. The right of the company to enjoy the consideration of the contract was thereafter to depend upon its continuing to perform it. There was not and could not be a final and absolute acceptance of the waterworks by the city, without regard to a future compliance on the part of the water company with the requirements of the contract. The case was not one of works constructed for the city, and to become its property upon acceptance; and the acceptance related merely to the sufficiency of the structures for fire service at the time."

There remains, then, the simple question as to whether the circuit court was justified, upon a finding that the water company had not and was not able to do what it agreed to do, in restraining the city from meeting the plain necessities of the case by constructing and operating its own plant, because the city would not accept as a condition the purchase at a price fixed by the court of so much of the waterworks plant as the court should be of opinion it could use in its own system. If, as is manifestly the case, the waterworks company has not complied with its contract in vital particulars, the city had the legal right to say, as it did in substance say, "You have failed to maintain a continuous and adequate supply of water fit for domestic purposes, as you were bound to do. Public considerations of the highest obligation require that the city and its inhabitants shall have a continuous water service adequate to the preservation of the public health and the public safety. We therefore shall treat the contract as at an end, and undertake this function by means of a municipal plant."

However serious the result to the water company or its creditors, the plain law of the case was with the city. The bondholders had neither legal nor equitable rights superior to the contract between the city and the water company. If the latter had not complied with the contract *aft- [662 er repeated experiments and much indulgence by the city, what is the equitable foundation for the enforcement of a broken and continuing obligation by enjoining the city from doing what it had a plain legal right to do if the water company was unable to carry out the contract upon its part? Nevertheless, the learned judge, after reaching and announcing the conclusions already stated as to the facts of the case, granted to the complainant the full equitable relief sought, because the city declined to agree to conditions imposed. The court justified the

imposition of conditions under the maxim that he who seeks equity must do equity. But this maxim is one which applies to him who affirmatively seeks equitable relief.

The complainant had, beyond serious doubt, failed to make a case entitling it to relief. But the court in substance said to the city that unless the city would agree to mitigate the injury and loss which must come to the creditors of the defaulting company by buying so much of the company's plant as the court should think adapted to use in the plant to be constructed by the city, that a decree should go for the complainant, although it had failed to make a case entitling it to the enforcement of the contract between the company and the city.

Manifestly the maxim cannot vest in the chancellor the power which has been exercised. It is true that the city by a cross bill asked to have the contract declared at an end for nonperformance. But this was defensive relief. If the complainant had shown a valid contract which was impaired by the legislation providing for a construction of rival waterworks, it was clearly entitled to a decree enjoining the city from proceeding with the construction of a municipal system. In that event the cross bill would be dismissed as a necessary result of such decree upon the original bill. But if complainant failed to show a state of facts which entitled it to restrain the city from **663]** *doing anything in impairment of the contract between it and the mortgagor water company, the only logical result was a decree dismissing the original bill because the city had not kept its contract, and a **54 L. ed.**

decree under the cross bill, declaring the contract abrogated rightfully by the city as a consequence of its breach in vital particulars.

A consideration of the consequence to creditors of the contracting company is not an answer to the legal rights of the city. Considerations of hardship cannot prevail to set up and enforce a broken agreement, which in law results in giving to the opposite party a right to treat the agreement as ended. *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Atty. Gen. v. Birmingham*, 4 Kay & J. 539; *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950. In the case of *Atty. Gen. v. Birmingham*, the vice chancellor said: "I am not sitting here as a committee of public safety, armed with arbitrary power to prevent what it is said will be a great injury not to Birmingham only, but to the whole of England; that is not my function."

The city should be left its freedom of contract in respect to buying such parts of the company's plant as it can profitably use.

The remedy by an action for damages was wholly inadequate to the city. The city had a right to treat the contract as terminated, and to invoke the aid of a court of equity to enforce its rescission. 133 U. S. 156, 179.

Reverse the decree and remand, with direction to dismiss the bill and grant the relief as prayed in the cross bill.

Reversed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

664] *INTERNATIONAL TEXT-BOOK COMPANY, Plaintiff in Error, v. CARL PETERSON. [No. 3.]; INTERNATIONAL TEXT-BOOK COMPANY, Plaintiff in Error, v. CONNELL R. LYNCH. [No. 27.]

Interstate commerce—correspondence schools—state regulation.

In Error to the Supreme Court of the State of Wisconsin to review a judgment which affirmed a judgment of the Circuit Court for Manitowoc County, in that state, denying the right of a foreign correspondence school to maintain an action in the state courts. Also

In Error to the Supreme Court of the State of Vermont to review a judgment which reversed a judgment of the County Court for Caledonia County, in that state, permitting such action to be maintained.

See same cases below, No. 3, 133 Wis. 302, 113 N. W. 730, 14 A. & E. Ann. Cas. 965; No. 27, 81 Vt. 101, 69 Atl. 541.

Mr. David C. Harrington for plaintiff in error.

No briefs filed for defendants in error.

November 7, 1910. *Per Curiam*: Substantially the same question of Federal law involved in these two cases arose under a Kansas statute in International Text-Book Co. v. Pigg, 217 U. S. 91, ante, 678, 27 L.R.A.(N.S.)493, 30 Sup. Ct. Rep. 481; and the Federal right asserted in that case was sustained. There is no difference in principle between the two cases last named and the Pigg Case, although the Federal question involved in them arises under the statutes, respectively, of other states,—Wisconsin and Vermont. In view of the pleadings and the conceded facts in these cases, the judgment in each of them must be reversed on the authority of the Pigg Case, and the cases are severally remanded for such further proceedings as is required by, and is not inconsistent with, this opinion. It is so ordered.

665] *EX PARTE: IN THE MATTER OF PATRICK LANCER, Petitioner. [No. —, Original.]

Motion for leave to file a petition for Writ of Mandamus.

Mr. Wilford H. Smith for petitioner.

October 17, 1910. Denied.

FRANK N. HOFSTOT, Appellant, v. BERNARD A. FLOOD, a Detective of Police of the City of New York. [No. 567.]
Extradition.

Appeal from the Circuit Court of the United States to review a decree denying relief by habeas corpus to a person held in custody under an extradition warrant.

See same case below, 180 Fed. 240.

Messrs. Adrian H. Joline, John D. Lindsay, and Adrian H. Larkin for appellant.

Messrs. W. A. Blakeley, Charles S. Whitman, Warren I. Scymour, George Gordon Battle, and H. Snowden Marshall for appellee.

October 17, 1910. Order affirmed with costs. No further opinion will be delivered. (Mr. Justice Hughes did not participate in the consideration or decision of this case.)

MERRIMACK RIVER SAVINGS BANK, Appellant, v. CITY OF CLAY CENTER, KANSAS, et al. [No. 604.]

Appeal from the Circuit Court of the United States for the District of Kansas.

Messrs. D. R. Hite and *C. C. Cole [666 man for appellant.

Messrs. A. A. Godard and F. B. Dawes for appellees.

October 24, 1910. Dismissed, with costs. No further opinion will be delivered.

WILLIAM J. POCHIN, Appellant, v. CITY AND COUNTY OF DENVER, COLORADO, et al. [No. 688.]

Appeal from the Circuit Court of the United States for the District of Colorado.

Mr. Harvey Riddell for appellant.

Messrs. George Q. Richmond and F. W. Sanborn for appellees.

October 24, 1910. Decree affirmed, with costs. No further opinion will be delivered.

CHARLES MARTEL, Plaintiff in Error, v.

STATE OF MAINE. [No. 26.]

Error to state court—Federal question.

In Error to the Supreme Judicial Court of the State of Maine to review a judgment overruling the exceptions of a person convicted in that court of being a common seller of intoxicating liquors.

See same case below, 103 Me. 63, 68 Atl. 454.

Mr. Herbert E. Holmes for plaintiff in error.

Mr. Warren C. Philbrook for defendant in error.

November 14, 1910. *Per Curiam*: Dismissed for want of jurisdiction in this court.

THEODORE R. CONVERSE, Receiver, etc., Plaintiff in Error, v. JOHN A. STEWART. [No. 30.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which had affirmed a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment in favor of defendant entered upon the report of a referee in an action to recover an assessment upon the stock of a foreign corporation.

See same case below in Court of Appeals, 192 N. Y. 578, 85 N. E. 1107.

667] Messrs. William G. Wilson and *C. A. Severance for plaintiff in error.

Mr. Edward W. Sheldon for defendant in error.

November 14, 1910. *Per Curiam*: Writ of error dismissed for want of jurisdiction in this court. *Beaupré v. Noyes*, 138 U. S. 397, 401, 34 L. ed. 991, 992, 11 Sup. Ct. Rep. 296; *Eustis v. Bolles*, 150 U. S. 361, 369, 370, 37 L. ed. 1111, 1113, 14 Sup. Ct. Rep. 131; *Rutland R. Co. v. Central Vermont R. Co.* 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Bacon v. Texas*, 163 U. S. 207, 227, 41 L. ed. 132, 139, 16 Sup. Ct. Rep. 1023.

1202

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Plaintiff in Error, v. J. B. BLACHLEY. [No. 34.]

Error to state court—Federal question.

In Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Grayson County, in that state, in favor of plaintiff in an action to recover damages for personal injuries received in the Indian territory. Application was made in the trial court for removal of the cause to the Circuit Court of the United States for the Eastern District of Texas, and was denied.

See same case below, 50 Tex. Civ. App. 141, 109 S. W. 995.

Messrs. James Hagerman and Joseph M. Bryson for plaintiff in error.

Mr. B. F. Looney for defendant in error.

November 28, 1910. *Per Curiam*: It is ordered that the Writ of Error be dismissed for want of jurisdiction, on authority of *Missouri, K. & T. R. Co. v. Hollan*, 216 U. S. 615, 54 L. ed. 639, 30 Sup. Ct. Rep. 576. No further opinion will be delivered in this case.

INDIAN PROTECTIVE ASSOCIATION, Appellant, v. HUGH H. GORDON, and Benjamin Miller, Administrator. [No. 520.]

Appeal from the Court of Appeals of the District of Columbia.

See same case below, 34 App. D. C. 553.

Messrs. Charles Poe, Daniel B. Henderson, Benjamin S. Minor, and Hugh B. Rowland for appellant.

Mr. Heber J. May, for Benjamin Miller, administrator, one of the appellees.

November 28, 1910. Decree affirmed with costs as to Benjamin Miller, administrator, one of the appellees.

EX PARTE: IN THE MATTER OF MALLORY STEAMSHIP COMPANY, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Prohibition.

Mr. Everett P. Wheeler for petitioner.

Mr. Frederick M. Brown for respondent.

December 5, 1910. Denied.

*EX PARTE: IN THE MATTER OF H. [668] A. BRADFORD, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writs of Prohibition and Mandamus.

Messrs. George P. Hoover and William E. Borah for petitioner.

December 5, 1910. Denied.

218 U. S.

EX PARTE: IN THE MATTER OF SOBRINOS DE EZQUIAGA, Petitioner. [No. —, Original.]
Motion for leave to file petition for Writ of Prohibition or Mandamus.
Mr. Francis H. Dexter for petitioner.
December 5, 1910. Denied.

EX PARTE: IN THE MATTER OF ATHANASI NICOLA, Petitioner. [No. 8, Original.]
Petition for a Writ of Mandamus.
Messrs. Lon O. Hocker, James C. Jones, and J. J. Darlington for petitioner.
Mr. Tyson S. Dines and Mr. Millard F. Watts for respondent.
December 5, 1910. Denied, rule discharged, and petition dismissed, on authority of *Re Tobin*, 214 U. S. 507, 53 L. ed. 1061, 29 Sup. Ct. Rep. 702.

EX PARTE: IN THE MATTER OF CUDAHY PACKING COMPANY, Petitioner. [No. 11, Original.]
Petition for a Writ of Mandamus.
Messrs. Ralph W. Breckenridge and Charles J. Greene for petitioner.
669] *Mr. Constantine J. Smyth and Mr. Edward P. Smith for respondent.
December 5, 1910. Denied, rule discharged, and petition dismissed, on the authority of *Re Pennsylvania Co.* 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141.

MARY R. TRIMBLE et al., Plaintiffs in Error, v. IDA V. KLUGH et al. [No. 61.]
In Error to the Circuit Court of the United States for the District of South Carolina.

Mr. William A. Gunter for plaintiffs in error.

Mr. F. Barron Grier for defendants in error.

December 5, 1910. Dismissed for the want of jurisdiction, on authority of *Empire State-Idaho Min. & Developing Co. v. Hanley*, 205 U. S. 225, 51 L. ed. 779, 27 Sup. Ct. Rep. 476.
54 L. ed.

CLARENCE H. VENNER, Plaintiff in Error, v. CHICAGO CITY RAILWAY COMPANY et al. [No. 125.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Illinois to review a decree which affirmed a decree of the Supreme Court of Cook County, in that state, dismissing a bill filed by a stockholder in a street railway company to set aside, as impairing contract obligations, a municipal ordinance embodying an agreement between the municipality and the directors of the street railway company with reference to the occupation of the city streets and the rebuilding of the street railway system.

See same case below, 236 Ill. 349, 86 N. E. 266.

Mr. Elijah N. Zoline for plaintiff in error.

Mr. John P. Wilson for defendants in error.

December 12, 1910. *Per Curiam*: As it does not appear from the record that this court has jurisdiction in this case, the writ of error is dismissed for want of jurisdiction.

JULIO AYBAR, Appellant, v. PEOPLE OF PORTO RICO. [Nos. 68 and 69.]

Appeals from the Supreme Court of Porto Rico.

Messrs. Jackson H. Ralston, F. L. Siddons, and William *E. Richardson for [670] appellant.

Messrs. Paul Charlton and Foster V. Brown for appellee.

December 12, 1910. As jurisdiction in this court does not appear from the records in these cases, the appeal in each case is dismissed for want of jurisdiction.

BARTLETT RICHARDS, Petitioner, v. UNITED STATES. [No. 562.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Charles J. Hughes, Jr., John W. Lacey, and R. S. Hall for petitioner.

The Attorney General and the Solicitor General for respondent.

October 17, 1910. Denied.

WILL G. COMSTOCK, Petitioner, v. UNITED STATES. [No. 563.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Charles J. Hughes, Jr., John W. Lacey, and R. S. Hall for petitioner.

The Attorney General and the Solicitor General for respondent.

October 17, 1910. Denied.

CHARLES C. JAMESON, Petitioner, v. UNITED STATES. [No. 564.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Charles J. Hughes, Jr., John W. Lacey, and R. S. Hall for petitioner.

The Attorney General and the Solicitor General for respondent.

October 17, 1910. Denied.

671] *ACQUILLA TRIPLET, Petitioner, v. UNITED STATES. [No. 565.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Charles J. Hughes, Jr., John W. Lacey, and R. S. Hall for petitioner.

The Attorney General and the Solicitor General for respondent.

October 17, 1910. Denied.

LON D. MARRS, Petitioner, v. IDELLA EM-RICK. [No. 579.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. I. W. Stephens and George E. Miller for petitioner.

Mr. Charles K. Bell for respondent.

October 17, 1910. Denied.

JACOB GOLD, Petitioner, v. SOUTH SIDE TRUST COMPANY, Trustee, etc. [No. 580.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Lowrey C. Barton, for petitioner.

No appearance for respondent.

October 17, 1910. Denied.

BALTIMORE & OHIO RAILROAD COMPANY, Petitioner, v. EDWARD WINTERS. [No. 595.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. George E. Hamilton and F. A. Durban for petitioner.

No appearance for respondent.

October 17, 1910. Denied.

ROSARIO MINING & MILLING COMPANY, a Corporation, Petitioner, v. CHARLES W. **672]** *CLARK. [No. 632.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. John A. Goodrich for petitioner.

Mr. Walter M. Bickford for respondent.

October 17, 1910. Denied.

MARY D. GRACE, Petitioner, v. CHARLES C. BURLINGHAM et al., Trustees. [No. 699.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Frederie C. Seofield, William J. Grace, and Theodore E. Hancock for petitioner.

Messrs. Charles Stone, Irving L. Ernst, and D. R. Cobb for respondents.

October 17, 1910. Denied.

WILLIAM D'ALTON MANN et al., Petitioners, v. SAMUEL DEMPSTER. [No. 709.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Albert A. Wray for petitioners.

Messrs. Charles O. Maas and James A. Wakefield for respondent.

October 17, 1910. Denied.

HERBERT S. HADLEY et al., Petitioners, v. ARTHUR C. HUIDEKOPER. [No. 533.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Elliott W. Major and John M. Atkinson for petitioners.

Mr. John L. Thomas for respondent.

October 17, 1910. Granted.

ANNIE LAPINA, Petitioner, v. WILLIAM WILLIAMS, Commissioner of Immigration. [No. 581.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. I. Henry Harris for petitioner.

The Attorney General and the Solicitor General for respondent.

October 17, *1910. Granted. **[673]**

THOMAS B. STUART et al., Petitioners, v. UNION PACIFIC RAILROAD COMPANY. [No. 694.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. L. T. Mieheuer, Thomas B. Stewart, and Joseph C. Helm for petitioners.

Messrs. Clayton C. Dorsey, William V. Hodges, Maxwell Evarts, and N. H. Loomis for respondent.

October 17, 1910. Granted.

WALTER J. GREGORY, Petitioner, v. DISTRICT OF COLUMBIA. [No. 583.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. A. S. Worthington for petitioner.

Messrs. Edward H. Thomas and William Henry White for respondent.

October 24, 1910. Denied.

WILLIAM B. KRAFT, Petitioner, v. DISTRICT OF COLUMBIA. [No. 588.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Messrs. Daniel W. Baker and Frank J. Hogan for petitioner.

Messrs. Edward H. Thomas and William Henry White for respondent.

October 24, 1910. Denied.

ABILENE NATIONAL BANK et al., Petitioners, v. JOSEPH N. DOLLEY, Bank Commissioner, et al. [No. 652.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. John Lee Webster, Chester I. Long, B. P. Waggener, and John W. Glead for petitioners.

Mr. F. S. Jackson for respondents.

October 24, 1910. Denied.

UNITED STEAMSHIP COMPANY, Claimant, etc., Petitioner, v. SOCIÉTÉ NOUVELLE d'ARMEMENT. [No. 661].

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Charles Page, Edward J. McCutchen, and Samuel Knight for petitioner.

Mr. William Denman for respondent.

October 24, 1910. Denied.

MARITIME INSURANCE COMPANY, LIMITED, Petitioner, v. M. S. DOLLAR STEAMSHIP COMPANY. [No. 697.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. William Denman for petitioner.

No appearance for respondent.

October 24, 1910. Denied.

HATTIE L. JOHNSTON, Administratrix, etc., et al., Petitioners, v. STATE MUTUAL LIFE INSURANCE COMPANY. [No. 710.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. John G. Capers and W. Boyd Evans for petitioners.

Mr. J. P. K. Bryan for respondent.

October 24, 1910. Denied.

54 L. ed.

*ARTHUR P. HEINZE, Petitioner, v. [675] UNITED STATES. [No. 698.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. John Mason Brown for petitioner.

The Attorney General and Mr. Felix Frankfurter for respondent.

October 24, 1910. Denied.

UNITED STATES, Petitioner v. TIFFANY & COMPANY. [No. 735.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General for petitioner.

Mr. Arthur M. King for respondent.

October 31, 1910. Denied.

CHARLES WEST, Attorney General, et al., Petitioners, v. ATCHISON, TOPEKA, & SANTA FÉ RAILWAY COMPANY [No. 725]; CHARLES WEST, ATTORNEY GENERAL, et al., Petitioners, v. GULF, COLORADO, & SANTA FÉ RAILWAY COMPANY [No. 726]; CHARLES WEST, Attorney General, et al., Petitioners, v. MISSOURI, KANSAS, & TEXAS RAILWAY Co. [No. 727]; CHARLES WEST, Attorney General, et al., Petitioners, v. MIDLAND VALLEY RAILROAD COMPANY [No. 728]; CHARLES WEST, Attorney General, et al., Petitioners v. KANSAS CITY SOUTHERN RAILWAY COMPANY [No. 729]; CHARLES WEST, Attorney General, et al., Petitioners, v. CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY [No. 730]; CHARLES WEST, Attorney General, et al., Petitioners, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY [No. 731].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Frederick N. Jndson and Charles West for petitioners.

Messrs. Robert Dunlap and Frank Hagerman for respondents.

October 31, 1910. Denied.

*JAMES DEWAR et al., Petitioners, v. [676] J. LUDWIG MOWINCKEL. [No. 739.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. J. Parker Kirlin and Charles R. Hickox for petitioners.

No appearance for respondent.

October 31, 1910. Denied.

STUART WOOD, Petitioner, v. BALLARD PRESTON BROWNING et al. [No. 744.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Malcolm Jackson, C. W. Campbell, and William A. Glasgow, Jr., for petitioner.

No appearance for respondent.

November 7, 1910. Denied.

UNION FERRY COMPANY OF NEW YORK AND BROOKLYN, Claimant, etc., Petitioner, v. NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY. [No. 745.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. De Lagnel Berier and James J. Macklin for petitioner.

Mr. William Greenough for respondent.

November 7, 1910. Denied.

MOORE BROTHERS, Petitioners, v. A. DREHER & COMPANY et al. [No. 749.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Edwin C. Brandenburg and F. Walter Brandenburg for petitioners.

Mr. James Trotter for respondents.

November 14, 1910. Denied.

677] *WABASH RAILROAD COMPANY et al., Petitioners, v. JAMES POLLITZ. [No. 719.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Lawrence Greer, Rush Taggart, and F. W. Nicodemus, Jr., for petitioners.

Messrs. Stephen M. Yeaman and J. Aspinwall Hodge for respondent.

November 14, 1910. Denied.

JAMES D. GILL, Collector, etc., Petitioner v. JAMES W. AUSTIN, Executor, etc. [No. 761.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

The Attorney General for petitioner.

Mr. J. L. Thorndike for respondent.

November 14, 1910. Denied.

W. FRANK KINNEY, Collector, etc., Petitioner, v. SAMUEL MORRIS CONANT et al., Executors, etc. [No. 762.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

The Attorney General for petitioner.

Messrs. Walter F. Angel and Mr. Frank H. Swan for respondents.

November 14, 1910. Denied.

JAMES D. GILL, Collector, etc., Petitioner, v. J. SCOTT FARRISII, Administrator. [No. 763.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

The Attorney General for petitioner.

Mr. J. L. Thorndike for respondent.

November 14, 1910. Denied.

*FERDINAND EIDMAN, Collector, etc., [678] Petitioner, v. HENRY B. SHEPARD, Executor, etc. [No. 764.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General for petitioner.

No appearance for respondent.

November 14, 1910. Denied.

FERDINAND EIDMAN, Collector, etc., Petitioner, v. ALBERT LEWISOHN et al., Executors, etc. [No. 765.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General for petitioner.

Mr. Edward Lauterbach for respondent.

November 14, 1910. Denied.

ARCHIE D. SANDERS, Collector, etc., Petitioner, v. LAWRENCE D. RUMSEY et al., Executors, etc. [No. 766.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General for petitioner.

Mr. Ansley Wileox for respondents.

November 14, 1910. Denied.

UNITED STATES, Petitioner, v. PETER W. ROUSS, Executor, etc. [No. 767.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General for petitioner.

Mr. John Jerome Rooney for respondent.

November 14, 1910. Denied.

WILLIAM MCCOACH, Collector, etc., Petitioner, v. ALBERTINE BAMBERGER et al., Executors, etc. [No. 768.] [679]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

The Attorney General for petitioner.

Mr. William Y. C. Anderson for respondents.

November 14, 1910. Denied.

P. A. WILLCOX, Receiver, etc., Petitioner, v. LEILA A. JONES, Administratrix, etc. [No. 747.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Henry E. Davis for petitioner.

Mr. Walter Hazard for respondent.

November 28, 1910. Denied.

E. F. SWIFT et al., Petitioners, v. LESTER M. DAVID. [No. 755.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. William T. S. Curtis for petitioners.

Mr. James A. Kerr for respondent.

November 28, 1910. Denied.

E. M. HERR et al., Receivers, etc., Petitioners, v. TWEEDIE TRADING COMPANY. [No. 769.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. J. Parker Kirlin and Charles R. Hickox for petitioners.

Mr. Frederick M. Brown for respondent.

November 28, 1910. Denied.

ZOE AGNES SEMPLE et al., Executors, etc., Petitioners, v. LEWIS CONSTRUCTION COMPANY. [No. 771.]

Petition for a Writ of Certiorari to the **680** *United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Twyman O. Abbott for petitioners. No appearance for respondent.

November 28, 1910. Denied.

J. M. GUFFEY PETROLEUM COMPANY, Petitioner, v. COASTWISE TRANSPORTATION COMPANY. [Nos. 773 and 774.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for Second Circuit.

Messrs. D. T. Watson, C. C. Burlingham, and James H. Beal for petitioner.

Messrs. Edward E. Blodgett and J. Parker Kirlin for respondent.

November 28, 1910. Denied.

O. P. HALLIGAN, Warden, etc., Petitioner, v. FRANK WAYNE. [No. 778.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

The Attorney General for petitioner.

Mr. Edwin C. Brandenburg for respondent.

November 28, 1910. Denied.

54 L. ed.

HENRY FRIEND et al., Petitioners, v. JAMES TALCOTT. [No. 748.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Jacob Newman, S. O. Levinson, B. V. Becker, and Arthur V. Schaffner for petitioners.

Messrs. Horace Kent Tenney and Roger Sherman for respondent.

November 28, 1910. Granted.

JOHN A. RIPPER, Petitioner, v. UNITED STATES. [No. 714.]

Petition for a Writ of Certiorari *to **[681]** the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Shepard Barclay, Thomas T. Fauntleroy, and P. H. Cullen for petitioner.

The Attorney General and Mr. Assistant Attorney General Harr for respondent.

December 5, 1910. Denied.

AMANDA C. FOSTER, Petitioner, v. LUCIANO F. BOULO, Executrix, etc. [No. 797.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Frederick G. Bromberg and J. Blocker Thornton for petitioner.

Mr. Harry Pillans for respondent.

December 5, 1910. Denied.

FREDERICK A. HYDE et al., Petitioners, v. UNITED STATES. [No. 798.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. A. S. Worthington for petitioners.

The Attorney General for respondent.

December 5, 1910. Granted.

STATE OF NEW JERSEY, Petitioner, v. FRANKLIN TRUST COMPANY et al. [No. 772.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Mr. Arthur Lord for petitioner.

Mr. William H. Dunbar for respondents.

December 12, 1910. Denied.

STANDARD OIL COMPANY OF NEW YORK, Petitioner, v. UNITED STATES. [No. 775.]

Petition for a Writ of Certiorari to the United States Circuit *Court of Ap- **[682]** peals for the Second Circuit.

Messrs. Martin Carey and Daniel J. Kenefick for petitioner.

The Attorney General, Assistant to the Attorney General Kenyon, and Messrs. L. Wallace Dempsey and Barton Corneau for respondent.

December 12, 1910. Denied.

NATIONAL SURETY COMPANY, Petitioner, v. KANSAS CITY HYDRAULIC PRESS BRICK COMPANY. [No. 782.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Frank Hagerman for petitioner.

Mr. James S. Botsford for respondent.

December 12, 1910. Denied.

ROLAND F. QUILLIN, Claimant, etc., Petitioner, v. ATLANTIC MUTUAL INSURANCE COMPANY. [No. 810.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Horace L. Cheyney for petitioner.

Mr. Edwin L. Baylies for respondent.

December 12, 1910. Denied.

UNITED STATES, Plaintiff in Error, v. GEORGE F. LAMSON. [No. 129.]

In Error to the Circuit Court of the United States for the District of Rhode Island.

The Attorney General for plaintiff in error.

683] Messrs. Walter H. Barney, *Thomas Z. Lee and Francis I. McCanna for defendant in error.

October 11, 1910. Dismissed on motion of Mr. Attorney General Wickersham for the plaintiff in error.

UNITED STATES, Plaintiff in Error, v. JAMES DURIE. [No. 292.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

The Attorney General for plaintiff in error.

Mr. Francis S. Laws for defendant in error.

October 11, 1910. Dismissed on motion of Mr. Attorney General Wickersham for the plaintiff in error.

UNITED STATES, Plaintiff in Error, v. JAMES STOTT. [No. 293.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

The Attorney General for plaintiff in error.

Messrs. J. Parker Kirlin and John M. Woolsey, for defendant in error.

October 11, 1910. Dismissed on motion of Mr. Attorney General Wickersham for the plaintiff in error.

UNITED STATES, Plaintiff in Error, v. HUGH E. MONSON. [No. 353.]

In Error to the District Court of the United States for the District of Colorado.

The Attorney General for plaintiff in error.

Mr. Edwin H. Park for defendant in error.

October 11, 1910. Dismissed on motion of Mr. Attorney General Wickersham for the plaintiff in error.

UNITED STATES, Plaintiff in Error, v. LUIGI CAFARELLI. [No. 354.]

In Error to the District Court of the United States for the District of Colorado.

The Attorney General for plaintiff in error.

Mr. Edwin H. Park for defendant in error.

October 11, 1910. *Dismissed on [684] motion of Mr. Attorney General Wickerham for the plaintiff in error.

UNITED STATES, Plaintiff in Error, v. WILLIAM A. DUNCAN. [No. 355.]

In Error to the District Court of the United States for the District of Colorado.

The Attorney General for plaintiff in error.

Mr. Edwin H. Park for defendant in error.

October 11, 1910. Dismissed on motion of Mr. Attorney General Wickersham for the plaintiff in error.

UNITED STATES, Plaintiff in Error, v. HENRY BOECKMAN. [No. 502.]

In Error to the Circuit Court of the United States for the Eastern District of New York.

The Attorney General for plaintiff in error.

No appearance for defendant in error.

October 11, 1910. Dismissed on motion of Mr. Attorney General Wickersham for the plaintiff in error.

JANE M. WHITE et al., Plaintiffs in Error, v. CONNECTICUT GENERAL LIFE INSURANCE COMPANY. [No. 722.]

In Error to the Court of Appeals of the District of Columbia.

No appearance for plaintiffs in error.

Mr. John Ridout for defendant in error.

October 11, 1910. Docketed and dismissed with costs on motion of Mr. John Ridout for the defendant in error.

RAMON VALDES Y COBIAN, Appellant, v. LAWRENCE H. GRAHAME, as Commissioner of the Interior of Porto Rico. [No. 65.] 685] Appeal from the District Court *of the United States for Porto Rico.

Mr. F. Kingsbury Curtis for appellant.
No appearance for appellee.

October 11, 1910. Dismissed with costs, on motion of counsel for the appellant.

MARY E. CARTWRIGHT, Plaintiff in Error, v. I. M. HOLCOMB, Administrator of the Estate of D. J. Spencer, Deceased, et al. [No. 97.]

In Error to the Supreme Court of the State of Oklahoma.

Mr. Marshall Fulton for plaintiff in error.

Mr. Joe T. Robinson for defendants in error.

October 11, 1910. Dismissed with costs, on motion of counsel for the plaintiff in error.

LAUREL OIL & GAS COMPANY, Appellant, v. GALBREATH OIL & GAS COMPANY. [No. 137.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. William T. Hutchins, for appellant.

No appearance for appellee.

October 11, 1910. Dismissed with costs, on motion of counsel for the appellant.

JACKSON LUMBER COMPANY, Appellant, v. CHARLES F. TURNER, Tax Collector of Walton County, Florida, et al. [No. 144.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. William W. Flournoy for appellant.

Mr. S. K. Gillis for appellees.

October 11, 1910. Dismissed with costs, on authority of counsel for the appellant.

JACKSON LUMBER COMPANY, Appellant, v. CHARLES F. TURNER, Tax Collector of 686] Walton *County, Florida, et al. [No. 145.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. William W. Flournoy for appellant.

Mr. S. K. Gillis for appellee.

October 11, 1910. Dismissed with costs, on authority of counsel for the appellant.

PORTLAND RAILWAY, LIGHT, & POWER COMPANY et al., Appellants, v. CITY OF PORTLAND et al. [No. 176.]

Appeal from the Circuit Court of the United States for the District of Oregon.

Mr. Frederiek V. Holman for appellants.

No appearance for appellees.

October 11, 1910. Dismissed with costs, on motion of counsel for the appellants.

54 L. ed.

SOUTHERN STATES LAND & TIMBER COMPANY, Appellant, v. ALBERT W. GILCHRIST, Governor of the State of Florida, et al. [No. 198.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. J. C. Cooper and E. J. L'Engle for appellant.

Mr. William S. Jennings for appellees.

October 11, 1910. Dismissed, each party paying its and their own costs, per stipulation of counsel.

FLORIDA LAND & TIMBER COMPANY, Appellant, v. ALBERT W. GILCHRIST, Governor of the State of Florida, et al. [No. 199.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. J. C. Cooper and E. J. L'Engle for appellant.

Mr. William S. Jennings for appellees.

October 11, 1910. Dismissed, each party paying its and their own costs, per stipulation of counsel.

*CONSOLIDATED LAND COMPANY, Appellant, v. ALBERT W. GILCHRIST, Governor of the State of Florida, et al. [No. 200.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. J. C. Cooper and E. J. L'Engle for appellant.

Mr. William S. Jennings for appellees.

October 11, 1910. Dismissed, each party paying its and their own costs, per stipulation of counsel.

EMPIRE LAND COMPANY, Appellant, v. ALBERT W. GILCHRIST, Governor of the State of Florida, et al. [No. 201.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. J. C. Cooper and E. J. L'Engle for appellant.

Mr. William S. Jennings for appellees.

October 11, 1910. Dismissed, each party paying its and their own costs, per stipulation of counsel.

MODEL LAND COMPANY, Appellant, v. ALBERT W. GILCHRIST, Governor of the State of Florida, et al. [No. 202.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. J. C. Cooper and Alexander St. Clair Abrams for appellant.

Mr. William S. Jennings for appellees.

October 11, 1910. Dismissed, each party paying its and their own costs, per stipulation of counsel.

FLORIDA EAST COAST RAILWAY COMPANY, Appellant, v. ALBERT W. GILCHRIST, Governor of the State of Florida et al. [No. 203.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

688] Messrs. *J. C. Cooper and Alexander St. Clair Abrams for appellant.

Mr. William S. Jennings for appellees.

October 11, 1910. Dismissed, each party paying its own and their own costs, per stipulation of counsel.

ST. BENEDICT'S ABBEY, a Corporation, Plaintiff in Error, v. MARION COUNTY, OREGON, et al. [No. 240.]

In Error to the Supreme Court of the State of Oregon.

Mr. John A. Carson for plaintiff in error.

No appearance for defendants in error.

October 11, 1910. Dismissed with costs, on motion of counsel for the plaintiff in error.

MELVILLE D. HENSEY et al., Appellants, v. CHARLES H. MERILLAT and MASON N. RICHARDSON, Trustees. [No. 724.]

Appeal from the Court of Appeals of the District of Columbia.

No appearance for appellants.

Mr. Mason N. Richardson for appellees.

October 12, 1910. Docketed and dismissed with costs, on motion of Mr. Mason N. Richardson for the appellees.

J. W. GREEN et al., Appellants, v. HARVEY H. ATHERTON, Trustees, etc. [No. 653.]

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Will W. Hammond for appellants.

No appearance for appellees.

October 17, 1910. Dismissed with costs, on motion of counsel for appellants.

DELAWARE RIVER FERRY COMPANY, Owner, etc., Appellant, v. JENNIE AMOS. [No. 665.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

689] Mr. *Charles Heebner for appellant. Mr. Thomas Leeming for appellee.

October 17, 1910. Dismissed per stipulation.

COLORADO & SOUTHERN RAILWAY COMPANY, Plaintiff in Error, v. UNITED STATES. [No. 172.]

In Error to the District Court of the United States for the District of Colorado.

Mr. E. E. Whitted for plaintiff in error.

The Attorney General for defendant in error.

October 24, 1910. Dismissed on authority of counsel for plaintiff in error, on motion of Mr. Attorney General Wickersham for the defendant in error.

JULIO BUSTOS, Plaintiff in Error, v. UNITED STATES. [No. 740.]

In Error to the Supreme Court of the Philippine Islands.

No appearance for plaintiff in error.

The Attorney General for defendant in error.

October 24, 1910. Docketed and dismissed, on motion of Mr. Attorney General Wickersham for the defendant in error.

SAN ANTONIO & ARKANSAS PASS RAILWAY COMPANY, Plaintiff in Error, v. STATE OF TEXAS. [No. 368.]

In Error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

Mr. A. W. Houston for plaintiff in error.

No appearance for defendant in error.

October 25, 1910. Dismissed with costs, on motion of counsel for the plaintiff in error.

D. W. DINSMORE, Appellant, v. STEPHEN B. WOOD and Albert Sartain, Agent of the State of *Ohio. [No. 746.]

[690

Appeal from the District Court of the United States for the Northern District of Illinois.

No appearance for appellant.

Mr. Karl T. Webber for appellees.

October 31, 1910. Docketed and dismissed with costs, on motion of Mr. Karl T. Webber for the appellees.

MATTHEW GAGE and Jane Gage, Appellants, v. RIVERSIDE TRUST COMPANY, LIMITED, et al. [No. 33.]

Appeal from the Circuit Court of the United States for the Southern District of California.

Mr. William B. Mathews for appellants.

Mr. John G. North for appellees.

November 1, 1910. Dismissed with costs, pursuant to the Tenth Rule.

WILLIAM F. COCHRAN, JR., Plaintiff in Error, v. EDWARD D. PRESTON, Inspector of Public Buildings, et al. [No. 40.]
In Error to the Court of Appeals of the State of Maryland.

Mr. Osborne I. Yellott for plaintiff in error.
Messrs. Edgar Allen Poe and Sylvan Hayes Lauchheimer for defendants in error.
November 3, 1910. Dismissed with costs, pursuant to the Tenth Rule.

POWHATAN COAL & COKE COMPANY, Appellant, v. NORFOLK & WESTERN RAILWAY COMPANY. [No. 474.]

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.
Mr. William A. Glasgow, Jr., for appellant.

Messrs. Joseph I. Doran, Theodore W. Reath, John H. Holt, and Lucian H. Cocke for appellee.

November 4, 1910. Dismissed with costs, on motion of counsel for appellant.

691] *BRENARD CORRIGAN et al., Plaintiffs in Error, v. KANSAS CITY et al. [No. 44.]

In Error to the Supreme Court of the State of Missouri.

Mr. O. H. Dean for plaintiffs in error.
No appearance for defendants in error.

November 4, 1910. Dismissed with costs, pursuant to the Tenth Rule.

RUSSELL P. GOODWIN and ROBERT M. FULTON, Plaintiffs in Error, v. PEOPLE'S UNITED STATES BANK. [No. 55.]

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

The Attorney General for plaintiffs in error.

No appearance for defendant in error.

November 7, 1910. Dismissed with costs, on motion of Mr. Attorney General Wickersham for the plaintiffs in error.

EAGLE MINING & IMPROVEMENT COMPANY, Plaintiff in Error, v. ROBERT E. LUND. [No. 52.]

In Error to the Supreme Court of the Territory of New Mexico.

Mr. Samuel Parker for plaintiff in error.
No appearance for defendant in error.

November 7, 1910. Dismissed with costs, pursuant to the Tenth Rule.

54 L. ed.

VIOLA LA BARRE, Plaintiff in Error, v. JOHN F. MARONEY. [No. 57.]

In Error to the Court of Errors and Appeals of the State of New Jersey.

Mr. Robert Carey for plaintiff in error.
Mr. Gilbert Collins for defendant in error.

November 9, 1910. Dismissed with costs, pursuant to the Tenth Rule.

*WILLIAM M. BROWN, Appellant, v. [692] JOHN F. HERR, Marshal of the United States, etc. [No. 126.]

Appeal from the District Court of the United States for the Southern District of Florida.

Messrs. Frederick C. Bryan and George M. Robbins for the appellant.

The Attorney General and the Solicitor General for appellee.

November 14, 1910. Dismissed with costs, on motion of Mr. Frederick C. Bryan for the appellant.

UNITED STATES, Plaintiff in Error, v. PACIFIC MAIL STEAMSHIP COMPANY. [Nos. 294, 295, 296, 297, 298.]

In Error to the District Court of the United States for the Northern District of California.

The Attorney General for plaintiff in error.

Mr. Maxwell Evarts for defendant in error.

November 28, 1910. Dismissed on motion for Mr. Attorney General Wickersham for the plaintiff in error.

SAN JUAN LIGHT & TRANSIT COMPANY, Plaintiff in Error, v. MARIA PLA. [No. 63.]

In Error to the District Court of the United States for Porto Rico.

Messrs. F. Kingsbury Curtis and Hector H. Scoville for plaintiff in error.

Mr. Francis H. Dexter for defendant in error.

November 28, 1910. Dismissed, per stipulation.

KATCHADOR M. TARPENIAN, Appellant, v. WILLIAM WILLIAMS, United States Commissioner of Immigration, etc. [No. 525.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. Everett P. Wheeler for appellant.

The Attorney General for appellee.

November 28, 1910. Dismissed with costs, on motion of *counsel for appellant. [693]

1211

EX PARTE: IN THE MATTER OF WILLIAM W. BIERCE, LIMITED, Petitioner. [No. 4, Original.]

Petition for a Writ of Mandamus.

Messrs. Frederic D. McKenney, Charles H. Aldrich, and Henry W. Prouty for petitioner.

Messrs. Aldis B. Browne and Alexander Britton for respondent.

December 12, 1910. Dismissed on motion of Mr. Frederic D. McKenney for the petitioner.

FIRST NATIONAL BANK OF PITTSBURGH, PENNSYLVANIA, Appellant, v. GUARANTEE TITLE & TRUST COMPANY, Trustee, etc. [No. 524.]

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Frederic D. McKenney and William M. Hall for appellant.

Mr. W. A. Way for appellee.

December 12, 1910. Dismissed with costs, per stipulation, and on motion of Mr. Frederic D. McKenney for the appellant.

FIRST NATIONAL BANK OF RICHMOND, VIRGINIA et al., Plaintiffs in Error, v. WILLIAM R. TRIGG COMPANY et al. [No. 82.]

In Error to the Supreme Court of Appeals of the State of Virginia.

Messrs. George Bryan and A. W. Patterson for plaintiffs in error.

Messrs. E. Randolph Williams and R. G. Bickford for defendants in error.

June 17, 1910. Dismissed pursuant to the 28th Rule.

694] *THOMAS W. STUBBLEFIELD, Appellant, v. LEE A. STUBBLEFIELD et al. [No. 185.]

Appeal from the Court of Appeals of the District of Columbia.

Messrs. James S. Easby-Smith and Howard Boyd for appellant.

Messrs. Joseph W. Cox and A. E. L. Leckie for appellees.

July 28, 1910. Dismissed pursuant to the 28th Rule.

GEORGE MENGEL, Plaintiff in Error, v. BLANCHE MENGEL et al. [No. 676.]

In Error to the Supreme Court of the State of Iowa.

No counsel for plaintiff in error.

Messrs. Andrew Wilson and Noel W. Barksdale for defendants in error.

August 19, 1910. Docketed and dismissed with costs

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error, v. STATE OF NORTH DAKOTA EX REL. T. F. McCUE, Attorney General. [No. 554.]; MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, Plaintiff in Error, v. STATE OF NORTH DAKOTA EX REL. T. F. McCUE, Attorney General. [No. 555.]

Appeal—judgment—affirming without prejudice.

In Error to the Supreme Court of the State of North Dakota to review a decree enjoining a carrier from further violation of a law fixing rates for the carriage of coal within the state.

See same case below (N. D.) 120 N. W. 874.

Mr. Charles W. Bunn for plaintiff in error.

Messrs. Andrew W. Miller, Guy C. H. Corliss and T. F. McCue for defendant in error.

March 14, 1910. Per Curiam. Affirmed without prejudice.

FRED H. WASKEY et al., Petitioners, v. JOSEPH HAMMER et al. [No. 519.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Joseph C. Campbell, W. H. Metson, Charles F. Consaul, George F. Pollock, James C. Hooe, and Charles C. Heltman for petitioners.

No appearance for respondents.

October 18, 1909. Granted.

CUBA RAILROAD COMPANY, Petitioner, v. WALTER E. CROSBY. [No. 585.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Howard Mansfield for petitioner.

Mr. Edwin L. Kalish for respondent.

October 18, 1909. Granted.

JOHN FLANNELLY and MARY ELLEN FLANNELLY, Petitioners, v. DELAWARE & HUDSON COMPANY. [No. 605.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Frank W. Hackett for petitioners.

Mr. James H. Torrey for respondent.

October 18, 1909. Granted.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Petitioner, v. J. WILLIAM McCUE et al., Infants, etc. [No. 615.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. William H. White and William H. White, Jr., for petitioner.

Mr. Daniel Harmon for respondents.

October 18, 1909. Granted.

FOURTH STREET NATIONAL BANK, Petitioner, v. A. MERRITT TAYLOR et al., Trustees, etc. [No. 629.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, — L.R.A. (N.S.) —, 96 C. C. A. 629, 172 Fed. 177.

Mr. Samuel Dickson for petitioner.

No appearance for respondents.

October 18, 1909. Granted.

BELT RAILWAY COMPANY OF CHICAGO, Petitioner, v. UNITED STATES. [No. 632.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. William J. Henley and William L. Reed for petitioner.

The Attorney General and the Solicitor General for respondent.

October 18, 1909. Granted.

CHICAGO, BURLINGTON, & QUINCY RAILWAY COMPANY, Petitioner, v. UNITED STATES. [No. 602.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Charles J. Greene and Ralph W. Breckenridge for petitioner.

The Attorney General and the Solicitor General for respondent.

November 1, 1909. Granted, and cause advanced to be heard with No. 277 as one case.

JOHN C. McCLELLAN et al., Petitioners, v. JOHN E. CARLAND, U. S. District Judge, etc. [No. 630.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Melvin Grigsby for petitioners.

No appearance for respondent.

November 1, 1909. Granted.

54 L. ed.

UNITED STATES OF AMERICA, Complainant, v. JOSEPH F. SHIPP et al. [No. 4. Original.]

Motion for leave to file petition for rehearing.

The Attorney General and the Solicitor General for complainant.

Messrs. James J. Lynch, Moses H. Clift, Robert B. Cooke, Judson Harmon, Robert Pritchard, William D. Spears, G. W. Chamlee, J. A. Hood, W. H. Cummings, W. F. Chamlee, T. Pope Shepherd, Lewis Shepherd, Martin A. Fleming for defendants.

November 1, 1909. Motions on behalf of defendants Shipp, Gibson, Williams, Nolan, Padgett, and Mayse for leave to file petitions for rehearing herein are severally denied, and said defendants are ruled to appear before the court for judgment on Monday, the 15th instant.

ROSEWELL E. MESSINGER, Petitioner, v. PETER ANDERSON. [No. 648.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Harry E. King, Oliver B. Snyder, and Clayton W. Everett for petitioner.

Rhea P. Cary for respondent.

November 8, 1909. Granted.

PEOPLE OF THE STATE OF NEW YORK EX REL. COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART, Plaintiff in Error, v. FRANK GASS, Register of the County of New York. [No. 187.]

In Error to the Supreme Court of the State of New York.

Mr. Henry B. Closson for plaintiff in error.

Messrs. Edward R. O'Malley and W. S. Jackson for defendant in error.

December 1, 1909. Dismissed, per stipulation.

EX PARTE: IN THE MATTER OF CHARLES R. HEIKE, Petitioner. [No. 15, Original.]

Motion for leave to file a petition for a Writ of Mandamus.

Messrs. John B. Stanchfield and George S. Graham for petitioner.

The Solicitor General for respondents.

March 14, 1910. Granted, and the answer of the District Judge of the United States for the District of Vermont, sitting in the Circuit Court for the Southern District of New York, and of the Circuit Court, to the petition for the writ taken as a return as to a rule entered on the petition. Rule made absolute thereupon, and order granted directing respondents to enter judgment for the United States upon the verdict, with leave to defendant to plead over.

GRENADA LUMBER COMPANY et al., Plaintiffs in Error, v. STATE OF MISSISSIPPI. [No. 493.]

In Error to the Supreme Court of the State of Mississippi.

Messrs. Edward Mayes and C. D. Joslyn for plaintiffs in error.

Messrs. J. B. Stirling and Robert B. Fletcher for defendant in error.

May 2, 1910. Writ of Error as to S. Bernheimer & Sons, P. T. Callicott, Tucker & Gabbert, Banks & Company, Alexander Lumber Company, Bailey & Grenshaw, Grenada Lumber Company, Stiles-Tull Lumber Company, Sessions & Roland, E. W. Pickens, Cohn Brothers, Shaw Hardware & Lumber Company, Knott & Ward, Love
1214

Wagon Company, and Sumner Lumber Company, certain plaintiffs in error herein. Dismissed with costs on motion of counsel for said plaintiffs in error.

PEOPLE OF THE STATE OF NEW YORK, Complainants, v. STATE OF NEW JERSEY et al. [No. 6, Original.]

Petition of intervention herein by the United States.

Mr. Maurice B. Dean for complainants.

Mr. Chandler W. Riker for respondents.

The Solicitor General, for intervener.

May 16, 1910. Dismissed without prejudice, per stipulation, on motion of Mr. Solicitor General Bowers in that behalf.

APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1909.

ORDER.

There having been an Associate Justice of this court appointed since the commencement of this term,

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, *viz.*:

For the First Circuit, Oliver Wendell Holmes, Associate Justice.

For the Second Circuit, Horace H. Lurton, Associate Justice.

For the Third Circuit, William H. Moody, Associate Justice.

For the Fourth Circuit, Melville W. Fuller, Chief Justice.

For the Fifth Circuit, Edward D. White, Associate Justice.

For the Sixth Circuit, John M. Harlan, Associate Justice.

For the Seventh Circuit, William R. Day, Associate Justice.

For the Eighth Circuit, David J. Brewer, Associate Justice.

For the Ninth Circuit, Joseph McKenna, Associate Justice.

January 10, 1910.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1909.

ORDER.

It is ordered by the court that § 7 of rule 24 be, and the same is hereby, amended so as to read as follows:

"For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, 15 cents per folio; but when the necessary printed copies of the record, as printed for the use of the lower court, shall be furnished, the fee for supervising shall be 5 cents per folio.

"For every printed copy of any opinion of the court or any justice thereof, certified under seal, \$2."

January 10, 1910.

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1909.

ORDER.

The reporter having represented that, owing to the number of decisions at the present term, it would be impracticable to put the reports in one volume, it is therefore now here ordered that he publish an additional volume in this year, pursuant to § 681 of the Revised Statutes.

April 4, 1910.

APPENDIX IV.

Supreme Court of the United States.

OCTOBER TERM, 1909.

ORDER.

It is ordered by the court that the bond presented by the marshal for the performance of his duties be filed and recorded.

April 15, 1910.

APPENDIX V.

Supreme Court of the United States.

OCTOBER TERM, 1909.

ORDER.

In pursuance of § 29 of the act of Congress approved August 5, 1909,

It is now here ordered by this court that the following table of fees to be charged in the United States court of customs appeals be, and the same is hereby, adopted and approved, *viz.*:

The fees of the clerk of the court shall be \$6 in each case. No fee shall be exacted in cases on appeal to other Federal courts and transferred to this court for final deter-

APPENDIX.

mination. There shall be paid for each certificate of admission of an attorney to practice, \$1, and for making or copying any record or other paper, and certifying the same, 15 cents per folio of one hundred words. An amount sufficient to cover the cost of printing the record shall be deposited with the clerk on his demand, provided that when an appeal is taken by the United States, no payment of fees shall be required. In all other cases, fees shall be paid in advance.

It is further ordered that the fees and costs to be allowed to the marshal shall be, and hereby are, fixed the same as those allowed to the marshal of the Supreme Court of the United States.

May 31, 1910.

APPENDIX VI.

Supreme Court of the United States.

OCTOBER TERM, 1909.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided, and all the other business of the term not disposed of, be, and the same are hereby, continued until the next term.

May 31, 1910.

APPENDIX VII.

Supreme Court of the United States.

OCTOBER TERM, 1909.

IN MEMORIAM RUFUS WHEELER PECKHAM.

The Bar of the Supreme Court of the United States and the officers of the court met in the court room in the Capitol at 12 o'clock, noon, Saturday, December 18, 1909.

On motion of Mr. Lloyd W. Bowers, Mr. Alton B. Parker was elected Chairman, and Mr. James H. McKenney was elected Secretary.

On taking the chair, Mr. Parker said:

Gentlemen of the Bar:

We are here to-day to commemorate a public career embodying the highest development of our democratic institutions, as manifested in our judicial system, and, at the same time, to recall a man sturdy, independent, kindly, modest, well-poised, and many-sided.

The devotion of Rufus Wheeler Peckham to the law was akin to his heritage of

life itself. He came from an ancestry distinctly legal. There have been families whose members have illustrated, in one generation after another, the best human qualities, but our history does not reveal another in which the public career of a son has touched that of a father at more, if so many, points.

Each began practice in the same city, and became, in his turn, the district attorney. Both early became genuinely attached to the ideas and policies of the same political party, and pursued those patriotic activities distinctive of the good citizen. They came to the Bench of the Supreme Court from the same judicial district, and exercised, with equal acceptance, authority over the same courts.

It was fitting and inevitable that, in due time, the son should follow the father into the court of appeals of the state of New York, there to adorn the highest state judiciary with the same ability, prudence, and fearlessness. There he was, in the year 1895, faithfully and ably discharging his duty, enjoying the well-earned plaudits of the Bench, the Bar, and the public, when President Cleveland nominated him to the Supreme Court of the United States.

The President was not only familiar with his judicial work, but, as they were close personal friends, he also knew that he was possessed of every other gift essential for worthy membership in that great court.

His personality was engaging and kindly. His attachment for old friends warm and tenacious. His hatred of fraud and deceit was so deep-seated, and his vigilance in its detection so untiring, that he who, in the words of Lord Blackburn, so palters in a double sense as to "lie like truth," could not thereby escape the consequences of his deceit.

He loved justice with all his heart, and his highest, indeed his only, ambition, was to devote his life to its administration. Therefore he welcomed the opportunity, which his modesty and dignity prevented him from seeking, of service to all the people of the United States in their court of last resort.

And so, in a process of evolution as orderly—I had almost said, as any of the processes of nature—Rufus W. Peckham came to be a constituent of the tribunal which occupies this modest court room. And what a tribunal!

It is at once the eminence and the base of the most imposing, the most beneficent, the most firmly planted of the governments the world has ever known.

In the trinity of government created by the fundamental compact, the powers are indeed three in one and one in three; but the untrammelled, independent exercise of each, within its sphere, is indispensable to the perfect strength of the whole. Thus blended, they yield a light to enlighten the whole world of human society. In lighting this lamp, the fathers realized that the light could not endure if the cruse did not contain the essential oil; the power of judging, separate and apart from that of enacting and executing the laws.

Hence this tribunal was invested with, and has fearlessly asserted, though always with the extreme of deliberation and delicacy, the authority to define and immovably fix the boundary established by the Constitution, beyond which its co-ordinate factors cannot move.

The founders seem to have assumed—and as we now know correctly—that around such a body, composed of men distinguished among their fellows by wisdom, firmness, integrity, and patriotism, there would be an atmosphere of uprightness, fidelity, and patriotic devotion which would furnish its own security against excesses.

De Tocqueville said in 1835: "The Supreme Court is placed at the head of all known tribunals, both by the nature of its rights and the class of justiciable parties which it controls. The peace, the prosperity, and the very existence of the Union, are placed in the hands of seven judges. Without their active co-operation the Constitution would be a dead letter; the Executive appeals to them for protection against the encroachment of the legislative power; the legislature demands their protection against the designs of the Executive; they defend the Union against the disobedience of the states; the states, from the exaggerated claims of the Union; the public interests against the interests of private citizens; and the conservative spirit of order against the innovations of an excited democracy."

The responsibility of the court is not overmeasured by De Tocqueville. Indeed, a large addition thereto was made by the 14th Amendment.

In its beginning, statesmen and students of history gravely considered whether a government could live with such power lodged in the court; but after and amid the vicissitudes of a century and nearly one quarter, involving bitter strife in the domain of politics, heated and even angry controversies in the legislative halls, quarrels between the legislature and the Executive, and a contest of arms evoking a destruction of lives and material treasure appalling to the imagination, its light burns with a brighter glow and a wider radiance of hope and assurance among mankind.

Through it all this court has preserved its serenity, its majesty, its influence, its power, and the respect and confidence of all the people.

To the sovereign state it says, "Here is the limit of your territory or your authority;" to the legislative department, state or national, it says, "You have exceeded the limit of your power, and your doing is void;" to the humblest and most destitute of humans it unlocks the prison door closed upon him by a sovereign; to the greatest aggregations of organized wealth and power it says, "Dissolve and disperse," and it is so.

And all this has been accomplished, in the words of the Marquis de Maboïs, "by a power which has no guards, no palaces, no treasures, no armies, but truth and wisdom."

Strictly speaking, however, the court exerts no power, nor does it promulgate rules of law. So far from it, this high court refuses to intervene in any instance except where its faculties are invoked to settle an actual controversy regularly brought before it. Then it exerts no power; it simply ascertains the relevant facts, eliminating the irrelevant, puts them with the pre-existing principles, whether created by statute or of general recognition, into the legal crucible and announces the result.

But its method of working out the result, as attested by the late Justice Field, has enhanced its dignity and increased the affection of the people for it. He said, "Every suitor, however humble, is entitled to and receives the judgment of *every Justice* upon his case. No case is ever referred to any one Justice, or to several of the Justices, to decide and report to the others."

Into this court, the very crown of our judicial system, Judge Peckham entered with his ripe experience, buttressed by a strong mental equipment. As a result he did not have to grope his way, but assumed at once his natural place among equals. As he had adopted for his own the apostolic command: "Whatsoever thy hand finds to do, do it with all thy might," his phenomenal industry was newly devoted to the consideration of the most vital questions, just as it had been given to those which had absorbed him during the whole of his career as a lawyer and a judge.

It was his privilege, although he could not foresee it at the beginning, to be a member of the court during a period when more questions of far-reaching national importance were to be passed upon than during any like period in the history of the court, as it was also to be his pleasure to be associated with Justices whose usefulness to the court and the country has not been surpassed in our history.

One is tempted to take up some of the celebrated cases decided by the court during his period of service, especially those disposing of questions between the several states and the United States; those calling for the ascertainment and the application of settled principles to the novel and unanticipated relations to foreign territory which had become annexed as an inevitable incident to foreign complication; the income tax case; the group of cases known as the Insular Tariff cases; the controversy between two states where, in one of the opinions, the court indicated the broad scope of its duties in these words: "Sitting, as it were, as an international as well as domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand, and we are unwilling in this case to proceed on the mere technical admissions made by the demurrer . . ."; those in which the great writs of right have been discussed;—because they all so conspicuously illustrate the learning, the deferential independence, the proper sense of the trust being discharged, and the exalted sense of obligation, not only to this country, but to all others interested. But the temptation must be put aside.

It is not given to the public, not even to the Bar, to know the extent to which each or any member of the court contributes to its usefulness.

Our judgment is based solely upon the opinions written. But the real work of a court which follows the method of the Supreme Court, of deciding a case before the Chief Justice designates who shall write the opinion, is in the consultation room, behind closed doors. There each labors with a singleness of purpose to produce a correct result.

The opinions of Mr. Justice Peckham have given us, who were his personal friends and admirers, great satisfaction, and while we know not the secrets of the consultation room, our personal knowledge of this wise, just, and fearless man assures us that he met, with unfailing freshness and vigor of mind, the vital questions that came before the court during his term of service, and contributed his full part to their elucidation and settlement.

Therefore are we, in this hour of sorrow, most devoutly and patriotically thankful for the opportunity for service, and its rendition, by that learned jurist, to the Supreme Court and to all the people of these United States.

On motion of Mr. Elihu Root, the Chair appointed a committee on resolutions.

COMMITTEE ON RESOLUTIONS.

Mr. Elihu Root, Chairman; Mr. Philander C. Knox; Mr. Lloyd W. Bowers; Mr. Jacob M. Dickinson; Mr. William A. Maury; Mr. William B. Hornblower; Mr. John G. Johnson; Mr. Nathaniel Wilson; Mr. Simon W. Rosendale; Mr. Bernard Carter; Mr. DeLancey Nicoll; Mr. Frank P. Flint; Mr. Charles E. Patterson; Mr. William F. Mattingly.

Mr. Elihu Root, for the committee, presented the following

RESOLUTIONS.

Resolved, That the Bar of the Supreme Court of the United States deeply deplore the death of the late Rufus W. Peckham, Associate Justice of the Supreme Court, and desire to place upon record an expression of the respect and esteem in which Justice Peckham was held, and of regret for the loss which the court, the Bar, and the country have suffered in his untimely death. For twenty-four years he was an able and successful advocate at the Bar of his native state of New York. For twelve years, by the election of his people, he was a member of the highest court of original jurisdiction and of the court of last resort of that state. For fourteen years he sat upon the Bench of the Supreme Court of the United States. For a full half century he served the cause of justice without fear and without reproach. His learning and strong powers of reasoning preserved the standards of the law. His knowledge of affairs and the breadth and vigor of his sympathies with the life and men of his time saved his judgments from pedantry, and made them effective instruments for the application of the old principles to new conditions. His published opinions constitute a substantial and valuable contribution to the development of American law. The virile and courageous independence of his strong character, its integrity and its purity, created and justified universal confidence in his judicial acts. The influence of his life, and the effect of his work have contributed powerfully to promote that respect for law and for the courts of our country, which underlies all of our institutions.

Resolved, That the Attorney General be asked to present these resolutions to the court, with the request that they be entered upon the records, and that the Chairman of this meeting be directed to send to the family of the late Mr. Justice Peckham a copy of the resolutions, and an expression of our sympathy for them in the loss which they have sustained.

REMARKS OF MR. ELIHU ROOT.

Mr. Chairman:

I shall not repeat the language of these resolutions, for they express my sentiment. I shall not urge their adoption, because I know that they will appeal to the opinion and to the feeling of every member of the Bar who is present. I will but add to them a single word, and that is a word that comes from the knowledge of the man himself,—gained in friendship at the Bar of his own state.

Those of us who knew him in his early days, and who held to him the relation—the peculiar relation—that cannot be duplicated in any other way, which comes from association at the Bar, saw behind the impartial and immobile demeanor of the Judge the warmth, the intense humanity, the strong feeling, the loyalty of friendship, the flaming hatred of sham and pretense, the lovable qualities, the strong, vigorous, human qualities unseen to the world that looked upon the Judge alone, but all of which entered into the making of a great Judge. Those of us who journey to this court will miss not only the bulwark of the law and the certainty of his impartial justice. They will miss his kindly face and the warmth of feeling that diffused itself through those in the court room from the presence of our dear old friend on the Bench.

REMARKS OF MR. WILLIAM A. MAURY.

Mr. Chairman:

I cannot let this occasion pass without giving myself the gratification of saying a few words in support of the motion before the meeting.

It was my privilege, Mr. Chairman, to have an acquaintance of some intimacy with Mr. Justice Peckham, and I may truly say that the more I saw of him the more I admired him as man and a magistrate.

His character was marked by a sturdiness and tenderness which presented an interesting contrast that recalls, at the moment, in a way, the remark once made by William III. on the great Marlborough, that "he had the coolest head and the warmest heart he ever knew."

As might be looked for in such a nature, his mind was vigorous and direct, going straight to the mark without aiming at ornament or effect,—characteristics which distinguished all his deliverances from the Bench.

Mr. Bryce, in his Biographical Sketches, relates of the eminent equity judge, Sir George Jessel, that he had a habit of saying, "I may be wrong, but I never have any doubts." And so it was with him whose memory we are here to honor. His deliverances from the Bench were always convictions and never doubts, it made no odds how much men might be divided upon the particular subject before him. The Gettysburg Electric Railway Case, to be again referred to with more particularity, is an instance, and *Re Young* another; in neither is there a sentence that has not the ring of conviction. This is particularly notable in the second case, which belongs to a class where the principle involved is elusive in the application.

That luminary of the English bench, Sir William Scott, afterward Lord Stowell, thus speaks his mind with reference to this phase of judicial duty, when sitting in the consistory court of London. "It is," says he, "the business of judges to send into the world, not doubts, but decisions; and they must make up their minds on one side or the other, on the balance of the evidence that is before them."

It is interesting to note that this man of Roman mould, without a single art of the politician, was several times raised to the highest judicial stations in his state by the suffrages of his fellow-citizens. He was a born judge, and men recognized nature's hallmark.

It may be said of him as was said of another judicial celebrity: "He has shown us that real merit will make its own way without any little arts or assiduities, and that the only certain method to have a good reputation is to deserve it. Great and good men who dare do right without regard to the strength of opposition, or the clamors of a multitude are not only a blessing to the age in which they live, but to succeeding generations, by their being incentives to a similar behavior to posterity."

His original appointment as judge and the preferment that followed came to him "according to that ancient and honorable rule and way of law preferment mentioned by Fleta, *Nec prece, nec pretio, nec præmio.*"

Justice Peckham was regarded as belonging to the political school of which Mr. Jefferson was the head, but I am able to say that he was no blind follower of that leader. So far from it, I have heard him say that this government could not be carried on at this day upon the theories and views of its powers entertained and applied by Mr. Jefferson. His opinions show that he was content to walk in the pathway of con-

APPENDIX.

stitutional construction that had been blazed by the genius of Marshall. It is but to read his first opinion, which was in the case of *The United States v. Gettysburg Electric Railway*, to which a passing reference has been made, to be convinced of this. The case in question went, perhaps, to the very verge of the Constitution in holding that the Federal power of eminent domain might be exercised for the purposes of a national cemetery. It may be further referred to as characteristic of Justice Peckham that he was sworn in on January the 6th, 1896, and on the 27th of the same month delivered this difficult and delicate opinion. As he was in the beginning, so did he continue to be prompt and businesslike to the end, always keeping up with his work.

There cannot be a doubt that this Judge kept the balance true between the powers of the United States and the powers of the several states.

It is, indeed, natural that it should be so, for when a man goes on the Supreme Bench he drops his extreme views, if he has any, and becomes conservative. Mr. Taney is a good illustration. He was taken redhanded from the fierce strife of the political arena, and made Chief Justice. There was a storm of opposition to him. He was regarded as the chief agency in the removal of the deposits, besides being the close friend and supporter of President Jackson, who, it will be remembered, had thrown down the gauntlet of defiance to the Supreme Court with Marshall at its head, and yet, for all that, it may be doubted whether Marshall ever had a more faithful follower than Taney. What a tribute was there to the genius of the great expounder of the Constitution!

Mr. Justice Peckham bore the honors that had been bestowed on him without a vestige of pretense, which accorded with the Spartan simplicity of his character.

He was true to the country, he was true to his state, he was true to himself, and therefore false to no man.

His strong political opinions were kept completely in the background by his nice sense of judicial propriety; indeed, Mr. Chairman, this country will respect itself by treasuring the memory of this great Judge who laid down the ermine as pure and unstained as when he put it on.

In his case might have been repeated the incident that is related in the Jewish Talmud to have taken place at the funeral of the good King Hezekiah, on whose bier was laid as a mark of honor, a "roll of the law," with the inscription, "This man has fulfilled what is written in this book."

Should our lamented friend, like the aged Samuel, have put the question: "Who is there that has stood before me to whom I have not striven to do equal and exact justice?" the answer would have been like that of the Hebrew people to the royal judge of Israel: "There is no such man."

REMARKS OF MR. THOMAS H. CLARK.

Mr. Chairman:

In the few words I am impelled to offer in memory of Mr. Justice Peckham, prompted as these are by a fireside friendship, I mean, at the risk of an imputation of pedantry, to use suggestions naturally arising in a mood of the fireside. Since his death I have found myself often reflecting upon his character and career along with those of certain of the eminent dead of an elder time and an older civilization. I have had occasion recently to turn the leaves of a number of books that deal intimately with the social and institutional history of the greatest of the ancient republics, and the empire founded on that republic. You will believe me when I say that in volumes like those of Greenidge and Fowler and Dill and Boissier, I was often put in mind of the quite Roman simplicity, directness, and integrity, the untranslatable but deeply significant *virtus* of our dead friend. Every manly quality that commonly approved itself to that iron race was embodied in him. His very voice was Roman; his face, his figure, his bearing, all were Roman. He had the Roman's clear-headedness, his frankness, his courage, his reserve, his sense for order, his love for law. The last commanding genius in Roman letters has left us a memorable narrative concerning a great compatriot of his. Tacitus there describes Agricola as never stooping to win the applause of men by contriving excellence and then exhibiting it; and declares that it would have been

an insult to Agricola's manhood to aver his incorruptible integrity. These words are true of Mr. Justice Peckham. They aptly suggest the impression left by his whole life with its commingled austerity, simplicity, modesty, and purity. The honored Clerk of the Supreme Court, in private conversation, has termed him one of the most picturesque figures that ever sat upon that Bench. He was so; and not the least charm in that quality of picturesqueness was its association in him with manly probity, the love of truth as truth, fidelity to high aims, flowering out of—I dare say it—a singularly beautiful nature.

He was inevitably a lawyer, almost as inevitably a judge. His father had been a lawyer and a judge before him. If one should find, as I confess I do, a significance in the Weissman theory of heredity, these two Peckhams would have to be reckoned as brothers, rather than father and son. They were rivals in their own affections. It was the unquenched sorrow of our own Mr. Justice Peckham's life that the like close ties that came for him were untimely severed; that two beloved sons, who should have come after him, had gone before him.

Essentially a judge though he was, in the whole makeup of him, his interests early led him into other fields of study, reflection, and conduct. The historic creed of the Democratic party, formulated when oracles were not dumb, had its strong appeal for him. Indeed, rightly to conceive it, is, I venture to think, in some sort, an education in caring for one's country. The President who designated him for the post here had, too, his deep intellectual and moral affinities with that creed. To him, as to the Justice, it was neither obsolete nor obsolescent. They could not bring themselves to think that a combination of good men, having for objects the preservation of individual liberty, the conservation of every wholesome activity in lesser political organisms and in the states,—that such an organization deserved to perish or could perish. Surely, if there is anything written plainly in all history, and not simply in our history, those two noble men were right in holding that the strongest vitality in the nation springs from and must persist with vitality in the states as strong.

Mr. Justice Peckham's individual and permanent contribution to our national life will be looked for, of course, in what he put forth in this chamber, sitting on that Bench, not forgetting his share in the work to which his name could not be in anywise publicly affixed. A proper sentiment attaches to the labors of a good judge here. Nothing that the American citizen cherishes as a possession so merits his veneration as the healing law outwardly symbolized by this room. Gouverneur Morris almost persuades us that this court, unique in the world and in the world's annals for the power and responsibility lodged in it, moved silently and unnoted to its majestic place. Shining here, its influence has radiated, constantly and powerfully, over the complex ordering of our lives as a people. We may be sure its future will be greater rather than less great; that the provision of the Constitution that secures unimpaired the obligation of contracts will alone make certain, as Maine foresaw, that with the wide extension of state-intruding activities in the field of economics and politics, this court must more and more serve as a refuge and support for much of what appears to one now as best in our modes of life and in our national aspirations. Going with us, it leads; leading, it holds and preserves. The supremacy of the Constitution and the intimate fashion in which, ramifying through the statutes, it touches and affects every form of activity amongst us, has made us—has it not?—in affairs, a genuine race of talkers, if not of powerful debaters. As a new people, with a none too perfect sense for law, we are all lawyers. Burke has sagaciously said that even a failure in the profession of law stands almost as a sort of qualification for other things. You will take me to be, Mr. Chairman, not invidious of speech, but solicitous merely to illustrate how the Constitution and the Supreme Court, as its interpreter, have transformed the American people, making of them a huge parliament of lawyers, when I remind you that in the Congress there are now more than three hundred and fifty lawyers, nearly seventy in the Senate, more than two hundred and eighty in the House of Representatives.

I shall not assume to appraise Justice Peckham's work on the Bench, as this is shown in more than fifty volumes of the Reports. I am content to say he was a strong, capable, upright, natural judge. What he saw, he saw clearly; what he believed, he believed fearlessly. There was at the same time with him, it seemed to me, at least,

a consummate inwardness of mind, intrepidity ruling there, too. No soul so choice that could have wished in behalf of this tribunal for a choicer soul to be here and labor here. He held steadily aloft the light, not only for those repairing hither for justice, but for all those as well who ponder and brood over our destiny as a people and as a race.

It is no new thing, Mr. Chairman, to say that no new thing can be said about death. There is a Breton legend that on one night of the year, the dead in the great plain of Carnac rise and throng swiftly and noiselessly to the rock chapel standing gloomily there, where Death himself, ascending into the pulpit, discourses. Death's discourses are not preserved. The calm and wise Goethe found himself able to say that he was daily taught more and more that our life is a hell, through which one must struggle as one best can. Matthew Arnold echoed this, and declared, moreover, that—

"We are here as on a darkling plain,
Swept with confused alarms of struggle and flight,
Where ignorant armies clash by night."

My strong admiration and cordial affection for Mr. Justice Peckham make me turn willingly away from the chill of a despondency bodied in language like that. Not, believe me, because I am to pretend to have a knowledge of our mystery when I have no knowledge. There is, though, a better, a truer note, it seems to me; and to get this, we need only to attend once again our Roman preceptor. I would adopt, and adopting, adapt, a sentence or two of the moving sentences of prayer with which Tacitus concludes his fond record. I would say of our dead friend—and may I not venture to hope I may speak for all here?—"If there is any home for the departed, if, as the wise tell us, great souls perish not along with the body, may he rest in peace, *quiescas placide*, and call us away from any weak regret or weaker lament to a sense of his virtues; these can be no subject for either sorrow or sighing. Not with fleeting praise do we seek to adorn his memory, but with an admiration lasting as long as life, and with efforts unceasing to emulate him. All of him that we loved, all that we admired, abides and will abide in our hearts."

REMARKS OF MR. CHARLES E. PATTERSON.

Mr. Chairman:

I come here with no set speech, but I feel impelled to ask the indulgence of this meeting while I make a few remarks.

It was my pleasure and my great honor to know Mr. Justice Peckham in his early manhood, and to be intimate with him during the last thirty years or more of his life. While he was at the Bar I had occasion to meet him as an antagonist. I later had occasion to be associated with him in important litigations, and in this way I think that I came to know him as those knew him who were associated with him on the Bench. They learn to know one another in the consultation room. They learn to know his qualities better than they would have known when seeing him in the court room or meeting him as an adversary. When he was first called to the Bench, there were many of his acquaintances and his admirers who had some fear that the life that he had led as a political advocate, and as having an interest in public affairs, would lead him to deviate from purely judicial conduct; but they need not have feared, for the ambition of his life seemed to have been to get to the Bench of the court of appeals, where his father had preceded him. Probably it is not known to many of you, perhaps to none of you, that in 1880 he might have had the nomination of his party for the Presidency of the United States. In the convention at Cincinnati, Samuel J. Tilden had declined to be a candidate. That convention had conceded to New York the privilege of naming the candidate. His personal friends were in control of the delegation of the state of New York, and they asked him that he take the nomination. He declined. Again, in 1882 (when Grover Cleveland was nominated for Governor of the state of New York), Mr. Peckham's friends were in control of that convention, and they tendered him privately the nomination for the governorship. He felt that the place that he wanted to fill, and that he could fill, was on the Bench.

To lead the life he led required a man of courage. But he dared do everything that became a man, and nothing more. I remember on one occasion when he had the courage to stand up in court in the state of New York, and request the justice presiding at the trial to withdraw from that trial, because of his intimate relations with the parties on one side of the case. His request, of course, was refused. It was not long after that that in an important trial in the state of New York a party accused of crime took occasion to hand up a paper, not making his demands in open court, asking that the decision on questions involved in that case might be regarded as having been prejudged by the presiding judge, and transferred to another court. That request was indignantly refused, and the members of bar who appeared for the defense in that case were adjudged guilty of contempt of court. The senior counsel were subjected to a fine; all to a reprimand, and, if I recollect correctly, the present junior Senator from the state of New York was one of those who escaped with a reprimand.

The request of Mr. Justice Peckham, then Mr. Peckham, in the case I have spoken of, was regarded by many as a piece of audacity. It was not that. He dared to do what the interest of his clients demanded, and he did that duty fearlessly.

It has been said that the wings of human life are plumed with the feathers of death. Yet death does not come to all with the passing away of the body. The works of Mr. Justice Peckham will live. For centuries the impression that he has made upon the jurisprudence of this country will be lasting. When I think of him, I think of those lines of Goldsmith:

"As some tall cliff that lifts its awful form,
Swells from the vale and midway leaves the storm—
Though round its breast the rolling clouds are spread,
Eternal sunshine settles on its head."

The resolutions were adopted, and, on motion of Mr. William A. Maury, the meeting adjourned.

Supreme Court of the United States, Monday, January 10, 1910.

Present: The Chief Justice, Mr. Justice Harlan, Mr. Justice Brewer, Mr. Justice White, Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Day, and Mr. Justice Lurton.

Mr. Attorney General Wickersham addressed the court as follows:

May it please the court, I am requested by the members of the Bar of this court to present for entry upon your records the resolutions recently adopted, expressing their profound sorrow in the death of Mr. Justice Peckham, and their sincere tribute to his high character and eminent service to the country. These resolutions are as follows:

"Resolved, That the Bar of the Supreme Court of the United States deeply deplore the death of Rufus W. Peckham, Associate Justice of the Supreme Court, and desire to place upon record an expression of the respect and esteem in which Justice Peckham was held, and of regret for the loss which the court, the Bar, and the country have suffered in his untimely death.

"For twenty-four years he was an able and successful advocate at the bar of his native state of New York. For twelve years, by the election of his people, he was a member of the highest court of original jurisdiction and of the court of last resort of that state. For fourteen years he sat upon the Bench of the Supreme Court of the United States. For a full half century he served the cause of justice without fear and without reproach. His learning and strong powers of reasoning preserved the standards of the law. His knowledge of affairs and the breadth and vigor of his sympathies with the life and men of his time saved his judgments from pedantry, and made them effective instruments for the application of the old principles to new conditions. His published opinions constitute a substantial and valuable contribution to the development of American law. The virile and courageous independence of his strong character, its integrity and its purity, created and justified universal confidence in his judicial acts. The influence of his life and the effect of his work have contributed powerfully to promote that respect for law and for the courts of our country which underlies all of our institutions.

"Resolved, That the Attorney General be asked to present these resolutions to the

APPENDIX.

court, with the request that they be entered upon the records, and that the chairman of this meeting be directed to send to the family of the late Mr. Justice Peckham a copy of the resolutions and an expression of our sympathy for them in the loss which they have sustained."

These resolutions of the Bar are intended, in some measure, to express not alone the sense of personal bereavement which is so deeply felt by the immediate friends and associates of Mr. Justice Peckham, but a just and fitting estimate of his life and labors as they are known and esteemed by his countrymen.

The extent of the contribution of a single member to the work of this court is as difficult of exact ascertainment as is his influence upon its judgments. Only as he speaks through the published opinions which he is directed to announce can the Bar or the people know the extent or the character of his service. His devotion to the duties of his high place, his persuasive insistence upon the right as it is given him to see it, his painstaking industry, his aid in council, his personal characteristics,—all these are attributes which intimate friends may know, and which may be revealed now and again in the convincing earnestness of some striking opinion, but which have their full, free play only among his colleagues on the Bench.

Looking back with this light upon the services of Rufus Wheeler Peckham, it is not beyond the truth to say that in the period of his service on the Bench no man contributed more than he to the learning and development of the law.

He came of a family of lawyers and judges. His father, his brother, his sons made this profession the work of their lives. Though the span of his own life was little beyond seventy years, more than half of it was devoted to the public administration of the law of his State and his country. Though the period of his service in this court was less than fifteen years, it is perhaps not too much to say that in no other period of our history has the jurisprudence of the country been more profoundly affected by the new conditions and the new problems that have arisen as incident to our national growth and development. It has been largely during these fifteen years that the graver questions involved in the effort of the national government to cope with the great industrial problems arising out of our unexampled commercial expansion have found their way to this court. It has been wholly within these fifteen years that our relations with foreign possessions, and the interpretation of our laws for the government of alien peoples, have been here debated and determined.

In this work Mr. Justice Peckham did his full share. No one can examine, even cursorily, the deliverances of this court during the last decade and a half without being impressed by the tremendous volume of it which came from his hand and brain. In that time he wrote nearly four hundred opinions. They dealt with every aspect of the law. But more striking than the number is the fact that so many of them are to-day, and will ever remain, the leading and familiar cases upon the great questions with which they dealt. No tribute to the life and work of Mr. Justice Peckham could find a higher sanction than the mere citation of his opinions in such cases as *Maxwell v. Dow*, *Hopkins v. United States*, the *Addyston Pipe Case*, the *Trans-Missouri* and the *Joint Traffic Association Cases*, *Montague v. Lowry*, *Lochner v. New York*, *Ex parte Young*,—cases which reveal his great learning and industry.

But we cannot garner up his work as men would bind the harvest of a season. It has enriched the whole field of our national jurisprudence, and for all time the yield will be the better for his labor.

If it please the court, I have the honor to move that the resolutions adopted by the Bar be entered at large upon the records of this court.

The Chief Justice responded:

The resolutions and the remarks by which they are accompanied will be spread upon our records as deserved tributes to the memory of the brother who has so recently been taken from us. Whatsoever things are true and honest, just, and of good report, these are the things which the record of the life of Mr. Justice Peckham displays. Its most striking characteristic is the single-mindedness of his devotion to judicial duty. It may be said of him, as it was of Mr. Justice Story, that "in all his commerce with the world and in his intercourse with the circle of his friends, the predominance of his judicial character was manifest." He discharged his judicial duties not as upon compulsion, but

because he loved them. It ran in his blood, and he profoundly believed that justice was "the great interest of man on earth."

"As a man thinketh, so is he;" and as this man was, so was his style,—simple, forcible, and direct. He aimed to do substantial justice in an intelligible way, dealing in no strained inferences, nor muddling definite results by qualifying his qualifications.

His opinions, from the first, in volume 160 of our Reports, to the last, in volume 214, are all lucid expositions of the matter in hand, and many of them of peculiar gravity and importance in the establishment of governing principles. He sought to avoid the curse denounced on the removal of landmarks while meriting the blessing accorded to their wise re-enforcement. His death is a serious loss to the cause of jurisprudence, to this court, and to his country. I cannot trust myself to speak of the loss to his brethren of this lovable and beloved comrade. We cannot but be exceeding sorrowful as we recall the touch of the vanished hand and the sound of the voice that is still. "Let us alone," sang the Lotos Eaters. "What is it that will last?" We find the answer in the example of this distinguished, faithful, and thorough life, which, "though the whole world turn to coal, then chiefly lives."

Mr. Elihu Root presented to the court the resolutions adopted at a meeting of the members of the Bar of the state of New York, in memory of Mr. Justice Peckham, and it was ordered that they be placed on file.

RESOLUTIONS

ADOPTED BY THE

NEW YORK STATE BAR ASSOCIATION.

To the New York State Bar Association:

The undersigned, appointed as committee to present resolutions to this Association with regard to the late Mr. Justice Peckham, hereby present the accompanying Resolutions.

Dated December 9, 1909.

William B. Hornblower,
Chairman.

Joseph H. Choate,
Alton B. Parker,
Louis Marshall,
Francis Lynde Stetson,
John G. Milburn,

Committee.

Resolutions adopted by the New York State Bar Association at a special meeting held in the city of Albany on the evening of Thursday, December 9, 1909:

Resolved, That the New York State Bar Association desires to express its profound sense of the great loss which the Judiciary, the Bar, and the public at large have suffered by the death of Mr. Justice Rufus W. Peckham, Associate Justice of the Supreme Court of the United States. The members of the Bar of this, his native state, feel that loss in a peculiar and special degree, and we adopt the following memorial, to be spread upon our minutes.

Rufus W. Peckham was born in the city of Albany in 1838. He was the son of one of our most distinguished jurists, who rounded out his career by serving upon the Bench of the highest court of the state, and whose life was cut short, while still in the full vigor of his powers, by a terrible catastrophe at sea. Bearing his father's name and strongly resembling him in his physical, mental, and moral characteristics, Rufus W. Peckham had an hereditary claim to the regard and esteem of his fellow citizens of this state. His is one of the rare instances in which the honors of the father have descended naturally to the son. He and his elder brother, Wheeler H. Peckham, became eminent members of the profession, and achieved for themselves a distinction worthy of that which had been bequeathed to them by their father.

Rufus W. Peckham practised law for many years in the city of Albany with ability and success. He was a man of vigorous and forceful character; frank and out-spoken and courageous in every relation of life. In the practice of his profession he won the

APPENDIX.

respect and admiration of his brethren of the Bar, the members of the Bench, and the public at large.

He was elected a justice of the supreme court of this state more than twenty-five years ago, and until his death he remained continuously in judicial office, so that to very few of the members of this Association was he known otherwise than as a judge, and for most of us it is difficult for us to think of him except as we remember him in the performance of his judicial functions, or as we met him personally and socially, from time to time, during his judicial career.

Elected to the supreme court of this state in 1883; transferred to the court of appeals of the state January 1, 1887, and to the Supreme Court of the United States in January, 1896, and dying in the full vigor of his ripe manhood in 1909, while still serving on the Bench, he has been to the members of the Bar of this state for a quarter of a century our ideal of judicial character and conduct. His intellectual perceptions were keen and penetrating; his powers of analysis of intricate questions of fact and law were unexcelled; his terse, forcible, and vigorous expressions of his conclusions, as embodied in the opinions which he from time to time delivered in the various courts of which he was a member, will always remain to illuminate the path of searchers for the doctrines of our jurisprudence, as set forth in judicial decisions. His absolute and unyielding impartiality and integrity were such marked characteristics that it was impossible for any one to so much as suspect that he was conscious of either fear or favoritism, no matter who were engaged in a cause before him, or what might be the interests involved. It was impossible for Rufus W. Peckham to think except in a straight line from premise to conclusion, according to the logic and reason of the case, as he saw them. All must agree that the conclusions reached by Judge Peckham were the honest conclusions of an open-minded judge, and they were expressed in clear and convincing language which bespoke the sincerity and the ability of the man.

Not only was Judge Peckham our ideal of a judge in ability, character, and conduct, but he had the judicial manner upon the Bench; always courteous yet dignified; his occasional colloquies with counsel arguing before the court were always with the purpose of acquiring information or obtaining the views of counsel, and not with the purpose of indulging in controversy. His keen and incisive questions to counsel left no doubt of his desire to arrive at the very truth of the case, and left no sting behind.

And now, what shall we say of Judge Peckham as a man and as a friend? As we have already said, there are few of us who can remember him in the days before he became a judge, in the freedom from restraint and reserve of ordinary professional life. But, to those of us who knew him only as a judge, when he was surrounded to some extent by that undefined, but always-felt distinction between the Bench and the Bar, Judge Peckham preserved, even after he became a Justice of the Supreme Court of the United States, a geniality and a kindness which, in social intercourse, made him peculiarly attractive. We would not call him affable, for that implies a certain amount of condescension, and there was nothing of condescension about Rufus Peckham. He never seemed conscious of his honors, nor did he feel it necessary to maintain an attitude of judicial reserve, but to his dying day he was the same hearty, outspoken, warm-hearted Rufus Peckham that some of us knew in our earlier days.

It is hard for us to realize that the life and the judicial career of this eminent son of New York state are at an end. His sturdy intellectual honesty, his absolute and exclusive devotion to judicial duty, and his sterling common sense, made him an invaluable member of the great tribunal which he so fitly graced. The influence which he has exerted upon the jurisprudence of this state and of this country cannot be overestimated. As has been frequently remarked, it is one of the advantages which the judicial function possesses over that of the advocates of the Bar, that while the fame of the latter vanishes, with rare exceptions, with the brain and the voice which gave it life, the fame of the former is written imperishably in the volumes of official reports, which will be handed down from generation to generation. The name and the fame of Rufus W. Peckham will last as long as the decisions of the court of appeals of this state and of the Supreme Court of the United States are quoted as authority.

This Association extends to the bereaved widow and family our deepest and profound sympathy, and begs to assure them that the members of the Bar of this state are fellow mourners with them in their great loss.

APPENDIX VIII.

Supreme Court of the United States.

OCTOBER TERM, 1909.

IN MEMORIAM DAVID JOSIAH BREWER.

The Bar of the Supreme Court of the United States and the officers of the court met in the court room in the Capitol at 12 o'clock, noon, Saturday, April 30, 1910.

On motion of Mr. William F. Mattingly, Mr. Charles Curtis was called to the chair, and Mr. James H. McKenney elected Secretary.

On taking the chair, Mr. Curtis said:

Gentlemen of the Bar:

We are met to-day to do honor to the memory of a distinguished jurist sent forth by the state of Kansas. Justice Brewer was an American and a son of an American in every characteristic and in every attribute. His demise was not only a loss to Kansas, but a loss to the country as well. His memory is respected accordingly.

His administration upon the Bench of the Supreme Court of the United States will go down in history as that of a just judge, a broad-minded statesman, a great lawyer, and a man able to take his stand on the highest pinnacle of modern thought, seeking not technicalities, but going to the very foundation of the legal structure of whose corner stone he was an integral part.

Justice Brewer is mourned, therefore, not simply as a man who embodied within himself all the lovable traits which men admire; he is also mourned because in his death there passed away one who made his impress upon humanity; one whose aim in life was for the betterment of the country, the people, and the government.

Justice Brewer has gone to his great reward, but he will continue to live in the memory and in the hearts of those who knew him.

In his passing this court lost one of its greatest members, the Bar one of its ablest lawyers, the country a broad-minded Christian man.

The Chair appointed the following committee on resolutions:

COMMITTEE ON RESOLUTIONS.

Mr. William E. Borah, Chairman; Mr. William Warner; Mr. J. P. Dolliver; Mr. G. D. Clark; Mr. R. Wayne Parker; Mr. Henry M. Teller; Mr. George R. Peck; Mr. John S. Runnells; Mr. Charles Blood Smith; Mr. Charles W. Bunn; Mr. Gardiner Mathrop; Mr. R. Ross Perry; Mr. Henry E. Davis; Mr. A. S. Worthington; Mr. A. B. Browne; Mr. J. J. Darlington.

Mr. William E. Borah, for the committee, reported the following resolutions:

RESOLUTIONS.

Resolved, That the Bar of the Supreme Court of the United States deeply deplore the death of the late David J. Brewer, Associate Justice of the Supreme Court, and desire to place upon record an expression of the respect and esteem in which Justice Brewer was held, and of regret for the loss which the court, the Bar, and the country have suffered in his untimely death.

His judicial career was one of exceptional length and of marked distinction and success. Elected judge of the district court of the first judicial district of the state of Kansas in 1864; three times elected a justice of the supreme court of the state of Kansas; appointed in 1884 judge of the circuit court of the United States for the eighth circuit; appointed a Justice of the Supreme Court of the United States in December, 1889, it will be observed that for nearly fifty years he discharged the high and sacred duties of a judge. In this long service, in the vast number of opinions which he

wrote, the infinite variety of legal principles considered and treated, the learning and wisdom displayed, the consecration and fidelity ever and always evidenced, will be found his only fitting eulogy. His remarkable grasp of the underlying principles upon which our whole structure of government rests, his unswerving fidelity to the fixed rules of order and stability so essential and so often sorely tested, his strong, positive, upright, fearless character, his power of sustained intellectual effort, place him easily among the great judges of his day and time. No one ever doubted his purity of life, his integrity of purpose, and all who read and consider his legal opinions pay homage to his profound intellect. Those who knew him are quick to testify to his tender and considerate nature, and those who must be content to find his character in his opinions scattered through many state, circuit, and Supreme Court decisions will never doubt his probity or his power as a jurist.

Resolved, That the Attorney General be asked to present these resolutions to the court, with the request that they be entered upon the records, and that the Chairman of this meeting be directed to send to the family of the late Justice Brewer a copy of the resolutions, and an expression of our sympathy for them in the loss which they have sustained.

REMARKS OF MR. WILLIAM E. BORAH.

Mr. Chairman:

The resolutions, though couched in earnest and sincere language, seem but inadequately to express the sorrow which we all feel in the unexpected death of Justice Brewer. In fact, anything we may write and spread upon the records can denote in but a feeble way the bereavement of friends or the loss to the country at large.

The truest measure of his work, his rarest tribute, are to be found in the opinions which he wrote and the services he rendered as a member of this great tribunal. He was commensurate in dignity, in character, and in intellect with the tribunal upon which he sat. Its traditions, its influence, and its power found appropriate expression in the masterful intellect and commanding personality of the great jurist. His mastery of judicial expression, his wide-reaching and comprehensive knowledge of the law, his searching insight into the genius of our institutions, moreover, that keen sense of justice, the highest faculty of human endowment, which seems sometimes in the perplexing questions which confront a court to seize upon and incorporate principles found in no code and written in no book, rendered him not only serviceable and efficient, but distinctly an ornament to the court where have presided the present venerable Chief Justice and Chase and Waite and Taney and Marshall.

But he was not alone a great judge. Guarding well and jealously the proprieties which hedge about a court, always mindful that justice associated with partisanship or prejudice is the humiliation of a proud people, nevertheless his sympathetic nature, his many-sided mind, his militant spirit led him often into the field of general discussion. He abhorred hypocrisy and all species of the demagogue. He demanded that men be intellectually sincere as well as morally honest. He loved our institutions, and held them sacred to the preservation of human happiness and human liberty. He looked upon all tendencies and customs which would seem to undermine them as the crusader would watch the crescent's baleful shadow fall athwart his altar. He was upon the hopeful, progressive side of every question. He did not believe that the human race had ceased its march. He felt and thought he knew that our form of government, our institutions, were sufficient as framed to admit of mankind's highest development, and to encompass and preserve the intellectual wealth within the wide reach of the highest progress. He pleaded always for a conscientious, free, unburdened citizenship, and at the same time yielded nothing in his advocacy of holding inviolate the guaranties of property. He accepted in full faith the professed tenets and teachings of the Republic, and smote with merciless force the vicious principles and practices which constantly burden a peaceful people with the display and ostentation of perpetual war. Strong, earnest, progressive, he moved among his distinguished associates and countless friends to the very last, as indeed he was, an earnest, active, ideal citizen. While retiring for the slumbers of the night, wholly unconscious of the summons at hand, he died as he had lived, in expectation with to-morrow's dawn of eagerly and faithfully

discharging the duties and obligations imposed by his high station. Lawyer, jurist, orator, publicist, humanitarian, an exemplary Christian citizen, Justice David J. Brewer was one of those stately and sublime figures which seem as finished and complete as the statue which moves into view from under the spell of the inspired chisel. Perhaps if we could know the guiding, controlling principle around which this beautiful life grew and ripened into strength, symmetry, and wisdom it would be found expressed in the words of Carlyle: "There is justice here below, and even at bottom there is nothing else but justice. Forget that and thou hast forgotten all."

REMARKS OF MR. HENRY E. DAVIS.

Mr. Chairman:

To me, a native and lifelong resident of this city, this occasion peculiarly appeals. I well remember, when a mere boy, my first entrance into this room, when I was bidden to look upon the figure who sat where you now sit, the venerable Taney, then within a brief year of his summons hence. At that time the Bar of the Supreme Court was comparatively small in number, and its business was performed very largely by the local members of the Bar. Visitations of nonresident counsel here were then, by comparison, few, and there existed at that time between the Bench and our local Bar a fellowship, to the adequate description of which no words of mine are equal. At that time this great court, so far as it had been called upon to do constructive work at all, had engaged itself with the questions arising out of the Constitution, and with a determination of the principles which that great instrument embodies and speaks. It was not until comparatively some years later that the constructive character of the work of the court changed, taking on merely a new phase.

Scarce twenty years after I looked upon the great figure of Taney it was my privilege to be enrolled in the membership of this Bar, and during those intervening twenty years a change had come over conditions here which those of us belonging here could not fail to notice. As respects the Bar, its numbers had been greatly swelled. As respects the number of practising lawyers, the local Bar began to give place to the Bar at large. So, when I made my bow to this court, it was the Bar of the country, rather than that of the District of Columbia, which was most in evidence before it. By that time there had been built up by this court a great jurisprudence, growing out of the questions brought on by the Civil War, notable among them the great land law, which may be said to have been made a distinct jurisprudence by those two giants of this Bench, Justice Field and Justice Miller. But there still remained the old flavor of companionship between the Bench and our local Bar. At that time it was still our privilege to meet the members of the Bench in social converse, and, indeed, to attend their houses in turn when they themselves were our hosts.

Since that day something more than a quarter of a century has passed, and this court is now engaged in still another great line of constructive work, growing out of the enormous spread of commercial relations, so that to-day, if I may so state without apparent necessity for qualification, a great part of the work of this body is engaged in construing, preserving, expanding, and applying a single phrase which came from the lips of the great Marshall respecting the power of Congress to regulate commerce. Other incidents will occur to all without my naming them.

As respects the relations between Bench and Bar, it cannot fail to have been noticed by those who belong here locally that a change has come,—a change which, without rendering us less friendly and less social in intercourse, has yet limited the relations between Bench and Bar to an extent that some of us cannot think of without regret.

I mention these matters because the span of Justice Brewer's professional and judicial life covers the entire period of which I speak. He was appointed to the Bench in Kansas a year after Taney went to his rest. He wore the ermine until it may be said that he was "called home" in it. He touched all these points and periods in the history of the court. He touched all these matters in respect of jurisdiction and juris-

APPENDIX.

prudence to which I have imperfectly alluded, and now that he has laid his burden down I think it fair to say—I think it proper to say—that he exemplified in his life the career of one whose contact with the Federal law was more complete than that of any other man who ever sat upon this Bench. That side of him has already been adequately spoken of. It remains for me only to speak the thought that was in my mind when I arose.

As respects the relations between this great court and its members, on the one side, and the members of the Bar, on the other, I have come to look upon Justice Brewer as both a link and a survival. I love to think of him, not as the great jurist that he was, not as the great statesman that he was, not as the great exponent of the civic virtues that he was, but I love to look upon him as he always was to us,—as our fellow townsman, our neighbor, and our friend. Whatever may have been his impression upon the country at large, that speaks for itself. But it belongs to us, who live here in this beautiful city, to have enjoyed a side of Justice Brewer's character, the near appreciation of which was our proud privilege and will be our pleasant memorial of him. Brewer the judge, Brewer the statesman, Brewer the great civic apostle, belongs to the country at large; but Brewer the man, Brewer the neighbor, Brewer the friend, has been our peculiar possession.

In that character I pay him my humble tribute.

REMARKS OF MR. FRANK W. HACKETT.

Mr. Chairman:

The tribute that the Bar to-day is paying to the memory of Mr. Justice Brewer finds a warm response in the hearts of the American people. It is hefitting, it seems to me, that emphasis be laid upon the side of Mr. Justice Brewer's character that shows him to have been something more than a great jurist. He was really a statesman. What he accomplished upon the Bench and upon the public platform has been pictured in felicitous terms by the distinguished Senator who has just spoken. To a remarkable degree the late Justice possessed the rare gift of judicial foresight. He measured with surprising accuracy the extent to which a decision upon a constitutional question was likely to shape for future time our institutions. His heart was quickened with a desire to do all that he might in his day and generation to strengthen the foundations of the Republic, and to assure to posterity the blessings of a stable and benign government.

In this region of constitutional interpretation Mr. Justice Brewer exhibited a firm grasp and a perfect sense of the gravity of the precise question upon which he was called upon to render a decision. He considered himself a public servant in more senses than one. When mingling with his fellow men, he laid hold of an appropriate occasion to utter words of wise counsel upon some of the larger public issues of the day. Always the judge, he was ever the patriot. In this highly important sphere of service to the people, he has left behind a record worthy of most grateful remembrance. It is pleasant for us to recall the intellectual pre-eminence of that New England stock from which he sprang, and to note with what credit his lifework compares with that of his near relative, an ornament of this Bench, the late Mr. Justice Field.

No need is there of word of mine to testify to the ability and to the thoroughness with which Mr. Justice Brewer discharged his duty as a member of this court. A chief purpose of our meeting to-day is to give expression to the personal admiration and affection that we of the Bar feel for our friend who is no longer with us. A rule that governs us with a rigid hand forbids any special terms of intimacy between lawyers and the occupants of the Bench. Much as we esteem and like an individual judge, glad as we would be to frequent his society, we instinctively recognize the code which prescribes that the practitioner may associate only casually with the justice. So it comes about that when the judge has finished his work, and his place is vacant upon the Bench, then, and then only, can we speak. To-day it is our privilege to confess that we loved the man.

It may with truth be said of our brother that in his private relations no man could have been more delightful. Cordial in his greeting, in conversation simple and unaffected, Mr. Justice Brewer impressed you with the truth that here was a man indeed cast in

APPENDIX.

a noble mold. Let it go upon the record that the members of this Bar, one and all, held him in very strong affection. We shall miss his genial presence, shall miss that voice so full, rich, and kindly, shall miss the many tokens of a clear thinker, a strong reasoner, a broad-minded, generous lover of his fellow men.

The Clerk (and may he long be spared to continue the performance of his duties here) has but a few minutes ago put into my hands a note that came by mail. It is dated Topeka, Kansas, April 16, 1910. Let me close these remarks by reading the following lines, signed "Joseph G. Waters:"

"I knew a river that swept to the sea;
It engulfed no wreck, but broad and free
Gave back to the bird the song it sung,
Or childish laugh on its bosom flung;
Reflected the cloud and shining star,
Its banks abloom to the ocean bar;
It rippled the breeze and caressed the sun
Until the long, long way was run:
And he who stood upon its shore
Remembers the river that runs no more."

These simple lines are inscribed to "David Josiah Brewer."

REMARKS OF MR. GEORGE GRAFTON WILSON.

Mr. Chairman:

The American Society of International Law has been in session in Washington since Thursday of this week. During this period we have missed very keenly the genial and inspiring presence of our distinguished Vice President, Justice Brewer. When it was learned that you would gather here this noon to pay tribute to his memory, the Society adjourned to join with you in that tribute. We recognize his distinguished service to a branch of law somewhat different from those branches which have already been particularly mentioned,—to international law, which has gained greatly in importance during the period which Justice Brewer has served in this great court. Since 1890 cases have become more and more frequent, involving such legal principles as those in which we are specially interested. The Society, particularly regardful of his services to international justice, adopted the following resolutions:

"The American Society of International Law desires to record, with profound sense of loss, the death of Hon. David J. Brewer, since 1889 a Justice of the Supreme Court of the United States, in 1896 President of the Venezuela Boundary Commission, in 1899 a member of the Venezuela Arbitration Tribunal, from its foundation a Vice President and loyal supporter of the American Society of International Law."

REMARKS OF MR. GARDINER LATHROP.

Mr. Chairman:

With reverence for him as a jurist, with admiration for him as a citizen in its broadest sense, with love for him as a man, growing out of an intimate personal acquaintance of over a quarter of a century, begun in the West in my young manhood, and continued here until the time of his death, I lay my tribute upon the bier of Justice Brewer.

REMARKS OF MR. ALDIS B. BROWNE.

Mr. Chairman:

When a public man in high station passes beyond the veil, it is most appropriate that those who lived and labored with him should record their estimate of his character and worth. Impartial history speaks to the later generations from the public record he has made. The personal qualities of the man are learned from the record of such meetings as this.

It has always seemed to me that in no other public office, except, perhaps, that of Chief Magistrate, is the test of fitness more severe than in this great court. A tribunal

APPENDIX.

which vitalizes the Constitution through interpretation; which determines judicial conflicts between sovereign states; which sits in final judgment in great causes, involving far-reaching interests, and is hence almost daily making controlling precedent or enforcing established principles, calls not only for legal learning of highest order, but for the exercise of those attributes of mind and character which make and mark the well-rounded man. The learning of the law, with strong hold upon the humanities of life, makes the just judge.

These requirements Mr. Justice Brewer met in most exacting degree. Coming to this great seat of judgment in the full maturity of mental and physical powers, with ripe judicial experience, he has but increased his fame as a jurist through twenty years of faithful service in this court.

He was an intrepid judge. He applied the law as he believed it to be established, without fear of results. He was an intense lover of justice, and manifested always that high degree of judicial scorn against injustice, fraud, and wrong which this great court, both in the individual and in the concrete, has steadfastly exhibited. As no cause can be looked on with favor in this supreme tribunal which is tainted with moral weakness, Mr. Justice Brewer was quick to discern right from wrong,—as applied in the plain, every day understanding of men,—and as swift to rebuke and correct the wrong.

A great judge, a kind and genial friend, he has gone into the shadows, following the great men and great judges who have, in turn, made and kept untainted the high traditions of this supreme tribunal, which has stood in the past, as it stands now and must always in the future, the strong central and supporting column in the temple of a free state.

REMARKS OF MR. HANNIS TAYLOR.

Mr. Chairman:

My heart impels me to speak an unpremeditated word in memory of this great jurist who honored me with his friendship. A gentleman who preceded me vividly portrayed the scene as he viewed it in his youth, when the cultured and venerable Taney presided here over the court that decided the famous Dred Scott case. On either side of Taney sat at that time two intellectual giants who towered even above the Chief Justice himself. I speak of Mr. Justice Curtis, of the Boston Bar, and Mr. Justice Campbell, of the Mobile Bar, from which I come. I do not hesitate to say that in my humble judgment John Archibald Campbell was one of the most profound and thoroughly equipped jurists the South has sent to this court since Marshall's time. Before he took his seat here, at the age of forty-two, he had argued the great Gaines case with Daniel Webster, and after his retirement he became a member of the New Orleans Bar, where he at once assumed the leadership. He was able to do so because, apart from his great natural endowments, he was a master not only of English but of Roman law. No matter whether he was called upon to discuss the Code of Justinian or the Code Napoleon, the black letter lore of the common-law lawyers or the philosophical refinements of the English chancery, the dogmas of the canonists or the learning of the publicists who built up what is known as international law, he was equally at home. He had made all legal learning his province. In *Kansas v. Colorado*, 185 U. S. 125, Mr. Chief Justice Fuller said: "Sitting, as it were, as an international as well as a domestic tribunal, we apply Federal law, state law, and international law as the exigencies of the particular case may demand." Therefore no member of this court, however great his native powers may be, can be said to be fully equipped for all his duties unless he is a master of what the Germans call the "application of law" (*Anwendung der Gesetze*); and to be so he must understand to some extent, at least, the nature of every kind of law he is called upon to apply.

Just as John Archibald Campbell came from the South to this court at the age of forty-two, fully equipped for every intellectual task that might be assigned him, so David Josiah Brewer came from the West at the age of fifty-two, fully prepared for every perplexing problem that awaited him. During a little more than twenty years he applied his acumen and his learning to every part of the wide domain of

positive law in such a way as to win for himself an enduring place in the history of American jurisprudence. By a romantic accident he was born of American missionary parents in Asia Minor, not so far from that Hellenized Roman province in which St. Paul was born, and in which he passed his boyhood. It is not irreverent to say that the great Apostle of the Gentiles, who was "brought up at the feet of Gamaliel," and who transformed the mystery confided to a despised Jewish sect into a vast Christian theology, has never had a more worthy disciple. While an intellectual fervor very nearly akin to genius lighted the fires of his mind, a deep and tender religious feeling chastened his heart with a softer radiance. Out of the union of those rarely united streams grew the life of an almost perfect man, who was ever mindful of the exhortation of St. Paul to Timotheus: "Charge them to practise benevolence, to be rich in good works, to be bountiful and generous, storing up for themselves a good foundation for the time to come, that they may lay hold on eternal life." Fortunate, indeed, it is when the mind that expounds and applies positive law in the midst of vast and conflicting passions and interests is illumined by the inner light of a noble high-thoughtedness which spurns all vanities, all prejudices, all revenges.

The judgments of Mr. Justice Brewer, delivered during the last twenty years, and distributed through eighty volumes of the Supreme Court's Reports, involve nearly every question of Federal law, as well as many within that twilight zone of law by analogy, commonly known as international law. If he could come back to us in order to designate those special parts of his work by which he would prefer to be judged, I cannot doubt that his finger would point at once to those dissertations in which he has so luminously applied the principles of Roman law to the solution of the momentous questions that have arisen in this country of mighty rivers and inland seas, out of what are generally known as riparian or water rights. Whenever the fickle Missouri or the capricious Mississippi becomes so restless in its bed as to eat away its banks on the one hand in order to add on the other, or in some torrential frenzy suddenly leaps from its old bed in order to seek a new one, the resulting changes in public and private rights thus wrought by accretion or avulsion can only be defined by reference to the principles of that code whose influence has been second only to that of the Christian religion. And in justice to that code it should always be remembered that its immortal principles that still guide us in solving the finer problems involved in ascertaining the precise requirements of bona fides in human transactions, and in applying them to individual cases, were definitely settled before Christianity aspired to temporal as well as spiritual authority. It was from that line of pagan jurists, adorned by the names of Julian, Gaius, Papanian, Ulpian, Paul, and Modestinus, that the modern world has derived that body of private law which has the greatest importance for the ordinary citizen,—the private civil law of family and property, of contract and tort, based on principles of natural equity and universal reason which have not lost their force with the altered circumstances of an ever-advancing civilization. In the same way we were forced to look to the law of Rome as the only reservoir from which could be drawn that body of principles known as the law of discovery, that regulated the competition for the possession of the New World, and prevented conflicting settlements and consequent wars between contending nations. The basic principle that discovery gave title to the nation by whose subjects the discovery was made was drawn from that body of rules under which the Romans counted as the property of nobody a new island found in the middle of a river, divisible between the riparian owners by a line drawn midway between the banks; or, what is more to the point, a new island rising in the sea through volcanic action, to which Italy was no stranger. Of that body of principles drawn from Roman sources, upon which public and private rights in this country so largely depend, Mr. Justice Brewer was a master. In the great case of *Nebraska v. Iowa*, involving the boundary line between those states, as marked by the channel of the Missouri river, he made an exhaustive survey of the entire field of Roman-law authority, condensing his conclusions as to the law of accretion and avulsion into statements which, like those of Papinian, are marked by the lucidity of a Greek and the terseness of a Roman. Like Papinian, he had no superior in the precision with which he stated

APPENDIX.

a case, eliminating all irrelevancies of fact, and bringing out the essential matter in such bold relief, in accordance with the legal principle propounded, as to carry conviction by sheer statement without argument. It was, however, in the more famous and original judgment rendered in the case of *Kansas v. Colorado*, in which the former attempted to enjoin the diversion by the latter of the water of the Arkansas river, that Mr. Justice Brewer embodied his masterpiece. The gravamen of the bill was that the state of Colorado, "acting directly herself as well as through private persons thereto licensed, is depriving and threatening to deprive the state of Kansas and its inhabitants of all the water heretofore accustomed to flow in the Arkansas river, through its channel on the surface, and through a subterranean course across the state of Kansas; that this is threatened not only by the impounding and the use of the water at the river's source, but as it flows after reaching the river." That novel and unprecedented controversy was complicated by the contention upon the part of the United States that the amount of the flow of the river was subject to its superior authority and supervisory control. In solving, in a tentative way, questions upon which no human tribunal had ever passed before, this great jurist illustrated the breadth and versatility of his thoughts and the classic beauty of his style by this statement: "The underground movement of water will always be a problem of uncertainty. We know that when water is turned upon dry and barren soil the barrenness disappears, vegetation is developed, and that which was a desert becomes a garden. It is the magic of transformation; the wilderness budding and blossoming as a rose. The writer of this opinion recalls a conversation with Bayard Taylor, the celebrated traveler, in which the latter stated that nothing had contributed so much to secure the steady control of the French in Algiers as the fact that, after taking possession of that territory, they sank artesian wells on the borders of the desert, and thus reclaimed portions of it; for the Arabs believed that people who could reclaim the desert were possessed of a power that could not be withstood." While the great judicial sculptor was thus carving for the time to come, death came, and, without a word of warning, stayed his hand. The pale messenger with the inverted torch felled him as the woodsman fells the sturdy oak in the forest in midsummer, with all its leaves green upon it. There had been no "dying in the top;" no weakening of brain or heart. It was simply the death of Socrates, all save the hemlock.

REMARKS OF MR. R. ROSS PERRY.

Mr. Chairman:

It is said by Cicero, in his treatise concerning the laws, that, from time immemorial, when a man was buried in Athens, "the next relations, when they had cast the earth over the dead, scattered seeds of grain over the spot, in order that the earth might, like a mother, take her lifeless son to her bosom, and then, by the expiation of seed, again restore him to the living."

This beautiful symbolism brought back life out of the very jaws of death. Mother nature does not let die the seeds sown by mortal struggle, by mortal attainment, by mortal love. Her germinating bosom gives immortality to all that was vital in the dead man's life.

We hardly need as yet to recur for comfort in our loss to this symbolism, because we almost seem to have Judge Brewer with us in the body.

I want to say a few general words with respect to that side of his character which may be termed national, if, indeed, a still larger word should not be used. The events of his life as a judge have been so fully and forcefully set forth by those who have preceded me on this occasion that nothing more remains to be said in that connection. I must, however, speak of his judicial courage. The striking instances in which he has manifested this virtue, both in his opinions on the bench and in his quasi judicial utterances when off the bench, will at once recur to all of you. It could have been crushed, but not destroyed.

Another striking characteristic of Judge Brewer was the high emphasis which he gave to the position of the Supreme Court of the United States as one of the three

great co-ordinate instrumentalities of the government. He realized that the political government of this country could not be carried on without the assistance of that tribunal. He always recollected that the Supreme Court of the United States, under the leadership of Chief Justice Marshall, had enacted not only a co-ordinate but a most vital and creative part in the development of the nation. Its members had been statesmen and patriots as well as judges. While he believed that the great cardinal principles of free government, expressed in the Constitution of the United States, should be faithfully observed, yet he always felt that the men who assembled in Philadelphia in 1787 were not there for the purpose of constructing a coffin in which the future centuries of this nation should be confined, distorted, and paralyzed.

Again, no judge realized more completely than himself that the Supreme Court of the United States is a last barrier between all that protects life, liberty, reputation and property,—between all government of law,—and anarchy. You will all recall how often and fearlessly and with what strong words he has declared this realization.

I want to say something about him now as a private citizen, and yet it seems difficult to look at him in this limited way, because everything about him was so broad, so national, so universal. By the accident of birth he came into existence in another continent,—at Smyrna, in Asia Minor,—and that birth itself is, perhaps, a symbol of the world-wide extent of his knowledge, and, what is a much more valuable thing, of his sympathies. He passed the period which may be roughly called that of development in the West of his own country. These facts seem significant. In him there was, perhaps, a combination of the unconscious influences of the oldest civilization and the newest,—the refined subtlety and mystical charm of the one and the vigorous strength of the other. When he came here to the capital city this manifold quality of his nature could not but manifest itself in many ways. I may be pardoned for saying in this connection that for years I was associated with Judge Brewer in the administration of an educational institution here, which, in a sense, is a charitable institution, inasmuch as it provides education for those who have been deprived of two very vital faculties,—those of speech and hearing. He seemed to feel a sweet pleasure as well as a high duty in doing what he could to help those who were teaching the deaf ears to hear and the dumb lips to speak. Judge Brewer was a member of the board of trustees of this institution long before I was, but I have been a member for some time, and it has always made a very tender impression upon me that a man whose duties were so exacting, so overwhelming in their importance, as were his, as a member of the Supreme Court of the United States, could nevertheless take of his time to attend, as he punctually did, almost every one of the meetings of the board, and to manifest by his participation in their deliberations the hearty sympathy which he had for the unfortunate class of people whose infirmities were sought to be relieved by that institution, so far as relief is possible. I say it was a very sweet characteristic of his nature, but that is to say very little. All of us who read the newspapers know that wherever there was any movement, not only for the advancement of the law, but for the advancement of humanity, Judge Brewer was found participating in it. When we turn aside from the profession of the law to the church, again we all know from what we have read in the daily press how constantly he participated, not only in the services, but the public activities of his own denomination and of the church generally. He was anxious to appreciate and relieve every human want. Every call to which human sympathy could respond touched a chord that was very deep in his heart.

I do not know of any one man, as I stand upon my feet here and think of the public men in this country, whose field of activities was so large and at the same time was so thoroughly responded to by the capabilities of his own nature.

I say the death of such a man is an affliction to the world. He was a world-citizen; he was a world-worker; he was a world-sympathizer. There was not anything in the human race, or in that exquisite subordinate animal race which is trying to grow up into the human, which did not find a lodgment in his appreciation, in his sympathy and a willingness to help by word, by financial aid, and by earnest work; and yet he could only do this by unduly urging nature. I think there was not one of these wants which I have referred to which did not find in him a help in time of need.

I have said that we do not need the symbolism of the Athenians when we think of

APPENDIX.

Judge Brewer, but those who come after us will need it. His judicial opinions will never die, but as those of us who have known him pass away, the strong recollections which we have of his personality will disappear. It is well for us, therefore, to feel as the Athenians felt when they scattered seeds of grain upon the fresh grave: That, although these personal recollections will fade away, there will spring up from these precious seeds of his life harvests of grain which will give bread to future generations.

REMARKS OF MR. FRANK C. ALLIS.

Mr. Chairman:

I knew Justice Brewer from a side which has not been mentioned. It was my privilege to sit under him as a student for one year. During that time I found him not alone an expounder of what the law is, a director of where the law is to be found, but, first of all, a man whose personality and strong magnetism enthused one to nobler activity, and caused him to think that there was something more in life than the making of money or the mere reading of books.

REMARKS OF MR. JUSTIN MORRILL CHAMBERLIN.

Mr. Chairman:

As this seems to be the only opportunity we shall have to speak in open reverence of this great man, I, too, as a student, cannot refrain from paying him tribute.

I remember going into his class room in equity, now quite a number of years ago, with little conception of what equity meant in jurisprudence. After he stated that equity was resorted to where the remedy at law was found inadequate, his first words were:

"I may have a very valuable orchard of trees it would be difficult to replace. My neighbor comes in and cuts down one of the trees. I sue him at law and recover some monetary value, but later he comes in and cuts down another tree, and then again another, and I can sue him again, but realize that I shall eventually lose my valuable orchard, and have nothing to show for it but some money I do not want.

"I go into equity and there restrain him from further trespass, and thus preserve the remainder of my trees."

That, Mr. Chairman, was my first real conception of equity, and it illustrates how completely it was in the power of Mr. Justice Brewer to make a lasting impression upon the young and inexperienced mind, and have just the effect he wanted it to have, which is the ideal of the preceptor, and yet so difficult of accomplishment.

I believe that the majority of those who were fortunate enough to be members of his classes, now scattered, frequently, in the practice of their profession, recall not only the great truths he imparted, but the very words with which they were instilled in their minds and hearts in his class room.

The resolutions were adopted, and, on motion of Mr. Gardiner Lathrop, it was ordered that a copy of the resolutions be sent to the clerks of each of the United States courts in the eighth circuit.

The meeting then adjourned.

Supreme Court of the United States, Tuesday, May 31, 1910.

Present: The Chief Justice, Mr. Justice Harlan, Mr. Justice White, Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Day, and Mr. Justice Lurton.

The Attorney General addressed the court as follows:

May it please the court, at the request of the Bar of this court, I present the following resolutions, adopted at a meeting held in this court room:

Resolved, that the Bar of the Supreme Court of the United States deeply deplores the death of the late David J. Brewer, Associate Justice of the Supreme Court, and desires to place upon record an expression of the respect and esteem in which Justice Brewer was held, and of regret for the loss which the court, the Bar, and the country have suffered in his untimely death.

His judicial career was one of exceptional length and of marked distinction and success. Elected judge of the district court of the first judicial district of the state

of Kansas in 1864; three times elected a justice of the supreme court of the state of Kansas; appointed in 1884 judge of the circuit court of the United States for the eighth circuit; appointed a Justice of the Supreme Court of the United States in December, 1889, it will be observed that for nearly fifty years he discharged the high and sacred duties of a judge. In this long service, in the vast number of opinions which he wrote, the infinite variety of legal principles considered and treated, the learning and wisdom displayed, the consecration and fidelity ever and always evidenced, will be found his only fitting eulogy. His remarkable grasp of the underlying principles upon which our whole structure of government rests, his unswerving fidelity to the fixed rules of order and stability, so essential and so often sorely tested, his strong, positive, upright, fearless character, his power of sustained intellectual effort, place him easily among the great judges of his day and time. No one ever doubted his purity of life, his integrity of purpose, and all who read and consider his legal opinions pay homage to his profound intellect. Those who knew him are quick to testify to his tender and considerate nature, and those who must be content to find his character in his opinions scattered through many state, circuit, and Supreme Court decisions will never doubt his probity or his power as a jurist.

Resolved, That the Attorney General be asked to present these resolutions to the court, with the request that they be entered upon the records, and that the Chairman of this meeting be directed to send to the family of the late Justice Brewer a copy of the resolutions, and an expression of our sympathy for them in the loss which they have sustained.

Justice Brewer's period of service in this court covered twenty years. These two decades brought before this court some of the most important and far-reaching questions which have ever been submitted for its decision, and in the solution of these great problems Justice Brewer took a leading part. In the reports of this period there are to be found 719 opinions written by Justice Brewer, in 157 of which he dissented from the conclusions of the majority of the court. The limitations of this occasion will permit only a brief reference to a few decisions which illustrate the characteristics of his mind and the lucidity of his exposition.

One of the earliest of his recorded opinions was that in the case of the *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511, where the court was called upon to decide whether or not the act prohibiting the importation of foreigners and aliens under contract to perform labor in the United States applied to an English Christian minister who had come to the United States pursuant to an agreement with a Protestant Episcopal church in the city of New York. The opinion is of especial interest, not merely as a fine, discriminating construction of the statute, and the application of the principle that laws must receive a sensible construction, and that where a literal construction leads to an absurd conclusion the letter of the law must give way to the presumed intention of the legislature, but because of the enunciation of the principle that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."

"If we examine the Constitutions of the various states," said the learned Justice, "we find in them a constant recognition of religious obligations. Every Constitution of every one of the forty-four states contains language which either directly or by clear implication recognizes a profound reverence for religion, and an assumption that its influence in all human affairs is essential to the well-being of the community.

"There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people.

"These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation. In the face of all these, shall it be believed that a Congress of the United States intended to

make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?"

In the case of *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655, perhaps one of the most important decisions in which Mr. Justice Brewer wrote the opinion of the court, he was called upon to deal with riparian rights, and to determine whether or not one state has the right to the continuous flow of the waters of a river flowing to it through an adjoining state, or whether the latter state has the right to so appropriate its waters as to prevent such continuous flow; and whether the amount of the flow is subject to the superior authority and supervisory control of the United States.

In considering at the outset the foundations of the jurisdiction of this court over controversies between states, Justice Brewer laid down the proposition that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts, all the judicial power which the nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto. "These considerations," he said, "lead to the propositions that when a legislative power is claimed for the national government, the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication; whereas, in respect to judicial functions, the question is whether there be any limitations expressed in the Constitution on the general grant of national power."

One of the ablest opinions of Mr. Justice Brewer is that in the case of *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, in which he expressed the unanimous views of the court in affirming that the relations of the general government to interstate commerce and the transportation of the mails are such as to authorize a direct interference to prevent an obstruction thereto; and that a court of equity has jurisdiction to issue an injunction in aid of the performance of such duty.

Perhaps in no other opinion of this court is there a better summary of the principles upon which rests the power of the Federal government to maintain its sovereignty than that with which Justice Brewer concludes his opinion in this case: ". . . We hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has, within the limits of those powers, all the attributes of sovereignty: that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch, and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist or threaten to occur, to invoke the powers of these courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority."

Justice Brewer was always noted as a man of deep religious conviction. We have seen that one of the first questions which he was called upon to deal with after his elevation to the Supreme Court involved the relation between religion and the national government. He was keenly interested in the position of woman in our modern society, and one of the latest of his decisions (*Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 A. & E. Ann. Cas. 957), involved the right of a state to regulate the working hours of women. After reviewing the laws of Oregon, he observed: "It thus appears that, putting to one side the elective franchise, in the matter of personal

and contractual rights they stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers."

Yet he held, and in so doing voiced the unanimous opinion of this court, "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care, in order to preserve the strength and vigor of the race. Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control, in various forms, with diminishing intensity, has continued to the present. . . . Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs, it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of these rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right."

Your honors know better than any but his immediate family the personal qualities which endeared Justice Brewer alike to his associates on the Bench, to his friends, and to the Bar. Nothing better can be said of any man, however high his place or great his deeds, than that throughout his life he was not only esteemed, but beloved of all who knew him; and, indeed, that praise is greater in proportion as exalted station and high career tend to isolate from one's fellows. Justice Brewer everywhere and always won affection. It was so in his life at the university. His activities as a judge of his adopted state, Kansas, and then as judge of the United States for the largest circuit in the country, were made easier and more effective by the warm and lasting regard of his Bar; and when advancement to this court widened his contact from the lawyers of the West to the lawyers and, indeed, to the people of the nation, he soon gained the love of his countrymen generally, and it remained with him to the end. Reasons need not be sought. They would not be difficult to find or to declare, but such continued and ever-extending hold upon the hearts of men proves, without analysis, the worth and beauty of the personality that gains it.

Justice Brewer was a son of a Christian missionary, and the son's life, like the father's, was one of service. For six and forty years he served the people, hearing causes and judging "righteously between every man and his brother and the stranger that is with him." And in the discharge of his great office he did ever obey the injunction laid upon the judges of Israel by their great lawgiver: "Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man, for the judgment is God's." (1 Deut. 17.)

The Chief Justice responded as follows:

During the years of my occupancy of a seat upon this Bench it has been my sad duty to accept for the court tributes of the Bar in memory of many members of this tribunal who have passed to their reward. As our brother Brewer joins the great procession, there pass before me the forms of Matthews and Miller, of Field and Bradley and Lamar and Blatchford, of Jackson and Gray and of Peckham, whose works follow them now that they rest from their labors. They were all men of marked ability, of untiring industry, and of intense devotion to duty, but they were not alike. They differed as "one star differeth from another star in glory." Their names will remain illustrious in the annals of jurisprudence. And now we are called on to deplore the departure of one of the most lovable of them all.

He died suddenly, but not the unprepared death from which we pray to be delivered.

APPENDIX.

When the unexpected intelligence was conveyed to me I could not but think of Mrs. Barbauld's poem on "Life," and seemed to hear our dear friend exclaim—

"Life! we've been long together,
Through pleasant and through cloudy weather;
'Tis hard to part when friends are dear;
Perhaps 'twill cost a sigh, a tear;
Then steal away, give little warning,
Choose thine own time;
Say not, Good night, but in some brighter clime
Bid me, Good morning."

The resolutions of our Bar and the discriminating remarks of the Attorney General adequately cover the magnificent judicial labors of Mr. Justice Brewer, but it is the ineffable sweetness of his disposition that chiefly impresses itself upon me, and is indicated by the serenity of the verse I have quoted.

He was a truly eloquent man. The fountain of tears and the fountain of laughter ran close together, and carried the hearer away upon the mingled current of their waters. And like Mr. Lincoln, he evidently found great comfort from the inevitable trials and tribulations of the world in the humorous anecdotes which brought the relief of merriment.

But I cannot prolong these remarks. The resolutions and the observations of the Attorney General will be spread upon our records.

APPENDIX IX.

Supreme Court of the United States.

OCTOBER TERM, 1910.

ORDER.

It is ordered by the court that the following correspondence be spread upon the minutes and journal of the court:

Supreme Court of the United States,
Washington, D. C., November 23, 1910.

Dear Brother Moody:—

We cannot let you leave us without an expression of our deep regret. The too few years during which we sat together on the Bench already had confirmed the prophecy of your arguments at the Bar. They had proved that your unusual powers would be applied as faithfully and impartially to dispassionate decision as, when you were Attorney General, they had been devoted to an always lofty presentation of a side. We grieve that the country so soon should lose services that it ill can spare, and we companionship in which affection was joined to respect. But you have left a sample of your work in the reports, and, we believe, have earned the great reward that the wise and good of the future, as well of the present, will say it was well and nobly done.

John M. Harlan.
E. D. White.
Joseph McKenna.
Oliver Wendell Holmes.
William R. Day.

APPENDIX.

We came to the Bench of the Supreme Court after Brother Moody was compelled by sickness to lay aside active public work. But we have knowledge of his course of life, and of his judicial opinions, and concur most cordially in what is said in the above letter by those of his associates who served with him on the Bench.

Horace H. Lurton.

Charles E. Hughes.

1525 Eighteenth Street N. W.,
Washington, D. C., December 5, 1910.

My Dear Brethren:—

I cannot let your letter go unanswered, but at this time I am unable fittingly to say more than that your words reach deep in my heart and mind, and awaken there an intense gratitude to you all. With the expression of this and of my respect and affection for each individual member of the court, I must be content.

Most sincerely, yours,

William H. Moody.

APPENDIX X.

Supreme Court of the United States.

OCTOBER TERM, 1910.

IN MEMORIAM MELVILLE WESTON FULLER.

On the convening of the court on Monday, October 10, 1910, Mr. Justice Harlan, as Presiding Justice, said:

Gentlemen of the Bar:

Since its last session this court has sustained a very great loss. The earthly career of the Chief Justice has been closed by death. This sad event occurred on the 4th day of July of the present year, at his summer residence, after nearly twenty-three years of continuous and distinguished service on this Bench. He met the final summons with that calmness of spirit and composure of mind that marked his whole life. From his early manhood he walked in the good way, uprightly before God and his fellow men, and passed from this life into the life beyond the grave in the confident belief, I doubt not, that the Maker and Ruler of the Earth ordereth all things aright. This court, indeed, the nation, will miss him, but the memory of his stainless life will ever remain with his countrymen as a priceless heritage.

The regular call of the docket will be commenced to-morrow. No formal business will be transacted by the court to-day. All motions and applications noticed for to-day will then be heard.

The Presiding Justice then announced that, out of respect for the late Chief Justice, the court would now adjourn until to-morrow at the usual hour.

On Monday, January 9, 1911, Mr. Attorney General Wickersham presented to the court the following

APPENDIX.

RESOLUTIONS.

Resolved, That the members of the Bar of the Supreme Court desire to express their profound regret at the death of Melville Weston Fuller, eighth Chief Justice of the United States, and to record their high appreciation of his life and character, and of his conspicuous and faithful service to his country.

Born in the state of Maine, he went to Chicago at the age of twenty-three, when that great city was in its infancy, and there entered upon his long and distinguished professional career, which culminated in his elevation to the most exalted judicial station in our government.

He secured the advantages of an academic and classical education at Bowdoin College, and always retained the habits and tastes of the student and scholar.

He was a man of the most extensive and varied reading in the profession, in governmental and political discussion, and in general literature.

He rapidly achieved a commanding position at the then exceptionally brilliant bar of the city of his adoption, and for thirty-two years carried on an extended and diversified practice in the courts of his state; nor did he infrequently appear before the great tribunal over which he afterwards, and for twenty-two years, presided with such marked ability and distinction.

He was a man of singular beauty and purity of character.

While he was at the bar no one harbored a suspicion that the exigency of forensic controversy, in which he was almost constantly engaged, could ever tempt him to aught that was unfair or unworthy of the highest ideals of a noble and honorable profession.

As Chief Justice it is enough to say that with conspicuous fidelity he fully and consistently maintained the best traditions of that high office. He took a deep interest in the efforts to secure peace between nations by international arbitration, and was appointed by our government to membership in the permanent court established in 1899 by the First Peace Conference, and served in that capacity.

His character was marked by a gentle courtesy and consideration which constantly illuminated and attended upon the discharge of his important public duties, always marked his relations with the bar, and earned that popular confidence which goes out to him whom the people believe to be a merciful and considerate as well as a just and impartial judge.

All this he was; and, endowed by nature with talents not inferior to those of his predecessors, possessed of attainments, training, and experience adequate to the exacting requirements of his great office, he filled it at all times in such a manner as to command the admiration and respect of the bar and the grateful appreciation of his countrymen.

On the morning of July 4 last, at his beautiful summer home, on the soil of the state in which he was born, and to which he remained always deeply attached, his long, useful, and honorable life ended; and when the sad announcement was made, we who had practised in the great tribunal where he so long presided felt a deep sense of personal loss and personal bereavement that he had gone from us forever.

Resolved also, That the Attorney General be asked to present these resolutions to the court, and to request that they be inscribed upon its permanent records.

And that the Chairman of this meeting be requested to transmit a copy of the resolutions to the family of the late Chief Justice, and an expression of our sincere sympathy with them in the great and irreparable loss which they have sustained.

The Attorney General then said:

On the last day of the last term of this court, Chief Justice Fuller, responding to resolutions of the bar and observations in commemoration of Mr. Justice Brewer, spoke sadly of the procession of his brethren who had passed before him to their reward. "They were all men of marked ability, of untiring industry, and of intense devotion to duty, but they were not alike. They differed 'as one star differeth from another in glory.'"

A few days later, and he too joined that procession, leaving but one survivor of that body of great judges—Miller, Field, Bradley, Harlan, Matthews, Gray, Blatchford,

and Lamar—over which he was called to preside when he succeeded Chief Justice Waite, in October, 1888.

"The oldest members of this court," said Mr. Justice Miller, in speaking of Chief Justice Waite, "know of no one who was better fitted to discharge the administrative duties of the office of its Chief Justice, or who ever did so much with acceptability to his associates and to the public at large." (126 U. S. 611, Appx. 31 L. ed. 1018.)

Mr. Waite's successor was to fully earn a like encomium. He was peculiarly well fitted to the discharge of those duties. As the presiding officer and spokesman of the court, during his long incumbency, his gentle, dignified bearing, and kindly, considerate manner won for him the sympathetic appreciation of the bar, and the respect and affection of his associates.

Campbell wrote of Lord Eldon, "Among his qualifications for the judgment seat must be reckoned his fine temper and delightful manners."

These attributes in a judge are entirely consistent with the possession of a discriminating intellect, clear perceptions, and decisiveness of character. They tend to the preservation of that relation of cordial respect which must exist between Bench and Bar in order that the court may get from the Bar the advantage of clear, temperate, candid statement, and the bar may feel assured of patient hearing and thorough comprehension by the court. The life of a justice of this court is one of unremitting toil. The creation of the circuit courts of appeals in 1891 afforded it but a temporary relief. Only by the most arduous labor has the court been able to keep measurably abreast of the business which the expanding exercise of Federal power has brought upon its dockets. The period of Chief Justice Fuller's incumbency was one of unprecedented national growth. Even the twenty years following the Civil War did not give rise to the great number and variety of new questions which have been pressed upon the court since the year 1888.

The attempts to solve by legislation economic questions resulting from our industrial growth, of which the income-tax law, the bankruptcy law of 1898, the acts concerning carriers in interstate commerce, the law against unlawful trusts and monopolies, the meat-inspection laws, the food and drugs act, the tea-inspection law and the oleo-margarine laws, the Chinese-exclusion acts and the other immigration and naturalization laws are illustrative, have required this court to construe and apply with patient study and statesmanlike comprehension the principles of the Federal Constitution in the effort to preserve inviolate the dual nature of our governmental system, not hesitating to assert the paramountcy of the national government over those subjects where the Constitution declares it to be supreme, nor check the usurpation by Federal authority of those powers which, not being expressly or by implication delegated to the general government, are reserved 'to the states respectively or to the people.' The war with Spain made us a world power, and brought to the decision of this court novel questions as to the relations of our government to territory acquired by conquest or purchase. In dealing with all of these great questions, Chief Justice Fuller played no inconsiderable rôle. During his twenty-two years of service he wrote eight hundred and twenty-nine opinions of which but twenty-nine expressed the views of a minority of the court. He wrote the opinion of the court in the Behring Sea Cases (*Re Cooper*, 143 U. S. 472, 36 L. ed. 232, 12 Sup. Ct. Rep. 453); in the first case arising under the Sherman anti-trust law (*United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249), and in one of the latest, the so-called Danbury Hatter's Case (*Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815); in the Income-Tax Cases (*Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912); in *Kansas v. Colorado* (185 U. S. 135, 46 L. ed. 841, 22 Sup. Ct. Rep. 552); in the case arising under the first safety-appliance law (*Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158); and in the contempt proceedings against the sheriff of Chattanooga, Tennessee, and his deputies (*United States v. Shipp*, 215 U. S. 580, ante. 337, 30 Sup. Ct. Rep. 397).

"He wrote dissenting opinions in *Re Neagle* (135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658), the case in which it was held that petitioner, a deputy United States

marshal, was justified in killing an assailant of a justice of this court whom he had been detailed to protect from violence; in the case of *Church of Jesus Christ of L. D. S. v. United States* (136 U. S. 1, 34 L. ed. 473, 10 Sup. Ct. Rep. 792), where he denied the power of Congress to enact the law of February 19, 1887, repealing the charter of the Mormon Church, and directing legal proceedings to be taken to wind up its affairs and dispose of its property; in the *Chinese Exclusion Case* (*Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016), and in the case of *United States v. Wong Kim Ark* (169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456), where the court held that a child of Chinese parents, born in the United States, became at birth a citizen of the United States; in the *Lottery Case* (*Champion v. Ames*, 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561); in the *Insular Cases* (*Dooley v. United States*, 183 U. S. 151, 46 L. ed. 128, 22 Sup. Ct. Rep. 62); in *Hale v. Henkel* (201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370); and he concurred with Mr. Justice White in his dissent in the *Northern Securities Case* (193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436).

It is difficult to select from the great volume of Chief Justice Fuller's contributions to the work of this court those of his opinions which best illustrate the extent of his learning and the nature of his acumen without unduly extending these remarks.

Chief Justice Fuller's opinions are all characterized by a simple lucidity of statement and a directness of reasoning free from subtlety. His mind naturally tended to resist the broadening application of Federal control over subjects which, until recent years, had been left entirely to state regulation.

"In my opinion," he wrote, in the *Mormon Church Case* (136 U. S. 1, 67), "Congress is restrained, not merely by the limitations expressed in the Constitution, but also by the absence of any grant of power, express or implied in that instrument. . . . I regard it of vital consequence that absolute power should never be conceded as belonging under our system of government to any one of its departments. The legislative power of Congress is delegated, and not inherent, and is therefore limited. I agree that the power to make needful rules and regulations for the territories necessarily comprehends the power to suppress crime; and it is immaterial even though that crime assumes the form of a religious belief or creed. Congress has the power to extirpate polygamy in any of the territories by the enactment of a criminal code directed to that end; but it is not authorized, under the cover of that power, to seize and confiscate the property of persons, individuals or corporations, without office found, because they have been guilty of criminal practices.

"The doctrine of *cy près* is one of construction, and not of administration. By it a fund devoted to a particular charity is applied to a cognate purpose, and if the purpose for which this property was accumulated was such as has been depicted, it cannot be brought within the rule of application to a purpose as nearly as possible resembling that denounced. Nor is there here any counterpart in congressional power to the exercise of the royal prerogative in the disposition of a charity. If this property was accumulated for purposes declared illegal, that does not justify its arbitrary disposition by judicial legislation. In my judgment, its diversion under this act of Congress is in contravention of specific limitations in the Constitution, unauthorized, expressly or by implication, by any of its provisions, and in disregard of the fundamental principle that the legislative power of the United States, as exercised by the agents of the people of this Republic, is delegated, and not inherent."

The Chief Justice wrote the opinions of the court in deciding a number of controversies between states of the Union (*Kansas v. Colorado*, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552; *Virginia v. West Virginia*, 206 U. S. 290, 51 L. ed. 1068, 27 Sup. Ct. Rep. 732; *Louisiana v. Mississippi*, 202 U. S. 1, 50 L. ed. 913, 26 Sup. Ct. Rep. 408, 571), and in the prize cases which resulted from the Spanish War (*The Carlos F. Ros*, 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. Rep. 803; *The Pedro*, 175 U. S. 354, 44 L. ed. 195, 20 Sup. Ct. Rep. 138; *The Benito Estenger*, 176 U. S. 568, 44 L. ed. 592, 20 Sup. Ct. Rep. 489; the *Manila Prize Cases* (*United States v. Dewey*) 188 U. S. 254, 47 L. ed. 463, 23 Sup. Ct. Rep. 415; *The Infanta Maria Teresa* (*United States v. Taylor*) 188 U. S. 283, 47 L. ed. 477, 23 Sup. Ct. Rep. 412). In the case of *Ponce v. Roman Catholic*

Apostolic Church (210 U. S. 296, 52 L. ed. 1068, 28 Sup. Ct. Rep. 737), by an interesting historical review, he sustained the proposition that the Roman Catholic Church in Porto Rico was a juridical person, whose property was entitled to protection under the terms of the treaty between the United States and Spain.

The Talmud compares the study of the law to a huge heap of dust that is to be cleared away. "The foolish man says, It is impossible that I should be able to remove this immense heap. I will not attempt it. But the wise man says, I will remove a little to-day, some more to-morrow, and more the day after, and thus in time I shall have removed it all." It was in this spirit that Chief Justice Fuller toiled during the years that he presided over this court. Much of the work of all courts is of but transitory importance, save in so far as it keeps ever burning the sacred lamp of justice to lighten the footsteps of men. But the labors of this tribunal are essential to the preservation of the liberties of a free people. In the largest proportion of causes submitted to its judgment every decision becomes a page of history, and may become part of a rampart against anarchy. To this court men look for the maintenance of those rights which our forefathers wrung from a reluctant monarch at Runnymede eight hundred years ago, which are now embodied in the Constitution of the United States, and which are as essential to the protection of the citizen against the tyranny of a hydra-headed tyrant of the future as they were against the monarchs of the past.

The labors of the eighth Chief Justice are over, and his work in this court is submitted to the judgment of men. As he said of Justice Brewer, "He died suddenly, but not the unprepared death from which we pray to be delivered;" and having finished his course in faith, he doth now rest from his labors.

The Chief Justice responded:

Mr. Attorney General:

The resolutions which you present are consoling, since they show how poignantly our brethren of the Bar share with us the sorrow caused by the death of our cherished and venerated Chief Justice. When the shadow which the bereavement resulting from his loss casts upon the path of duty which lies before us is considered, the resolutions are additionally consoling, since they strengthen our conviction that, whatever may be our infirmities, we may always rely upon the generous judgment of our brethren of the Bar if only we bring to the discharge of our duties the singleness of purpose which ever characterized the judicial labors of our late Chief Justice.

Those labors find an enduring memorial in the reported decisions of the court, rendered during the long period of his service. Their potency, whether in enforcing and protecting individual right or in perpetuating representative government by upholding our constitutional institutions, have passed beyond the influence of praise or blame. They have become the heritage of his countrymen, for whose good he labored with untiring devotion.

The darkness of the valley of the shadow of death yet so obscures vision as to render it impossible for me to attempt now to fix the result of the labors of the Chief Justice, or to define with accuracy the scope of the blessings to his countrymen and to mankind which have arisen from his work. I therefore do not attempt to supplement the brief statement on that subject which you, Mr. Attorney General, have so eloquently made. So, also, I shall forbear to comment upon the wide attainments of the late Chief Justice, his engaging literary fancy, his great familiarity with precedents, and his grasp of fundamental principles. I leave these special attributes, as well as the wider considerations which would be required to be taken into view in order to symmetrically analyze the judicial work of the late Chief Justice, not only because some other occasion would be more appropriate and some more masterful hand than mine be required to do justice to those subjects, but also because my purpose now is only briefly to refer to some of the more endearing and admirable personal traits of the Chief Justice which were manifested to those associated with him in judicial labor, and at the same time to mark the attributes from which those traits were derived and sustained.

Briefly, those qualities were his untiring attention to his judicial duties and the

dedication which he made to the efficient and wise performance of those duties of every intellectual and moral power which he possessed; his love of justice for justice's sake; his kindness, his gentleness, associated, however, with a courage which gave him always the power to fearlessly do what he thought was right, without fear or favor. The source whence these endearing and noble qualities were derived was not far to seek. It was faith in the power of good over evil; faith in the capacity of his fellow men for self-government; faith in the wisdom of the fathers of our institutions; faith, unshaken faith, in the efficiency of the system of constitutional government which they established, and its adequacy to protect the rights and liberties of the people. And, above all, there was an abounding faith in Divine Providence, the faith of a Christian, which dominated his being and welded all his faculties into an harmonious whole, causing his nature to be resonant with the melody of hope and charity, which made him what he was,—a simple, kindly, generous, true, brave, and devoted public servant, treading with unswerving step the path of duty, until the tender voice of the All-Wise and Merciful Father called him from labor to rest, from solicitude to peace, and to his exceeding and enduring reward.

Mr. Attorney General, the resolutions of our brethren of the Bar will be made a part of the records of the court. In making this order, the thought comes unbidden to the mind that if there be in the future by either the Bench or the Bar a failure to discharge duty because of the want of an honest effort to do so, the resolutions will become the test of our moral insufficiency and be a relentless instrument for our condemnation. But the shadow created by these misgivings is at once dispelled by our conviction that although the Chief Justice has gone before, yet doth he speak to us by his precept and example, which I cannot refrain from thinking will be a beacon, leading both Bench and Bar to a perfect dedication of all their powers to the complete discharge of their whole duty. Ah! in the luminosity afforded by that example and precept, and with the benign vision given by that faith which is the proof of things unseen, may the hope not be indulged in that the result of such a consecration to duty will enable us to behold a continued righteous administration of justice, a preservation of our constitutional government, the fructification of all the activities of our vast country for the benefit of the whole people, the abiding of tranquillity and happiness in all the homes of all our land, and the continued enjoyment by all our countrymen of individual liberty, restrained from license, and safeguarded from oppression.

The resolutions of the Bar and the remarks of the Attorney General will be spread upon the minutes, and any other tributes that may be received will be placed upon the

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